

Human Rights and Political Wrongs



A new approach to Human Rights law

Sir Noel Malcolm



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About the Judicial Power Project

This project examines the role of judicial power within the constitution. There is rising concern that judicial overreach has the potential to undermine the rule of law and to impair effective, democratic government. The project considers the ways in which the judiciary's place in the constitution has been changing, and might change in the future. If we are to maintain the separation of judicial and political authority, we must restate, in the context of modern times and modern problems, the nature and limits of judicial power within our constitutional tradition and the related scope of proper legislative and executive authority.

www.judicialpowerproject.org.uk

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Preface

I was invited by Policy Exchange to write a pamphlet on human rights and human rights law, a topic on which I had had an interest for many years, but had not had an opportunity to gather my thoughts. I began to write a pamphlet and found, when I had finished, that I had written – to my surprise – a book. Perhaps I owe all my readers an apology for this at the outset. But I would like to emphasise that although the text has turned out longer than expected, it still has the character of a short work written for a general readership.

No specialist knowledge is presumed here on the part of the reader. Although the subject-matter becomes quite abstract in some places, my hope is that any concerned citizen who takes the trouble to follow the argument will find it both interesting and comprehensible. This is not an academic monograph, even though it deals with the kinds of issues that are discussed in such works. Academic writers, and in particular academic lawyers (a highly professional group, to which I do not belong) will no doubt think of many points on which I could or should have developed implications, dealt with possible objections, conducted side-arguments with the secondary literature, and so on. I ask for their understanding of my reasons for not going down all those paths; at the same time I hope that they will find some arguments and ideas here that do engage in a potentially stimulating way with their own professional concerns. If it is true that war is too important to be left to the generals, it is possible that human rights and human rights law may also benefit from some fresh thinking, supplied by someone who is not a human rights lawyer.

The book is divided, in an unbalanced way, into three parts. The first and longest part (chapters 1-4) discusses the way in which our human rights law currently works. This law comes to us from the European Convention, as explicated by the judgments of the European Court of Human Rights (and, more recently, by our own national courts). I discuss the various problematic principles which the European Court has developed in order to interpret the Convention – such matters as ‘proportionality’, the test of ‘necessity in a democratic society’, the allowance of the ‘margin of appreciation’ and the appeal to ‘consensus’. I also look in some detail at the problem of rights expansion, the inflation or proliferation (or both) of rights in the Court’s judgments, and I try to analyse some of the ways in which this process

happens. The overall picture that emerges is – as I think any unbiased reader will agree – a very troubling one.

The second part (chapter 5) explores the theoretical foundations on which the whole body of human rights law apparently rests. Modern theories of human rights have mostly assumed that they are to be derived from basic principles of moral philosophy. As these rights are generally supposed to have a special, perhaps overriding, force – which is why human rights law is granted, to a significant extent, precedence over other law – one might think that the philosophical theory would be a very solidly established one, yielding conclusions with the status of objective truth, or the nearest available thing to it. But that is not the case. The standard theories are problematic, disputable and, indeed, much disputed.

In their place I propose a simpler view which, I believe, solves many problems: my view is that human rights belong essentially not to moral philosophy but to political theory. They are protections against abuses of state power; they relate directly to the conditions of legitimacy of the government that wields that power; and the state in question is not any state in human history, but a democratic one, or one in which the citizens desire to be governed democratically. This last point also helps to restore the vital link between human rights and democracy, a connection which has itself come under threat from some of the ways in which modern human rights law has developed.

The third and last part (chapter 6) is, I confess, the one where I feel most diffident: it puts forward some suggestions about how to change the present system, in order both to free ourselves of the problems discussed in the first part, and to embody the understanding of the nature of human rights proposed in the second. My aim here is simply to stimulate thought in a new direction. Others who accept at least some of my arguments may come up with better ideas, out of what may be a range of possible policies. All I ask is that we adopt one, in the end, that respects the two fundamental values which this book is designed to preserve and strengthen: the value of human rights (which I believe to be of vital importance, when properly understood), and the value of democracy itself.

1

Where We Are

The International Framework

Human rights, as we now understand them, may have some sort of prehistory; but their actual history begins in the early 1940s, during the darkest days of the Second World War. When the Allied powers began to adopt ‘human rights’ as a slogan to emphasise the difference between their own moral and political vision and that of their Nazi and Fascist enemies – announcing, for example, in the Declaration of the United Nations of 1 January 1942 that they were fighting ‘to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands’ – they were employing a phrase which had hardly been used in practical politics until then.¹ Despite, or perhaps because of, the fact that there was no general agreement about what those rights might be, the idea proved resonant and powerful. By 1945, when the United Nations Charter was promulgated, the fundamental purposes of that organisation, set out in the Preamble, included ‘to reaffirm faith in fundamental human rights’. The Universal Declaration of Human Rights – the first internationally accepted document of its kind – was issued three years later.

As its name made clear, the Universal Declaration was merely declaratory. But its provisions were later elaborated in two International Covenants, on civil and political rights and on economic, social and cultural rights respectively. Drafts of these were discussed at the UN from the mid-1950s onwards, with their final versions being adopted by the General Assembly in 1966; as multilateral treaties, these Covenants came into force only ten years later, when the requisite number of states had ratified them. Most countries in the world have now done so, which means that they are under an obligation in international law to abide by the terms of

¹ On the halting development of the term, and the concept, in this period see E. Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA, 2005), pp. 4-55; S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, 2010), pp. 44-55.

the Covenants. However, the mechanism for holding them to that obligation is very weak. There is a UN ‘Committee’ for each Covenant (as there is for other such UN-organised multilateral agreements, such as the International Convention on the Elimination of All Forms of Racial Discrimination), which analyses the reports sent in by individual countries on their own compliance – reports which few deliver on time, and some never send in at all. The committee can receive a complaint by one state against another state, and can act as a kind of advisory service, making recommendations. If a state has signed an optional protocol, the committee can also receive petitions from individual citizens of that country; but again, it is limited to asking for explanations, and suggesting ways of resolving the issue. So whilst the International Covenants have considerable moral authority, they are endowed with little real power.²

In addition to these worldwide instruments of human rights law, there are three regional conventions, for Europe, the Americas (meaning, essentially, Latin America), and Africa. Each has given rise to a court, in which serious human rights cases can be tried. The African Court on Human and Peoples’ Rights, located in Tanzania, is a very recent creation: formed in 2006 and active since 2008, it has so far issued judgments in fewer than 30 cases. The Inter-American Court of Human Rights has a longer history; established in 1979 and based in Costa Rica, has heard some important cases relating to such matters as extra-judicial killings by death squads. However, both courts are hugely overshadowed, in terms of the influence they have had and the amount of jurisprudence they have generated, by the European Court of Human Rights in Strasbourg.

The European Court³

The European Convention on Human Rights, on which this Court is based, was drawn up by the Council of Europe in 1950. It consisted of a listing of essential human rights – modelled to a large extent on the provisions of the Universal Declaration of Human Rights – plus what it called a mechanism for ‘collective enforcement’. At first, only states could bring complaints against other states; this was later changed to allow the right of petition by individuals (but only against states). For individuals, there was initially a two-stage process, with a ‘Commission’

² For a good summary see E. A. Posner, *The Twilight of Human Rights Law* (New York, 2014), pp. 40-3. At the time of writing, 115 states have signed the protocol to the International Covenant on Civil and Political Rights, and only 22 the protocol to the one on Economic, Social and Cultural Rights. Neither protocol has been signed by the UK or the US.

³ Note that throughout this work the phrase ‘European Court’ will refer to the European Court of Human Rights at Strasbourg. This is entirely different from the EU’s ‘European Court of Justice’.

acting as a sort of filter, giving a judgment on the merits of cases before taking the deserving ones to the Court; this was later streamlined into a single process in which individual applicants could go to the Court directly. Each member state of the Council of Europe supplies one judge, which means that there are currently 47; they sit in panels to hear cases, and issue reasoned judgments (often by a majority, with dissenting opinions also issued, or ‘concurrent’ ones, which have reached the dominant conclusion but on different grounds). The list of substantive rights and freedoms on which they base their decisions consists of the essential articles of the original Convention, plus a number of articles added by supplementary agreements, known as ‘protocols’, over the years.

As for ‘collective enforcement’: this is provided for in Article 46 of the European Convention. Paragraph 1 states: ‘The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.’ According to paragraph 2, execution of the judgment is to be supervised by the Committee of Ministers – a body of the Council of Europe. Paragraph 4 says that if the Committee of Ministers finds that a state is refusing to abide by a judgment, it (the Committee) may refer the matter back to the Court, which can then find the state guilty of violating its duty under paragraph 1. And paragraph 5 says that if the Court does find that there has been such a violation, it must refer the case back to the Committee of Ministers ‘for consideration of the measures to be taken’. This little procedural *pas de deux* is legally correct, but potentially quite ineffectual in practical terms, given that the Committee of Ministers of the Council of Europe exerts no real power over member states. And yet adverse judgments are, in most cases, accepted by states and acted upon. What makes the system work is not the threat of unspecified ‘measures’, nor the mere existence of an obligation under international law (weighty though that is), but rather the intrinsic moral authority of human rights, which generates a kind of political authority of its own. The sanction consists, quite simply, of moral and political shame.

The Human Rights Act

Until 1998, the UK’s adherence to the European Convention was a matter of international law, with no direct effect in the UK’s own domestic law – though if the European Court did find that a UK law was defective, Parliament would normally amend or replace the law in order to remedy the problem. The situation changed after the passing of the Human Rights Act in 1998, which incorporated the European Convention in UK law. Under this Act, it is illegal for any ‘public authority’ in the UK to act in a way that is incompatible with a Convention right, unless primary legislation clearly requires such action. People whose rights have

been shown to have been wrongly infringed can seek remedies from a domestic court. When considering any case that concerns a Convention right, a UK court is required to ‘take into account’ the relevant jurisprudence of the European Court; and in its interpretation of any existing legislation, the domestic court is required to read it, if possible, in such a way as to make it compatible with the Convention. If it finds that this is impossible, the court does not have the power to ignore the law, still less to strike it down; instead, it issues a ‘declaration of incompatibility’, to draw attention to the problem. It is then up to Parliament to decide whether to leave the incompatibility as it is, or to eliminate it by changing the law: the Human Rights Act supplies a fast-track procedure for making such changes. And where any new legislation is concerned, the Act also requires that a draft law should be accompanied by a statement of its compatibility (or otherwise) with the Convention. Accordingly, as any new law passes through Parliament it is scrutinised by a special Joint Committee on Human Rights.

This system under the Human Rights Act gives the British state the same political freedom to decide whether or not to change its laws that it had under the pre-1998 regime. In almost every case – the notable exception being that of prisoners’ votes – it has made the required change. Human rights judgments thus have the power to change UK laws not *de jure* but, almost always, *de facto*. In this way, over the decades before and after 1998, a large number of alterations have been made to the substance of UK law because the existing laws were found not to satisfy the requirements of one special, authoritative document, the European Convention on Human Rights. Many of the resulting changes will strike any decent-minded person as improvements: protections have been introduced or strengthened for various categories of people, including criminal defendants, transsexuals, the mentally handicapped, asylum-seekers and immigrants.⁴

But it would be misleading to imply that the effects of the European Convention on UK law have been confined to encouraging measures on behalf of marginal groups, as if the Convention operated only on the margins of ordinary life. On the contrary, its effects have been felt across a very wide range of subject-areas, from schools, care homes, hospitals and coroner’s inquests to trade unions, the press, the security services and the conduct of the army overseas. Citizens of the UK may still be entitled to ask whether giving more and more *de facto* power over their laws to one privileged document – not just to the text of the document itself, that is, but to

⁴ For a defence of this process, eloquently concentrating on such cases, see C. Gearty, *On Fantasy Island: Britain, Europe and Human Rights* (Oxford, 2016).

the ever-expanding body of legal principles and derivations that have been found to flow from it, some of which, as we shall see, go well beyond what is stated in the text – is an entirely positive development. A wise and benevolent dictator might also introduce many improvements to a country's laws, bringing comfort to vulnerable groups and sweeping away long-standing injustices; yet citizens would be justified in feeling that something of value was lost when their normal democratic methods of law-making were eroded or, in effect, replaced thereby.

Prisoners' Votes: The Story So Far

For many people in the UK, it is the question of whether prisoners should have the vote – raised by the case of *Hirst v. UK* – that has brought these issues to a head. In 1979, while spending time out of prison on parole, Mr John Hirst killed his landlady with an axe; he later pleaded guilty to manslaughter on the ground of diminished responsibility (medical evidence suggested that he had a severe personality disorder), and was sentenced to discretionary life imprisonment. After the passing of the Human Rights Act, he began legal proceedings, complaining that the ban on convicted prisoners voting in local and parliamentary elections was a breach of human rights. His argument rested on Article 3 of Protocol No. 1 of the European Convention, which declares: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.' In 2001, the case was dismissed in the Divisional Court. Hirst took it to Strasbourg, where it was heard first by an ordinary panel (or 'Chamber') and then by a 'Grand Chamber' of 17 judges. Their judgment, issued in October 2005 (by which time Hirst had in fact been released from prison) was that the general ban on prisoners voting was, by virtue of its indiscriminate and 'disproportionate' nature, a violation of human rights.⁵

The British Government then drafted plans for a graduated system, in which only those convicted of the most serious crimes would be deprived of the vote, but there was no willingness in Parliament to implement such a scheme. When another case about prisoners' votes, *Greens and M.T. v. UK*, was brought to Strasbourg in 2010, the European Court of Human Rights not only confirmed its previous judgment but

⁵ *Hirst v. UK* (no. 2) (6 October 2005). All judgments of the European Court of Human Rights cited in this work can be found on the website of the Court itself (<http://hudoc.echr.coe.int>) or, in most cases, more easily on that of the British and Irish Legal Information Institute (<http://www.bailii.org>), using the 'Find by Case Title' search.

issued a demand that the UK Parliament must bring forward legislative proposals to remedy the situation within six months. (Such a demand has no legal basis whatsoever in the Convention: as we have seen, Article 46 sets out a quite different procedure, involving an interplay between the Court and the Committee of Ministers.) Parliament's response was to hold a debate in February 2011 in which it passed, by a majority of 234 to 22, this defiant resolution:

That this House notes the ruling of the European Court of Human Rights in *Hirst v. the United Kingdom* ...; acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-elected lawmakers; and supports the current situation in which no prisoner is able to vote except those imprisoned for contempt, default or on remand.⁶

In the following year, the issue was raised by another case at Strasbourg, *Scoppola v. Italy*, at which the UK also made formal submissions; but in May 2012 the Court's judgment on that case reaffirmed the opinion given in *Hirst v. UK* that a general ban violated human rights (while upholding the Italian system, in which those sentenced to short terms of imprisonment could still vote).⁷ This elicited a public statement by David Cameron that the UK would not implement the *Hirst* judgment. Later that year, a Draft Bill was put forward, in which Parliament was offered two possible ways of changing the law to satisfy Strasbourg's requirements, plus a third option: retaining the existing system, unchanged. This bill had made no progress by the end of the parliamentary term in May 2015, and there the matter rests.⁸

Prisoners' Votes: Issues Raised

Whilst this is not the place for a detailed analysis of the issues at stake in the *Hirst* judgment, it is worth mentioning a few of the relevant points in outline, to give an

⁶ *Hansard*, HC, 10 February 2011, vol. 523, cols. 493 (motion), 585-6 (vote).

⁷ *Scoppola v. Italy* (no. 3) (22 May 2012), esp. paras 93-6 on the *Hirst* case.

⁸ For general accounts of the *Hirst* case and its aftermath see D. Raab, *Strasbourg in the Dock: Prisoner Voting, Human Rights & the Case for Democracy* (London, 2011); D. Davis, 'Britain must Defy the European Court of Human Rights on Prisoner Voting as Strasbourg is Exceeding its Authority', in S. Flogaitis [Phlogaites], T. Zwart, and J. Fraser, eds, *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Cheltenham, 2013) pp. 65-70; R. Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the *Hirst* Case', in A. Føllesdal, J. Karlsson Schaffer and G. Ulfstein, eds, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge, 2014), pp. 243-71; P. Leach and A. Donald, *Parliaments and the European Court of Human Rights* (Oxford, 2016), pp. 245-53. For a penetrating critical account see J. Finnis, 'Judicial Law-making and the "Living" Instrumentalisation of the European Convention on Human Rights', in N. W. Barber, R. Ekins and P. Yowell, eds, *Lord Sumption and the Limits of the Law* (Oxford, 2016), pp. 73-120, at pp. 94-102.

idea of some of the ways in which the approach of the Strasbourg Court has been seen as questionable. Several of these points will offer a foretaste of some larger problems, to be explored later.

First, it should be noted that Article 3 of Protocol No. 1, quoted in full above, is not phrased in terms of an individual right. This is in contrast to all the other right-specifying articles of the European Convention, which typically begin with 'Everyone has the right...' or 'No one shall be...'. In the early years of the Convention, when most cases were heard first by the 'Commission' at Strasbourg, the idea that this Article did not create a right for every individual was explicitly confirmed: in 1961 the Commission said that a state could exclude some people from the franchise so long as 'such exclusion does not prevent the free expression of the opinion of the people in the choice of the legislature'. But from the mid-1970s the Commission and the Court began to say that since the Protocol formed an intrinsic part of the Convention, and since its Preamble declared (rather airily) that 'certain rights and freedoms' were protected by it, 'it must therefore be admitted that, whatever the wording of Article 3, the right it confers is in the nature of an individual right, since this quality constitutes the very foundation of the whole Convention.'⁹ It is surely not necessary to be an old-fashioned lawyer to find the phrase 'whatever the wording of Article 3' a little disturbing.

The general rules of treaty interpretation allow judges to consult the 'travaux préparatoires', the official records of the negotiations and drafting procedures that led to the establishment of the text of the treaty, as a supplementary source of indications as to the purpose and meaning of the text. The European Court of Human Rights has drawn on the travaux préparatoires in order to bolster its case here: it notes the occurrence of very general phrases such as 'political rights', 'political freedom' and 'the right to free elections' in the early discussions of this Article, and jumps from there to the assumption that the Article must give voting rights to all individuals.¹⁰ Yet at the same time, it ignores the much more specific point that during those discussions the term 'universal' was deliberately dropped from any description of the franchise or the ballot, evidently on the grounds that some categories of people might properly be excluded.¹¹ This may suggest a worrying selectivity in the use of the evidence.

⁹ P. van Dijk, F. van Hoof, A. van Rijn and L. Zwaak, eds, *Theory and Practice of the European Convention on Human Rights*, 4th edn (Antwerp, 2006), pp. 916-17.

¹⁰ *Mathieu-Mohin and Clerfayt v. Belgium* (2 March 1987), para. 49; *Hirst v. UK* (no. 2), para. 57.

¹¹ Preparatory Commission of the Council of Europe, *Collected Edition of the 'Travaux préparatoires'*, 8 vols (The Hague, Dordrecht, 1975-85), vi, pp. 12, 30, 44-6, 50; vii, pp. 150-60, esp. p. 160.

One of the factors normally taken into account in such a judgment is the degree of ‘consensus’ that exists, where the disputed practice is concerned, among the signatory states. As we shall see, in cases where there is a range of different approaches among the various states, the Court is often more inclined, for that reason, to treat an individual state as if it had some leeway to determine its own practice. In *Hirst v. UK* the British Government pointed out that 13 signatory states maintained such a general ban on prisoners voting – a significant proportion of the total of 47. The Court chose to give this fact no weight, on the grounds that 13 was merely a minority.

At the same time, however, it devoted a significant part of its judgment to summarising recent case-law from two non-signatory states, Canada and South Africa, in favour of allowing prisoners to vote. No mention was made of other democratic states outside Europe, such as New Zealand, where prisoners are disenfranchised, nor of the fact that almost all states in the US deny felons the vote during incarceration. (Some, indeed, continue the disenfranchisement long after the prisoner’s release. So too does Italy, where those who have been imprisoned for more than five years are normally barred for the rest of their lives from voting or standing for office. One might suppose that that is a more serious infringement of human rights than the UK’s ban for the duration of the sentence; but by virtue of undergoing some gradations of severity, the Italian system manages to satisfy the Court’s requirement of ‘proportionality’.) In short, the evidence of state practice suggests something that the Court chose not to believe: that this is a matter on which decent and responsible liberal democracies can and do reasonably differ.

Where reasonable differences of opinion are possible, a special importance may be attached to the decisions of a democratic legislature. This, after all, is one of the basic functions of democratic voting: to turn a situation of disagreement (about principles and/or policies) into one of general practical agreement to follow one particular course. The choice is validated not so much by the reasons given for it, important though those are, as by the fact that it has been made democratically. In its submission to the Court, the UK Government pointed out that the ban on convicted prisoners voting had been upheld in a series of Acts of Parliament, from the Forfeiture Act of 1870 to the Representation of the People Acts of 1918, 1969, 1983 and 2000. The multi-party Speaker’s Conference on Electoral Law of 1968 had explicitly discussed and upheld the ban; and when the working group for the Representation of the People Act 2000 recommended that unconvicted prisoners should be permitted to vote (as that Act duly granted), it deliberately maintained the ban on the convicted ones. During the passage of that Act through Parliament, George Howarth MP, speaking for the Government, said that ‘it should be part of a convicted prisoner’s punishment that he loses rights and one of them is the right to

vote'. Also during that process, the Government declared that the Act was compatible with the European Convention, as it had been scrutinised and passed by the relevant human rights committee in Parliament.

The Court noted these facts but brushed them aside. 'It may be said', it conceded, 'that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless, it cannot be said that there was any substantive debate by members of the legislature...'¹² Members of Parliament are constantly written to and spoken to by their constituents, who are eager to bring issues of all kinds to their attention. If an issue seems so uncontentious to MPs that they do not devote any parliamentary time to debating it, and if not one of them rises to disagree with an explicit statement made about it by one of their number on behalf of the Government, one reason may be, surely, that they are thereby reflecting the views of the people they represent. Another, equally, may be that they have thought about it and decided that there is no reason to change the current law.

The final word here may go to Christopher Chope, a Conservative MP and former Chairman of the Committee on Legal Affairs and Human Rights of the Council of Europe's Parliamentary Assembly:

In many ways, the issue of giving prisoners the vote is *de minimis* ... But it's attracted a symbolism because it makes it seem as though the UK Parliament is no longer in charge of mundane issues ... The question is, why shouldn't Parliament be allowed to decide these things in its own national context?¹³

¹² *Hirst v. UK* (no. 2), para. 79.

¹³ Cited in Leach and Donald, *Parliaments and the European Court*, p. 245.

2 The Balancing Act

Moral Authority

As we have seen, even when international human rights law is not incorporated in domestic law, it wields a powerful moral sanction. What is the source of this special degree of moral authority? It is true that human rights concern some deeply important matters, and the violation of them can involve many kinds of morally significant suffering, both physical and mental; yet the same could be said of large areas of the ordinary criminal law. It is also true that international human rights law is founded on solemn pledges made between states, the breach of which must therefore be a grave matter. But that is not the main point. Human rights conventions are not typical treaties. Normally, the legal provisions of treaties belong to the sphere of international 'positive law'. That is, they create 'positive' legal obligations: an agreement by one country to cooperate in a certain way with another one is a product of human will, valid above all *because* the two parties have agreed it. What this means is that its contents could always have been quite different (but equally valid), had they agreed otherwise. While the fine details of a human rights convention may come under this description (together with some more contingent matters, such as the institutional arrangements it sets up), the basic principles which it enshrines cannot. To claim that international human rights law could have had a quite different set of contents if the signatory states had so chosen would, it seems, subvert its very foundations.

When the judges at Strasbourg reach their decision, their underlying assumption is that they are not simply explicating some contingent duties that happen to fall on certain states as a result of their decision to sign a convention. Rather, they think that they are stating, or attempting to state, objective facts about the human rights which that Convention describes. The text of the Convention itself begins by referring to the Universal Declaration, which aimed to secure general 'recognition' of such rights; the signatories affirm their 'belief' in fundamental freedoms, which require a common 'understanding' of human rights. Such rights are presumed to be located in a realm of truth, to be reached not by legislation but

by rational analysis; ultimately, they belong not to politics but to morality or philosophy.

It is generally supposed that statements of human rights are moral truths about human beings as such. Standard treatises on the subject emphasise this point at the outset. ‘They are the rights that one has simply because one is human’ (Jack Donnelly); ‘Human rights are universal: they belong to every human being in every human society’ (Louis Henkin). This universality in itself suggests that they must have a higher status than the variable laws of particular societies or states. And the notion that human rights arise directly from the condition of being human suggests another way in which they may be stronger, more indefeasible, than the provisions of ordinary man-made law: ‘Human rights are also inalienable rights, because being or not being a human being is an inalterable fact of nature’ (Donnelly); ‘Implied in one’s humanity, human rights are inalienable and imprescriptible: they cannot be transferred, forfeited, or waived’ (Henkin).¹

Rights as Trumps

One popular way of describing the superior force or higher status of human rights is to refer to them as ‘trumps’. This idea was developed by the legal philosopher Ronald Dworkin, whose main concern was with the functioning of those rights that are protected by the US Constitution; but his argument was a general one – not about human rights as such, but about how and why any fundamental rights should be maintained in a political and legal system. The central idea was that ‘rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.’²

What this meant was not just that rights should override dubious political arguments for particular policies designed to promote common interests; rather, they should override demonstrably good arguments too, because no mere calculation of common interests, however accurately made, could justify depriving any individual of his or her rights. (Hence the ‘trump’ metaphor: if hearts are trumps, even the ace or king of another suit cannot prevail against any heart, no matter how low its denomination.) This approach is thus non-utilitarian or anti-utilitarian; cost-benefit analysis may have its place where ordinary policy-making is

¹ J. Donnelly, *International Human Rights*, 3rd edn (Boulder, CO, 2007), pp. 21, 38; L. Henkin, *The Age of Rights* (New York, 1990), pp. 2-3.

² R. Dworkin, ‘Rights as Trumps’, in J. Waldron, ed., *Theories of Rights* (Oxford, 1984), pp. 153-67, at p. 153. See also his *Taking Rights Seriously*, 2nd edn (Cambridge, MA, 1978), pp. 188-205, 364-8.

concerned, but the moment it comes into conflict with anyone's rights, the rights must take priority.

There may be two basic reasons why this way of talking about human rights seems to make sense. One is that in many ordinary contexts, when we invoke a right – any right, not necessarily a fundamental one – we do so in order to assert a justification for our actions in the face of some quite valid reason or norm that points the other way. When my friends tell me that I should not spend all my money on gambling and drink, as this way of life is bad for me both financially and medically, I may answer, without disputing their argument about the harm I am doing to myself: 'but I have the right to spend my money as I wish.' Rights often involve an area of free choice, which includes the freedom to do things with negative consequences; some well-known human rights, such as that of freedom of expression, obviously fit this pattern.

The other reason is simply that human rights strike us as so intrinsically important that we do not think they should be outweighed by any other considerations. The prime example here is the right not to be tortured, which many believe should not be violated even in circumstances (e.g. scenarios involving an arrested terrorist who knows where the ticking bomb is) where torture might save large numbers of people from harm. Note, however, that this kind of right is different from the one that involves freedom of choice. My right not to be tortured is not a freedom which I choose how to exercise; it is an absolute claim that I should not be treated in a certain way. Here it is just the extreme importance of the content of the claim that seems to do the work. Those who assert the principle 'fiat justitia, ruat caelum' ('let justice be done, even if doing it makes the world collapse') have a similar sense of absolute and infeasible value.

Whatever our reasons may be for thinking that rights must trump other preferences or values, such an approach does make some requirements. In the first place, we need to have confidence that we know, reasonably accurately, what the rights actually are. It also becomes very desirable that those rights should form some sort of coherent pattern or system; if rights are to play the ultimate role of overriding all other values, it will be awkward to find ourselves in a situation where rights themselves are in conflict, necessitating an appeal to some even more ultimate set of principles in order to resolve it. And if we do possess a body of accurately defined and mutually coherent rights, we must also stand in need of reliable and objective ways of applying those rights to the facts of any particular case, so that we may know precisely which right is involved, and what needs to be done in order to protect it. As we shall see, the reality of human rights law shows that all of these points are, in different ways, problematic.

One negative effect of the ‘trumping’ theory should also be mentioned. This approach has a tendency to reinforce a rather simplistic, black-and-white view in which there is a world of law, concerned with individual rights and moral absolutes, on the one hand, and a world of politics, concerned with mere collective interests and preferences, on the other.³ This sits easily with the more general and even more simplistic idea that law operates through objective knowledge and reason, while politics depends on mere passion and the harnessing of base motives. According to Conor Gearty, Professor of Human Rights Law at the London School of Economics, ‘Courts deal in fact and data. Their weapon is reason ... Politicians in contrast deal in the carelessly thrown together passing truths of the moment. Their careers depend on the sum of these producing a positive reaction in a polling booth every five years or so ... Solid argument is their enemy.’⁴

Yet the major arguments that dominate democratic political debates are typically about fundamental values – not mere preferences, but conceptions of what is fair or just, including ideas about the rights that people have. As Jeremy Waldron puts it, ‘Disagreement on matters of principle is ... not the exception but the rule in politics.’⁵ Unless we can be sure that infallibly wise judges can solve all problems involving fundamental values in an objectively correct way, we should do well to maintain some residual respect for democratic politics. If certainty is not to be attained in these matters, democratic debate and democratic decision-making may possibly supply us with the next best thing: legitimacy.

Rights and Their Limitations

Let us now look at how the human rights set out in the European Convention actually work. The substantive rights are stated in eleven articles (nos. 2-12): the right to life, the right not to be tortured, the right not to be held in slavery or servitude, the right to liberty and security, the right to a fair trial, the right not to be punished except on the basis of a previously existing law, the right to respect for private and family life, the right to freedom of thought, the right to freedom of expression, the right to freedom of association, and the right to marry. Two further articles set out provisions that might be described as meta-rights or general rights relating to all of the above: the right to an effective remedy if any of those rights

³ For fundamental criticisms of Dworkin on this point see N. MacCormick, *Legal Reasoning and Legal Theory*, 2nd edn (Oxford, 1994), pp. 259-64, and J. Finnis, ‘Human Rights and Their Enforcement’, in his *Collected Essays, Volume III: Human Rights and Common Good* (Oxford, 2011), pp. 19-46, at pp. 31-5.

⁴ Gearty, *On Fantasy Island*, p. 72.

⁵ J. Waldron, *Law and Disagreement* (Oxford, 1999), p. 15.

have been violated, and the right to enjoy all those rights in a way that is not subject to discrimination on grounds such as sex, race or religion (etc.). One further article allows that at times of war or public emergency a signatory state may derogate from its obligations under the Convention, 'to the extent strictly required by the exigencies of the situation'. Later protocols have added other substantive rights, including the right to enjoy property, the right not to be imprisoned for debt, and the right not to be tried or punished twice.

The listing of rights is not hierarchical: there is no attempt to suggest that any one particular right is subsidiary to, or derived from, another one. Nevertheless, a privileging of some rights is clearly apparent. The article about derogation in times of emergency and war says that it does not permit states to suspend the right to life, the right not to be tortured, the right not to be held in slavery or servitude, or the right not to be punished except on the basis of a previously existing law. In 1983 Protocol no. 6 abolished the death penalty, and made that provision non-derogable in times of emergency (while still permitting derogation in times of actual or impending war); twenty years later Protocol no. 13 made the abolition of the death penalty absolute, removing all possibility of derogation.

These details suggest that the rights fall into two categories, one more absolute than the other. Closer inspection of the wordings of the articles reveals other variations. In most but not all cases, an article contains two elements. First there is the statement of the right; then there is a description of the 'limitations', the conditions under which exercise of the right may properly be qualified, restrained or prevented. Thus:

Article 8 – Right to respect for private and family life

1. 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 is 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.

Some of these limitations recur in other articles, with small but significant differences. Article 9, on freedom of thought, conscience and religion, has several of

the limitations given in Article 8, but it lacks the references to ‘national security’ and the ‘economic well-being of the country’, and the phrase about the prevention of disorder or crime is replaced by one about the protection of ‘public order’. Article 10, on freedom of expression, includes not only ‘national security’ but also ‘territorial integrity’ and ‘public safety’ (in addition to ‘the prevention of disorder or crime’), and after the reference to ‘health or morals’ it continues: ‘for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary’.

While some limitations refer to the rights of other individuals, most are concerned with general public goods such as national security. In several articles (as in Article 8), the limiting of a right must be ‘necessary in a democratic society’. But necessity too undergoes some gradations. In Article 6, the public nature of a trial may be limited ‘to the extent strictly necessary in the opinion of the court’ to avoid prejudicing justice. In Article 1 of Protocol no. 7, on the expulsion of aliens, the rights set out in the article may be overridden ‘when such expulsion is necessary in the interests of public order or is grounded on reasons of national security’.⁶ (Note that ‘necessary’ there is not qualified by the reference to a democratic society, and that the condition for acting on ‘reasons of national security’ falls some way short of necessity.) The term ‘justified’ is presumably a little less strong than ‘necessary’: in Article 2 of Protocol no. 4, on freedom of movement and residence within the state, the right may be subject to restrictions ‘justified by the public interest in a democratic society’. Most strikingly, Article 1 of Protocol no. 1, which guarantees the right to the peaceful enjoyment of possessions, adds that the state may ‘enforce such laws as it deems necessary to control the use of property in accordance with the general interest’. Here the test of necessity is subjective: it depends on the opinion of the state authorities.

It is worth pausing here to ask a simple question which is seldom considered in the human rights textbooks. What exactly is the statement of the human right: is it the ‘pure’ description of the right in the first part of the article, or the whole article, including the limitations?

Typically, the Court will use the following language. First, it looks to see whether the issue brought before it ‘engages’ the right in the article, i.e. whether it comes within the general subject-area of the right. Then it considers whether there

⁶ This protocol has not yet been ratified by the UK (or by 39 other countries).

has been an ‘interference’ with the right; for this purpose, it treats only the pure statement of the right as defining what that right is. And then it decides whether the interference was justified by one or more of the limitations set out in the article. If it finds that the interference was not justified, it declares that there has been a violation of ... the article.

Of course, when that happens, there is little practical difference between saying (for example) that there has been a violation of Article 10, and saying that there has been a violation of the human right to freedom of expression. But what if the Court decides that whilst there was some interference with the right, it was justified in accordance with one of the limitations? Is a justified interference the same as a justified violation (with the proviso that you can violate the right without violating the article)? Or is it possible to interfere with a right without violating it?

One way out of this theoretical problem might be to say that the pure statement of the right describes the generic right, whereas applying the limitations to the facts of the case gives you the specific right of that person in those circumstances. But this would mean that individuals would not know what their human rights were in any particular situation, without engaging in what could be a very complex and uncertain process of analysis – a process that might require access to information which they themselves did not hold. And the traditional rhetoric of human rights, which emphasises that those rights are immutable, inviolable and universal, would lose some of its appeal if it were conceded that the actual rights people possess may vary greatly from place to place and from time to time.⁷

Finding a Balance

Whether or not one describes the limitations as part of the overall right (in which case the right seems to become a composite of the right itself plus various countervailing interests), the fact remains that the actual task of the judges at the European Court of Human Rights consists to a very large extent of deciding whether the limiting factors are strong enough to restrict the right. Those factors may include, as we have seen, ‘reasons of national security’, ‘the economic well-being of the country’, ‘the general interest’ or ‘the public interest’. It must be obvious, therefore, that rights do not act as ‘trumps’, automatically overriding any mere

⁷ While the textbooks say almost nothing about these issues, some of the recent theoretical literature does cast light on them: see especially G. Webber, ‘On the Loss of Rights’, in G. Huscroft, B. W. Miller and G. Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge, 2014) pp. 123-54, at pp. 132-7, 142-9.

interests. On the contrary, human rights jurisprudence mostly consists of a complicated balancing exercise between the two.

The Court itself has made this point, repeatedly. In *Soering v. UK*, a landmark case in which the Court prohibited the deportation of a man to the US because of the possibility that he would end up on death row (a breach of Article 3, on the right not to be tortured or subjected to inhuman or degrading treatment), it declared: ‘inherent in the whole of the Convention is a search for the fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s human rights.’⁸ Sometimes the phrasing uses the word ‘interest’ or ‘interests’ for the individual too: ‘the fair balance that has to be struck between the general interest of the community and the interests of the individual’.⁹ And in some cases interests and rights may be referred to almost interchangeably: thus in a case concerned with the freedom to manifest one’s religious beliefs, the Court said that ‘in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected.’¹⁰

It can happen that the case involves the competing rights of more than one party, plus some more general ‘interest’ on the part of society as a whole. In *Odièvre v. France* the applicant had been adopted as a baby, and now, as an adult, wished to know the identity of her biological mother; but the mother had given birth, and handed over the child, under a special provision of French law that guaranteed anonymity. As the Court explained, ‘On the one hand, people have a right to know their origins, that right being derived from a wide interpretation of the scope of the notion of private life ... On the other hand, a woman’s interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied.’

But these were not the only interested parties: ‘nonconsensual disclosure could entail substantial risks, not only for the mother herself, but also for the adoptive family which brought up the applicant, and her natural father and siblings, each of whom also has a right to respect for his or her private and family life.’ And on top of that, ‘There is also a general interest at stake, as the French legislature has consistently sought to protect the mother’s and child’s health during pregnancy and

⁸ *Soering v. UK* (7 July, 1989), para. 89. Note that Article 3 is, as mentioned above, one of the articles to which no ‘limitations’ are attached in the Convention.

⁹ *Rees v. UK* (26 September 1986), para. 37.

¹⁰ *Kokkinakis v. Greece* (19 April 1993), para 33.

birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system.’¹¹ (This last point was presented as a matter of ‘the right to respect for life’, but would more properly have been left under the term ‘general interest’, given that the Court itself has always avoided ruling on whether abortion violates the right to life.)

One does not need to enter into the specifics of many cases in order to sense that there is something deeply problematic about these ‘balancing’ exercises. Where the competing claims of one right against another are concerned, it must be generally true that, as the philosopher Raymond Geuss puts it, conflict between rights is ‘irresolvable by appeal to rights themselves’.¹² Even if we accept unquestioningly the division of human rights into more absolute and less absolute, mentioned above, we may still face cases where a minor interference with a more absolute right confronts a major interference with a less absolute one; or competition between two or more absolute rights, or between two (or more) that are less absolute.

Judgments in such cases are less like technical applications of settled law, and more like political decisions: they are infused with values, and depend in the end on particular assumptions about what is a good life, and what is good for society at large. Such assumptions are not arrived at by making deductions from statements about objective rights; on the contrary, the real nature of what is going on may be obscured by conducting it in rights-language. As the international legal theorist Martti Koskenniemi has written, ‘if there is no general recipe for the solution of rights conflicts, no single vision of the good life that rights would express, then everything hinges on the appreciation of the context, on the act of *ad hoc* balancing, that is to say, on the kind of politics for the articulation of which rights leave no room.’¹³

As for matching the value of an individual’s right against that of a general ‘interest’: there are obvious issues of incommensurability that arise in such cases. What is less obvious is that those issues may penetrate the way in which the right

¹¹ *Odièvre v. France* (13 February 2003), paras 44-5. The Court found against the applicant. Seven judges dissented, citing among other reasons the fact that no evidence had been given to support the proposition that the abortion rate would go up if this provision for anonymity were abolished. See the critical discussion in M.-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge, 2006), pp. 209-10.

¹² R. Geuss, *History and Illusion in Politics* (Cambridge, 2001), p. 149.

¹³ M. Koskenniemi, ‘The Effect of Rights on Political Culture’, in P. Alston, with M. Bustelo and J. Heenan, eds, *The EU and Human Rights* (Oxford, 1999), pp. 99-116, at p. 107.

itself is understood. Some rights can be valued for more than one reason: the right to freedom of expression, for example, may be valued in terms of the intrinsic good of self-fulfilment, or because it is a means towards the generating of truth and knowledge, or because it is a necessary condition of democracy. Of those reasons, some are more consequentialist, more explicable in terms of a further good to which they contribute, than others. Different aspects of the right might be invoked in different contexts, and it is likely that the more consequentialist aspects will come to the fore when the context involves discussing general societal interests. As John Alder points out, ‘The “balancing” conceit is loaded in favour of the consequentialist approach in that it lends itself to cost-benefit analysis at the expense of intrinsic value.’¹⁴

Proportionality

Nevertheless, the general attitude of the Court is that it is operating an accurately objective system, in which the weighing and measuring of rights and their restrictions are carefully calibrated. The key concept here is ‘proportionality’. At its heart is the idea that a state should interfere with the exercise of a right only when it has to, and that when it does so the restriction needs to be ‘proportionate’. That such a restriction should not be excessive is easy to agree with – all too easy, alas, as ‘excessive’ means ‘more than it should be’, so that statement is a tautology. But to say that it should be proportionate raises some difficult questions: proportionate to what, and how are the proportions to be measured?

In a landmark judgment, *Handyside v. UK*, the Court set out some of the basic principles. (Mr Handyside was the publisher of *The Little Red Schoolbook*, a work aimed at teenagers which offered liberal and, by the standards of the day, provocative advice on such matters as drug-taking and sex; when the UK authorities seized the book and prosecuted him, he took the case to Strasbourg, alleging violation of his freedom of expression.) First, it said, one must check whether the reasons given by the state for restricting the right were ‘relevant and sufficient’ to count among the permitted limitations. Then one must apply a test of necessity: was there a ‘pressing social need’ for the interference? (In this case the answer was yes: the protection of morals.) If that test was satisfied, one must then ask whether the measures actually taken were necessary in order to achieve the purpose of the intervention.¹⁵

¹⁴ J. Alder, ‘The Sublime and the Beautiful: Incommensurability and Human Rights’, *Public Law* (2006), pp. 697-721, at p. 710.

¹⁵ *Handyside v. UK* (7 December 1976), paras 48, 50, 53.

This scheme, which has been followed in many subsequent judgments, looks solid and methodical at first sight, but it can become puzzling on closer analysis. If the reason for restricting the right is 'sufficient' to be a valid reason, that seems to establish the need for the restriction, without invoking a further test of necessity for it.¹⁶ Then again, if the 'pressing social need' has such normative force as to make it simply 'necessary' to suppress the exercise of a right, one could perhaps argue that when the aim of the restriction is so good, the results might be even more beneficial if the restriction were larger. So, in order to give any real meaning to the third stage of the operation (judging whether the measures taken were necessary to achieve the purpose of the intervention), it must be possible to calculate the force of the 'pressing social need' very precisely – that is, to work out that satisfying its requirements would involve just this much intervention and no more.

Once again we are in the realms of 'balancing', trying to establish just how much of this right should be taken as the equivalent of that countervailing right or interest, so that a little extra weight on the countervailing side will justify a little interference, and a larger amount will justify interference to a greater extent. As the standard modern work on proportionality points out, there are various choices and decisions to be made here, into each of which an element of subjectivity can enter: choosing which interests should be taken as the relevant ones on both sides, deciding whether this interest is intrinsically more important than that one, assessing whether each of the relevant interests is strongly or weakly engaged in this particular situation, and then performing the final comparative measurement, when there is no real common scale on which to place the two (or more) things.¹⁷ After an exhaustive study of the case-law, this author concludes that while the doctrine of proportionality has an outward appearance of objectivity and universality, its use in practice turns out to be 'fluid ... or even, to be honest, gaseous'.¹⁸

The Test of Necessity

While the full 'trumping' doctrine clearly does not apply in human rights law, a weak residue of it can still be seen at work: the idea that rights should take priority, to the extent that if a right is to be interfered with, the interference must be kept to the absolute minimum necessary to achieve the desired effect. This is the final

¹⁶ On this point see N. Lavender, 'The Problem of the Margin of Appreciation', *European Human Rights Law Review*, 2 (1997), pp. 380-90, at pp. 386-7.

¹⁷ S. van Drooghenbroeck, *La Proportionnalité dans le droit de la Convention Européenne des Droits de l'Homme: prendre l'idée simple au sérieux* (Brussels, 2001), p. 15.

¹⁸ *Ibid.*, p. 14: 'fluide ... voire même franchement gaseuse'.

problematic thing about the theory of proportionality: it requires that judges descend to a level of considerable detail in order to assess whether this particular measure was just what was needed, and no more, in these particular circumstances. The fit, so to speak, must be skin-tight.

Many legal systems, including that of the UK before the passing of the Human Rights Act, allowed a looser fit when assessing what was legally permissible. In English administrative law the long-standing principle, known as the *Wednesbury* rule, was that a test of reasonableness should be applied: the action of any public body could be overturned by judicial review if it was so unreasonable that no reasonable person, acting reasonably, could have made it. Otherwise, within the range of possible reasonable actions, the body had the discretion to make its own decisions.

Where cases involving human rights issues are concerned, that rule was overturned in a landmark judgment by the House of Lords in 2001 (*Daly v. Secretary of State for the Home Department*), and the principle of proportionality was put in its place. Henceforth, the question would be not whether the contested action was within the range of reasonable ones, but whether it was positively justified as necessary (which of course meant no more than what was necessary, as more than what is necessary is unnecessary) to achieve certain permitted aims.¹⁹

Thus the general tendency is that 'reasonableness' gets replaced by what is meant to be a stricter standard. An interesting version of this change arose in the case of *Osman v. UK*, concerning the duties of the police. Ahmet Osman was a London schoolboy who had become the object of an obsessive interest on the part of a mentally ill schoolmaster. After various troubling incidents, which had been reported to the police, the schoolmaster killed Ahmet Osman's father. An action against the police on grounds of negligence failed in the UK courts, so the case was taken to Strasbourg (under Article 2, on the right to life). The UK Government's position was that to prove negligence one must demonstrate that the police were guilty of either wilful disregard or serious dereliction of their duty. The Court ruled that proportionality imposed a stricter test: 'it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid

¹⁹ See the discussion in M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"', in N. Bamforth and P. Leyland, eds, *Public Law in a Multi-Layered Constitution* (Oxford, 2003), pp. 337-70, at pp. 338-42. Some elements of the doctrine of proportionality had been filtering into English law in the 1990s, thanks to the influence of EU law (see J. Wadham and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998*, 2nd edn (Oxford, 2000), pp. 20-1); but the change ushered in by *Daly* was systematic.

a real and immediate risk to life of which they have or ought to have knowledge.’²⁰ Here, while the word ‘reasonably’ did feature, the key to the test lay in the words ‘all that could ...’: what was required was not anything within a range of reasonable possibilities, but the maximum, at the very top of the range.

And how could that maximum be calculated? The very next sentence of the judgment explained: ‘This is a question which can only be answered in the light of all the circumstances of any particular case.’²¹ Attending to circumstances is, of course, a proper part of any judicial process. But the aim here is not just to find out what happened in order to place the events under some more general legal principles. It is to work out precisely what the authorities should have done, so that only if they did that precise thing – no more, and no less – can they escape a finding of illegality.

The most famous application of this principle was the judgment in *McCann and Others v. UK*, the so-called ‘death on the Rock’ case. Three members of the Provisional IRA had planned a car bomb attack in Gibraltar; when they crossed into Gibraltar from Spain and parked a car in a crowded place, members of the SAS who had been keeping them under surveillance shot them dead. It later emerged that the explosives were in a different car, still on the other side of the border. The case, brought by their relatives, argued that their right to life (under Article 2) had been violated. English law allowed the use of lethal force by the authorities on a test of ‘reasonableness’, and Gibraltar law similarly used the phrase ‘reasonably justifiable’, but the Court imposed a test of ‘necessity’. In order to apply that test, it entered into a detailed consideration of the tactical planning and execution of the surveillance operation, substituting its own judgment of operational matters for that of experienced officers who had undergone long training. By a narrow majority, it found the UK guilty of a breach of Article 2.

The joint opinion issued by nine dissenting judges made the following point:

in undertaking any evaluation of the way in which the operation was organised and controlled, the Court should studiously resist the temptations offered by the benefit of hindsight. The authorities had at the time to plan and make decisions on the basis of incomplete information. Only the suspects knew at all precisely what they intended; and it was part of their purpose, as it had no doubt been part of their training, to ensure that as little

²⁰ *Osman v. UK* (28 October 1998), para. 116.

²¹ *Ibid.*

as possible of their intentions was revealed. It would be wrong to conclude in retrospect that a particular course would, as things later transpired, have been better than one adopted at the time under the pressures of an ongoing anti-terrorist operation and that the latter course must therefore be regarded as culpably mistaken.²²

If one disregards the issue of technical competence for the moment, it is possible to agree that analyses made in hindsight may often come up with apparently superior tactical choices that differ in some respect from the ones made at the time. This does not matter in an ordinary legal system where a loose test such as that of reasonableness applies; it is only the requirement of proportionality that makes the problem acute. In the case of *Osman*, the Court recognised the existence of such a problem in general terms, observing that the obligation to protect life under Article 2 ‘must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.’²³

But a general statement of this kind does not do anything to solve the problem. How, in any particular case, are the authorities to know whether taking measures to protect someone is ‘disproportionate’, or proportionate and therefore necessary? And if measures are required, exactly how extensive should those measures be? There is no clear answer, nor can there be any; the apparent precision of this demand to match actions to circumstances is illusory. As a consequence of the *Osman* judgment, an increasing amount of police time and resources has been devoted in the UK to supplying protection to gangsters giving evidence in trials of other gangsters. According to a recent study by Dominic Raab MP, ‘the British police now spend £20 million a year protecting gangsters from each other, a direct consequence of the extension of the right to life under Article 2. As a result of the growing pressure on finite resources, police have proved unable to protect juries in criminal trials.’²⁴

²² *McCann and Others v. UK* (27 September 1995), Joint Dissenting Opinion of Judges Rysdsal ... [etc.], para. 8.

²³ *Osman v. UK*, para. 116.

²⁴ Raab, *Strasbourg in the Dock*, p. 12.

The Cult of Circumstance

While the doctrine of proportionality has not yielded any precise rules for deciding what would be necessary in any particular case, it has encouraged what might be called a general cult of circumstance – a presumption that measures will be proportionate if they are somehow calibrated to the circumstances of an individual case, and disproportionate if they are based on a more general rule.

As we have seen, the main objection to the UK's prohibition of convicted prisoners voting was that it was a general ban, not modified in any way from case to case. The Court said that it would be better to leave the decision on disenfranchisement to the judge who sentenced the person to imprisonment, and that the existing UK law was objectionable because it applied to all prisoners 'irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances'.²⁵ That the decision should be made by a judge was reaffirmed in a case decided in 2010, *Frodl v. Austria*; but two years later, in *Scoppola v. Italy*, the Court back-tracked, saying that a scheme laid down by the legislature could pass the proportionality test, so long as it contained some gradations of severity and offered the possibility of the ban being lifted at some point.²⁶ (The consequence, as we have seen, is that a prisoner in Italy serving more than five years, who is banned from voting not only during the sentence but for many years thereafter – possibly for the rest of his life – does not suffer a violation of his human rights, whereas a prisoner with the same length of sentence in the UK, who is entitled to vote again as soon as he leaves prison, does.)

In neither of those later cases, however, did the Court give any precise indication of how one might tell whether one graduated scheme was proportionate and another was not; nor did it explain which particular circumstances should weigh, and to what extent, in the mind of any national judge deciding whether or not to deprive a convicted criminal of the vote. In the *Frodl* case the Court said that the decision to disenfranchise must be 'accompanied by specific reasoning given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary'; national judges are left guessing as to what circumstances might or might not be relevant – but knowing that, whichever way they guess, subsequent judgments by the Court may come up with criteria, as yet unknown, by which to show that their decision was 'disproportionate'.²⁷

²⁵ *Hirst v. UK* (no. 2), paras 77-8, 82 (quotation).

²⁶ *Frodl v. Austria* (8 April 2010), paras 28, 34; *Scoppola v. Italy* (no. 3) (22 May 2012).

²⁷ *Frodl v. Austria*, para. 35.

Examples of this approach can easily be multiplied. *Dickson v. UK* was a case brought under Article 8 (on private and family life) by a prisoner serving a long sentence for murder. He had married after entering prison and applied for the use of facilities for artificial insemination in order to have a child, but the Home Secretary refused permission, citing the various conditions that had to be satisfied under the Home Office policy on such matters (which allowed artificial insemination in special cases). The Court, finding in Mr Dickson's favour, said that the existing policy 'did not allow a balancing of the competing individual and public interests' and 'did not permit the required proportionality assessment in an individual case'.²⁸

The policy, which did in fact involve considering each case individually, set out six different factors, including the likely age of the child at the time of the prisoner's release, the nature of the couple's relationship, and the arrangements for the welfare of the child.²⁹ That these were relevant factors, and that they had been taken into consideration, was not disputed by the Court. Its claim that the Home Secretary's decision was not 'proportionate' seems to have been based, rather, on its own feeling that the interest of a prisoner and his wife in having a child should just be given greater weight. But instead of simply saying so, the Court presented its opinion in terms of 'proportionality', as if a more minute attention to the specific circumstances in this case would, by its very minuteness and particularity, have yielded the correct outcome.

One further example may be given, this time from a UK court, applying European human rights law after the passing of the Human Rights Act. In *R (P and Q) v. Secretary of State for the Home Department*, the issue concerned the length of time for which a baby, born in prison, could remain with its incarcerated mother. The rule in force – contested by the applicants – specified a fixed maximum of 18 months. The Court of Appeal decided that the rule should be made flexible and adapted to individual cases in order to comply with the principle of proportionality, given that the case came under Article 8 (on private and family life).

Helpfully, the judges specified three factors that would need to be taken into account: the valid limitations on the mother's freedoms brought about by her imprisonment; the risk that relaxing the policy would cause problems within the prison service (e.g. accusations of favouritism); and the welfare of the child, which was to be considered under three aspects, the harm caused by separation, the harm

²⁸ *Dickson v. UK* (4 December 2007), paras 82, 84.

²⁹ *Ibid.*, para. 13.

caused by remaining in the prison, and the quality of the alternative arrangements.³⁰ Such specification went quite a long way beyond what would be normal in a judgment of the Court at Strasbourg. But of course the UK judges did not descend to the level of saying what relative weightings should be assigned to these different factors or sub-factors. Future decision-makers, trying to carry out this more flexible policy, would be left guessing as to which aspects of the case to prioritise, with little more than their own subjective values and personal sympathies to guide them.

The desire to tailor the law more closely to the circumstances of individual cases is, in itself, well-meaning and humane. But all systems of law and administration have to operate with rules which are general. The age of consent to sexual intercourse, for example, is fixed at a certain number of years, even though we know that different people mature at different rates, and regardless of the fact that there is something artificial about finding the same action illegal up to midnight on the eve of someone's birthday, and legal five minutes later.

There are various reasons why we maintain such rules at a certain level of generality. One of them is practical convenience – which should not be dismissed as unimportant, given that more elaborate and particularising systems inevitably consume more time and resources, and those resources might be used more beneficially elsewhere.

But the most important reason is that a system of just law must involve a high degree of knowability and predictability. A clear across-the-board age limit, like many other kinds of simple general rule, satisfies that requirement. If the rule is to be broken down into much more detailed point-by-point applications to particular cases, it will continue to satisfy that essential requirement only if the ways in which those detailed applications work are themselves clearly knowable and predictable. When one committee in one prison, assessing an application for an extension of the 18-month limit, judges on the basis of a variety of factors to which it gives, on its own subjective grounds, a variety of weights, and another such committee elsewhere judges differently on the basis of a different set of preferences, individual justice may possibly (though not necessarily) be done in one of the two cases. But a larger injustice is created: advantages are distributed to some, and withheld from others, on grounds that fall short of the proper legal requirements of predictability and clarity. The gain may be a more humane outcome for some individuals; the loss is an overall weakening of the rule of law.

³⁰ *R (P and Q) v. Secretary of State for the Home Department* (20 July 2001), EWCA Civ 1151 (<http://crae.org.uk/media/33615/R-P-Q-v-The-Secretary-of-State-for-the-Home-Department.pdf>), paras 102-5.

Genuine precision in the administration of the law can lead to more perfect justice. Pseudo-precision, which gestures in the direction of attention to detailed circumstances, and demands that they be considered in the light of a range of factors of varying weights, but cannot fit actual values to those variables in order to make the calculation work, leads in the opposite direction.

Balance and Proportionality: Some Overall Opinions

The lack of knowability and predictability, highlighted here, is not to be seen as a contingent feature of the Strasbourg jurisprudence, as if it could just have been avoided if the judges had done their work more thoroughly. It is intrinsic to the way in which the concepts of balance and proportionality have been built into the system. At the same time, one has to admit that the ways in which the judges have operated this problematic system have often been sub-optimal. Two scholars who have investigated much of the case-law have come to very similar conclusions. Aileen McHarg has written:

In relation to the proportionality test ... we find oscillation between factual inquiries into the necessity of interferences, again with varying degrees of rigour, and more substantive evaluation of the relative importance of rights and exceptions, sometimes turning on the absence of impairment of the 'very essence' of a right. In *Lingens*, it was stated that what is proportionate will vary depending on the background circumstances, the right in question and the type of interference concerned, while the burden of proof also seems to shift from case to case. Frequently, however, decisions as to proportionality are stated baldly without elaborating the weight to be ascribed to the various factors involved. Equally, the rhetoric used is often at variance with the practice.³¹

And Marie-Bénédicte Dembour has noted:

The Court has variously found the Convention to have or not to have been violated by reference to factual circumstances which are admittedly listed but unfortunately not compared in any systematic manner. The Court does not

³¹ A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights', *The Modern Law Review*, 62 (1999), pp. 671-96, at p. 687. The reference is to *Lingens v. Austria* (8 July 1986).

necessarily refer to the same factors across apparently similar cases. When it does, it does not always attribute to a given factor the weight it seems to have given it in previous cases. The Court never explains which factor is important and why. It obviously, and regrettably, does not feel that it needs to explain the way it achieves its balancing exercise – its calculus. Instead it lists factual circumstances, and having done so, it concludes without any further explanation – ‘somewhat abruptly’ – that either the public or the applicant’s interest is weightier than the other. The Court’s method is ... vague and unsatisfactory.³²

³² Dembour, *Who Believes in Human Rights?*, pp. 89-90. On the problematic nature of the ‘proportionality’ doctrine more generally, see G. C. N. Webber, ‘Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship’, *Canadian Journal of Law and Jurisprudence*, 23 (2010), pp. 179-202, and the essays in G. Huscroft, B. W. Miller and G. Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge, 2014).

3

The Democratic Dimension

The Problem

It was pointed out above that human rights law enjoys a special moral authority. The UK Government will normally seek to amend or repeal existing laws, or make new ones, in order to satisfy a judgment by the Strasbourg Court, or to deal with a declaration of incompatibility by its own domestic judges; and it will act in this way not because it is constitutionally obliged to do so, nor simply because the UK has a treaty commitment to abide by the terms of the European Convention, but because there is a strong moral feeling that human rights, as elaborated by the judges, must take priority.

One way to justify this special moral authority might be to say that human rights are trumps – that they are statements of pure moral absolutes, which must automatically override mere interests or policies. But, as we have seen, that is simply not how they work. They are bound up with all sorts of other factors, and the work of the judges consists not of asserting the pure value of the rights but rather of assessing different kinds of interests and policies, to see whether the rights may be outweighed by them. Whether or not the judges realise it, this involvement in policy issues is itself a kind of policy-making.

Another way would be to say that human rights law deals in objective truths, and that even when it descends to the level of weighing rights against interests, it does so in accordance with criteria so objective that the answers it gives are demonstrably correct. Yet, as we have seen, this claim is simply not sustainable. Whilst the most general formulations of the ‘pure’ rights may be so uncontested that we may feel that we can safely treat them as objective, the inclusion of the various limitations, and the lack of any clear principles of commensurability when we try to set such limiting factors against the pure rights, make objective certainty impossible to attain at the level of almost any particular judgment.

Assigning degrees of importance to different interests and policies (national security, economic well-being, the protection of morals, and so on) is the sort of messy business that is normally entrusted to democratic politics. There are different

ways of theorising about this, from crude models in which the interests of individuals are aggregated to more sophisticated accounts of ‘deliberative democracy’, in which ideas about interests, the values they embody and their relative importance are shaped by public debate. But in any comparison between policy-making by judges and policy-making by the institutions of democratic politics, it should not be supposed that the point is to work out which of the two will come closer to giving the objectively correct policy. In such matters, where so many interests and value-preferences are involved, there will in very many cases be no single correct policy. That, indeed, is why democratic choice has a special validating power of its own.

The Tyranny of the Majority

The standard defence of human rights law, on this point, is that it acts as a protection against the tyranny of the majority. Whatever the electoral system may be, and however the legislature is constructed, somewhere at the heart of any democracy is a procedure of majority voting, which means that the interests of the minority may often be overridden.

That is true as a descriptive statement; but the question is whether such overriding constitutes a wrong. Any discussion of this issue should pause at the outset to consider the meaning and significance of the term ‘minority’. The plain, arithmetical use of the term is not necessarily the same as the meaning it has in phrases such as ‘minority rights’, which belong to a special kind of normative language. As Lord Sumption has written:

Minorities are not the same as interest groups. Majoritarian oppression is different from discrimination, although they overlap. Groups such as bankers or higher rate taxpayers or people who believe in corporal punishment in schools may be interest groups. But they are not, simply by virtue of belonging to these categories, minorities entitled to protection against democratically enacted laws which adversely affect them.¹

To override an interest, in any case, need not be to ignore its existence. Typically, where democratic law-making and policy-making are concerned, it

¹ J. Sumption, ‘A Response’, in N. W. Barber, R. Ekins and P. Yowell, eds, *Lord Sumption and the Limits of the Law* (Oxford, 2016), pp. 213-24, at p. 221.

involves making a judgment about it, relative to other interests. A crude theory of interest-aggregation offers a very inadequate description of what goes on in these cases; for the judgment will almost always consist of significantly more than just saying 'a greater number of us want X than Y, therefore X is better'. Reasons are given, and values are applied. And if that is true where ordinary interests and interest-groups are concerned, it will be found to be even more true when we turn to those important moral or social or political issues where minorities (in the stronger sense) may be thought to have rights that deserve protection.

Nor should we assume that democratic political and legislative processes will yield nothing more than a projection of the values of the population at large (many members of which may, it is true, hold their values in a quite unreflective way). A wide range of policies have been enacted democratically – the abolition of the death penalty, for example – which prove the contrary. On such issues, a majority decision by representatives may differ significantly from the preference of the majority of the people they represent. It should not surprise us that political debate can embody very much the same perceptions of morality and fairness that are at work in the formulation and vindication of human rights. Neither is it necessary to assume, each time human rights law shines a light into some unreformed corner of our existing legal system and recommends a change that the problem it has highlighted is the result of majoritarian tyrannising; most often it is the result of inertia and neglect, which have allowed a build-up of unfairness in the system. The problem could be solved, perhaps less speedily but in the end no less effectively, by the normal method of a political campaign leading to a change in the law.

To see the fundamental problem with this argument about human rights protecting people from the tyranny of the majority, however, one must again consider the difference between the general statement of the 'pure' right, and the detailed application of it after the various limiting factors have been incorporated and (allegedly) weighed and balanced. We can all agree that it would be tyrannical for a majority in Parliament to pass a law banning freedom of speech, or abolishing free elections. Those things are, we feel, so important, so objectively right, that many of us would welcome some institutional protection against such misuses of parliamentary power. But that is not the sort of issue with which human rights law actually confronts. Instead it gives us specific judgments, arrived at by means of uncertain weighing and balancing operations in which values have been assigned, in ways that cannot be shown to be objective, to various interests and policies.

To suppose that in such cases, where the human rights court disagrees with an expressed view of a democratic legislature, there is an objective right on the one hand and a majority preference on the other, is not just simplistic; it is wrong. What

we really have is two different views of what the actual right is – that is, of what that right should amount to when it is balanced by competing interests, the values of which cannot be derived from any purely legal text or legal doctrine.² Neither of the two views is arrived at out of a calculus of ‘pure’ rights. Because of the involvement of the competing interests in the assessment of the right, there is an inescapably political dimension to any decision-making on such an issue. And as J. A. G. Griffith has written, “To require a supreme court to make certain kinds of political decisions does not make those decisions any less political.”³

To say that preventing prisoners from voting, or refusing to give a particular prisoner facilities for artificial insemination, is an example of the ‘tyranny’ of the majority is to beg the essential question; it is to assume that the serious wrongness of those policies has been demonstrated. It is to use a very powerful term, invoking a kind of moral certainty, in an area where such certainty is in fact unavailable. But powerful and definite proof of wrongness should surely be required in order to justify the overturning or strong-arming of democratic decision-making, so long as we continue to think that democracy is of some value in itself. And if that value consists above all in the fact that democracy gives a special kind of validity to choices in areas of decision-making where it is impossible to demonstrate that one particular answer is the objectively correct one, there may even be a case for saying that more of these matters should be left to democratic legislatures, and fewer to the courts. Note that this point applies specifically to courts that adjudicate on human rights. For, unlike ordinary criminal or civil law, the application of human rights law is inseparably bound up with the weighing of interests and policies. Like a stick of Brighton rock, it has ‘policy’ written all the way through it.⁴

² On this fundamental point see Waldron, *Law and Disagreement*, esp. p. 248. Cf. also Finnis, ‘Human Rights and Their Enforcement’, p. 42: ‘What is “necessary in a democratic society for the protection of, say, morals” is, it seems to me, an issue not to be mastered by legal learning or lawyerly skills.’

³ J. A. G. Griffith, ‘The Political Constitution’, *The Modern Law Review*, 42 (1979), pp. 1-21, at p. 16. On this point cf. also J. Goldsworthy, ‘Legislative Sovereignty and the Rule of Law’, in T. Campbell, K. D. Ewing and A. Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford, 2001), pp. 61-78, at p. 73.

⁴ Some might wish to claim that this is not true of those few human rights that are absolute and non-derogable, such as Article 2 (the right to life) and Article 3 (the right not to be tortured). But we have already seen, in the *Osman* judgment, the statement that the demand on the police to protect life should not be ‘disproportionate’, which means that it is to be limited by some policy interests; a similar argument can easily be constructed for the demand that the police should protect people against inhuman or degrading treatment by other people. Cf. also the statement about balancing in the *Soering* judgment: above, p. 25. For examples of the ‘relativising’ of Article 3 in some existing judgments, see van Drooghenbroeck, *La Proportionnalité*, pp. 123-32, and J. Callewaert, ‘L’Article 3 de la Convention européenne: une norme relativement absolue ou absolument relative?’, *Liber amicorum Marc-André Eissen* (Brussels, 1995), pp. 13-38. In addition, as we shall see, the certainty of Article 3 judgments can be undermined by fluctuations in the definition of inhuman or degrading treatment, which themselves may reflect changing assumptions of other kinds.

An Inadequate Defence

One surprisingly common defence of human rights law, where the question of its encroachment on democracy is concerned, goes as follows. Human rights law cannot possibly undermine or be in conflict with democracy, because some of its provisions are directly supportive of democracy – for example, the right to freedom of expression and the right to freedom of association or assembly. That this is a commonly expressed view is surprising, because the claim it makes is so obviously feeble. It is perfectly possible for a system of human rights to have some provisions that support democracy, while at the same time, other aspects of the functioning of the system reduce the proper scope of democratic decision-making. Any complex legal scheme can easily have more than one effect.

Sometimes one finds, combined with this argument, a reference to the clause in the European Convention's Preamble which says:

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend...

On this basis it is claimed that the Convention affirms its own commitment to democracy, when it announces that both democracy and human rights are means to the same ultimate end. As a historical statement about the intentions of the framers of the Convention, that is certainly true. But this preambular phrase in itself cannot guarantee that the ensuing system of human rights law will be incapable of conflicting with democracy. Indeed, the wording could be taken by some to suggest not that human rights law should be infused with respect for democratic procedures, but rather that the two things operate on different bases – which might mean that disagreement or competition between them will be more likely, not less.

'Necessary in a Democratic Society'

What is at first sight a more plausible line of argument in defence of European human rights law, where its relationship to democracy is concerned, focuses on the various articles of the European Convention in which the limitations are qualified by the general phrase 'necessary in a democratic society'. Does not this indicate a proper regard for the role of democratic decision-making?

Unfortunately, it does not. The meaning of the phrase has never been systematically clarified by the Court; its use is flexible, various and uncertain. Much of the uncertainty arises from the fact that whereas ‘democratic’ is normally used, primarily at least, to describe a political system, it is here attached to the word ‘society’, suggesting that it must characterise some general set of values rather than a more specific set of procedures. (The phrase was borrowed rather automatically from the Universal Declaration, where the limitations, instead of being set out article by article, are gathered into one general statement in Article 29. The second paragraph of that article says: ‘In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’ The first draft of that article had said ‘democratic State’; it was changed because of fears that countries such as the Soviet Union would be able to invoke the interests of the state in order to justify the suppression of human rights. The apparent focus on democratic social values was a more or less unintended consequence of that politically motivated change.)⁵

In many judgments of the Court, the phrase ‘necessary in a democratic society’ is reduced, in effect, to ‘necessary’; the argument is conducted purely in terms of necessity (‘pressing social need’, etc.) and proportionality. It is not surprising that some authors explicate the whole phrase just in those terms. One standard textbook says that it means ‘proportionate to the end to be achieved’, and a recent work explains the meaning of ‘necessary in a democratic society’ as follows: ‘more often than not, this boils down to a judgment about whether the proposed interference is proportionate ... crudely put ... proportionate equals necessary.’⁶

There are certainly many cases where, when the Court invokes the words ‘necessary in a democratic society’, it is hard to see what is added by the latter part of that phrase. Sometimes, however, it is used in a slightly roundabout way in order to imply that the right itself is important in a democratic society, so that strong reasons must be needed for interfering with it: in this way the Court has referred to ‘the prominent place held in a democratic society by the right to a fair trial’, has insisted that free communication between a lawyer and his detained client is ‘a fundamental right which is essential in a democratic society’, and has declared that ‘freedom of thought, conscience and religion is one of the foundations of a

⁵ J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, 1999), pp. 63-5.

⁶ Wadham and Mountfield, *Blackstone’s Guide*, p. 14; Gearty, *On Fantasy Island*, p. 141.

“democratic society” within the meaning of the Convention’.⁷ Such examples can be multiplied.⁸ Yet the Court is surely committed to the view that all the rights in the Convention are prominent or essential or foundational in a democratic society, so this gives little specific meaning to the phrase, and no help at all to someone trying to decide on what grounds the interference with those rights would itself be necessary in a democratic society.

In a landmark case, *Chassagnou and Others v. France*, the Court noted that one person’s rights might properly be restricted in order to protect the rights of others, and declared: ‘It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”’.⁹ But deciding on what should count as the correct ‘balance’ in any particular case is the job, in the end, of the Court, and this description of the fundamental nature of a ‘democratic society’ can offer it no guidance in reaching that decision.

In the previous paragraph of its judgment on *Chassagnou*, however, the Court gave a slightly different meaning to the phrase. Its point here was not just to say that there must be a balancing exercise, but to argue that the exercise must be conducted in the light of a particular set of values: ‘In addition, pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”’. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail.’¹⁰

If there has been one predominant way in which the term ‘democratic society’ has been invoked, in the relatively rare cases where it has some real meaning attached to it, it is this one: the term is used to justify an anti-majoritarian approach. Thus the word ‘democratic’, in the text of the Convention, is cited in order to oppose the choices made by the procedures of democratic decision-making; and the quasi-latitude which is sometimes given to national authorities to make their own decisions is explicitly reduced, in some cases, in the name of pluralism and tolerance, for fear that they will impose one dominant view.¹¹ There is no need to deny that the values the Court is thereby trying to protect are, at some level of generality, good and important ones; the point here is merely that this invoking of

⁷ *Airey v. Ireland* (9 October 1979), para 24; *S. v. Switzerland* (28 November 1991), cited in Wadham and Mountfield, *Blackstone’s Guide*, p. 95; *Leyla Sahin v. Turkey* (10 November 2005), para. 104.

⁸ See S. Marks, ‘The European Convention on Human Rights and its “Democratic Necessity”’, *British Year Book of International Law*, 66 (1995), pp. 209-38, at pp. 213-14.

⁹ *Chassagnou and Others v. France* (29 April 1999), para. 113.

¹⁰ *Ibid.*, para. 112.

¹¹ van Drooghenbroeck, *La Proportionnalité*, p. 517.

the term ‘democratic’ cannot be used as evidence that its judgments pay any special respect to the choices made by democratic legislatures. If anything, it indicates the opposite.

As Lord Sumption has written:

Properly speaking, democracy is a constitutional mechanism for arriving at decisions for which there is a popular mandate. But the Convention and the Strasbourg Court use the word in a completely different sense, as a generalised term of approval for a set of legal values which may or may not correspond to those which a democracy would in fact choose for itself.¹²

Overall, then, the use of the phrase ‘necessary in a democratic society’ neither recognises the value of democratic decision-making, nor yields any clear criterion that would help to clear up the difficulties inherent in the concepts of necessity and proportionality. As Aileen McHarg has written, ‘the fluidity and imprecision of the “democratic necessity” test is such that the Court and Commission appear to have no clear understanding of the proper relationship between rights and their exceptions.’¹³ And in the words of Steven Greer: ‘Ideally the Court should have a coherent and consistent conception of the general relationship between rights, democracy and the public interest. But ... this is not the case.’¹⁴

The Margin of Appreciation

The most plausible argument for saying that the European Court of Human Rights respects the value of democratic decision-making is to be drawn from the doctrine of the ‘margin of appreciation’. This phrase, which now looms large in the general jurisprudence of the Court, is a little misleading in English; ‘appreciation’ here is a mistranslation – or, one might almost say, a non-translation – of the French ‘appréciation’, which means ‘assessment’ or ‘evaluation’. The basic idea is that the national authorities may be better placed to assess some of the factors that are relevant to a human rights case, and that the Court will therefore allow them a ‘margin’ on some points, a degree of latitude within which the Court will not

¹² J. Sumption, ‘The Limits of the Law’, in N. W. Barber, R. Ekins and P. Yowell, eds, *Lord Sumption and the Limits of the Law* (Oxford, 2016), pp. 15–26, at p. 23. The only quibble one might have with that statement concerns the insertion before the noun ‘values’ of the adjective ‘legal’.

¹³ McHarg, ‘Reconciling Human Rights’, pp. 672–3.

¹⁴ S. C. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Strasbourg, 2000), p. 18.

substitute its own judgment for theirs. At an early stage in the drafting of the Convention there was talk of a much stronger kind of ‘liberté d’appréciation’, which would give each state the freedom to legislate in its own way to protect the human rights listed therein; that notion was abandoned, but the term ‘marge d’appréciation’ or ‘margin of appreciation’ later crept into the usage of the Court, first in connection with cases where a state invoked the right to derogate from the Convention in an emergency, and then more generally.¹⁵

There are two different ways of looking at this margin of appreciation. One of them is – by the general agreement of those scholars who have analysed the issue most carefully – fundamentally wrong, though it crops up quite often in the literature, and is even echoed from time to time in judgments of the Court. The incorrect way to think about the margin involves seeing it as offering a kind of protected domain for the states, guaranteed free of Court interference, and calculated as a margin of permissible error. This model would make sense only if the Court could first of all decide on the correct calculation which the state should have made, and then gauge the range of answers that are close enough to it to be acceptable; but that is not what the Court does when it invokes the margin of appreciation.

The correct way to think of it is that the margin of appreciation just represents an act of self-restraint on the part of the Court, which could perfectly well step in to scrutinise every aspect of the state’s decision-making, but chooses to stand back and accept some of it as given.¹⁶ The spatial metaphor of a fixed, privileged area is misleading; what happens is that there may be differing degrees of standing back, in favour of the state, on various considerations that are relevant to deciding the case. This is a more flexible approach, but it immediately raises questions about how and why the Court chooses to restrain itself more or less, and on some issues rather than on others.

One influential statement about these matters was made in the *Handyside* judgment. Referring to Article 10, on freedom of expression, and in particular to that article’s paragraph 2, which lists the limitations (including the protection of morals), it observed:

¹⁵ See A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford, 2001), pp. 676-7; Dembour, *Who Believes in Human Rights?*, pp. 47-8.

¹⁶ van Drooghenbroeck, *La Proportionnalité*, pp. 486, 503-10; J. Schokkenbroek, ‘The Basis, Nature, and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights’, *Human Rights Law Journal*, 19 (1998), pp. 30-6.

it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them ... it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context.

Consequently, Article 10 para. 2 ... leaves to the Contracting States a margin of appreciation.

Nevertheless ... The Court ... is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.¹⁷

The initial impression given by this statement is that the point is essentially about local knowledge. The state authorities are ‘in direct and continuous contact with the vital forces of their countries’; this gives them more accurate knowledge of what ‘the requirements of morals’ are, of the nature of the ‘pressing social need’, and therefore of the precise nature of the measure that is called for in order to satisfy that need. The last step in this sequence seems to involve more or less factual knowledge: once the pressing social need has been identified, it may be a fact that such and such a measure would be sufficient to satisfy it.

But is a statement about ‘the requirements of morals’ in a particular society a statement of fact? A description of public opinion on some issue might be that, and in some cases public opinion does seem to have played a role – in *Handyside*, for example, and in *A, B and C v. Ireland*, where the fact that the Irish people had voted against abortion in three referendums was given some weight.¹⁸ In other significant cases, however, such as *Dudgeon v. UK* (on criminal laws about homosexuality in Northern Ireland), the opinion of the local population has been dismissed as

¹⁷ *Handyside v. UK*, paras 48-9.

¹⁸ On the divorce case see K. Dzehtsiarou, ‘Interaction between the European Court of Human Rights and Member States: European Consensus, Advisory Opinions and the Question of Legitimacy’, in S. Flogaitis [Phlogaites], T. Zwart and J. Fraser, eds, *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Cheltenham, 2013), pp. 116-34, at pp. 126-9.

irrelevant: the real requirements of morals were not what local people believed them to be, so the fact that the law of the state reflected local beliefs was not to be taken into account at all. It is not easy for any state to predict, in this important area of ‘the requirements of morals’, whether its knowledge of local conditions will entitle it to any margin of appreciation or not.

In any case, although the *Handyside* statement gives the state some latitude both in assessing the requirements of morals (in some cases at least) and in judging what measure would satisfy them, it does not defer to the state in any way on the most important question, namely, whether that measure – an interference of some kind with a right – is justified. So the central ‘balancing’ operation, by which the rightness or wrongness of the state’s action will ultimately be judged, is not itself subject to a margin of appreciation. The Court’s judgments sometimes blur this point, by saying that if the right is especially important, or if the issue raised in a particular case is close to the heart of the right, the margin of appreciation will be smaller. It seems that what they really mean is that since the right has more weight in this balancing operation, it matters less what choice the state has made in deciding on the relevant limiting measure – the chances that the measure will be found to be justified are simply lower to begin with.

Some of the Court’s other pronouncements suggest, on the other hand, that the margin of appreciation can function in relation to the balancing act itself. In *Chassagnou*, the judgment said that special difficulties arose when the reason for interfering with one person’s Convention rights was to protect another person’s Convention rights:

The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a “pressing social need” capable of justifying interference with one of the rights guaranteed by the Convention.¹⁹

One might have expected the Court to argue the precise opposite: a situation where the basic rights of individuals are in conflict is precisely the sort of case in which the Court itself, as the guardian of those rights, needs to investigate closely

¹⁹ *Chassagnou and Others v. France*, para. 113.

and make its own decision on every aspect of the matter. Where those decisions are easy to make, it might have said, assessment of the relevant factors may more safely be left to the state, but in these difficult cases judicial self-restraint is not appropriate.

Another case that raised basic questions about the logic of the ‘margin of appreciation’ doctrine was *Markt Intern v. Germany*. Markt Intern was a subscription news-bulletin service, aimed at small businesses. It ran an item alleging poor (or possibly dishonest) service from a cosmetics supplier which operated by mail-order, and it solicited from its readers further examples of negative experiences at the hands of this supplier. The mail-order company sued it, successfully, under a German law against unfair competition; Markt Intern then took the case to Strasbourg, claiming a violation of its right to free expression (Article 10). In its judgment, the Court observed that a margin of appreciation is ‘essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, the European Court of Human Rights would have to undertake a re-examination of the facts and all the circumstances of each case.’²⁰

In the rest of the judgment, the Court set out the reasons why the decision of the German Federal Court (against Markt Intern) had been justified: the publication of the complaint was premature, the approach taken by the bulletin’s editor was prejudicial to the interests of the mail-order company, and so on. It described these as the ‘findings’ of the Federal Court. Then it concluded that ‘In the light of these findings and having regard to the duties and responsibilities attaching to the freedoms guaranteed by Article 10 ... it cannot be said that the final decision ... went beyond the margin of appreciation left to the national authorities.’²¹ Thus, apparently, it was because the national court had good arguments on the points of principle that its judgment was to be taken as lying inside the margin of appreciation – a margin which, the Court had just said, existed not because of the quality of the arguments but because of the factual complexity of such a case.

This judgment was reached only after the President of the Court had cast his vote to break the deadlock of a division between nine judges in favour and nine against. A dissenting opinion, issued by eight judges, complained that

We find the reasoning set out therein with regard to the ‘margin of appreciation’ of States a cause for serious concern. As is shown by the result

²⁰ *Markt Intern Verlag GmbH and Klaus Beermann v. Germany* (20 November 1989), para. 33.

²¹ *Ibid.*, para. 37.

to which it leads in this case, it has the effect in practice of considerably restricting the freedom of expression in commercial matters. By claiming that it does not wish to undertake a re-examination of the facts and all the circumstances of the case, the Court is in fact eschewing the task, which falls to it under the Convention, of carrying out 'European supervision' ...²²

An even more strongly worded opinion added by one of those judges pointed out that in such commercial matters there was no 'general interest' for the state to protect, the conflict being between individual parties, and insisted that 'The limitation of the freedom of expression in favour of the States' margin of appreciation, which is thereby given priority over the defence of fundamental rights, is not consistent with the European Court's case-law or its mission.'²³ And the separate opinion submitted by the ninth dissenting judge said that the Court should have begun by observing that the restriction of free speech by the relevant German law was in itself unacceptable, with the consequence that 'in such circumstances the margin of appreciation plays no role because this margin cannot justify assessments incompatible with the freedoms guaranteed under the Convention.'²⁴

Thus, in one and the same case, we find the following views: that the margin was wide because of factual complexity and the difficulty of examining all the circumstances in commercial matters; that the state remained within the margin because its arguments about points of principle were correct; that the Court had a duty to examine all the circumstances in commercial matters, which meant that there was no margin; that the margin must be smaller in commercial matters because the dispute there is between private interests, not involving calculation of the general interest by the state; and that, on a point of principle, there should be no margin at all in such a case. One distinguished former judge of the Court does not exaggerate when he writes: 'Much of the discussion of the margin of appreciation by the Court ... illustrates a disappointing lack of clarity.'²⁵

²² *Ibid.*, Joint Dissenting Opinion, section II.

²³ *Ibid.*, Individual Dissenting Opinion of Judge Pettiti.

²⁴ *Ibid.*, Dissenting Opinion of Judge Martens, para. 6.

²⁵ R. St J. Macdonald, 'The Margin of Appreciation', in R. St J. Macdonald, F. Matscher and H. Petzold, eds, *The European System for the Protection of Human Rights* (Dordrecht, 1993), pp. 83-124, at p. 83 (and cf. pp. 94-5, discussing the *Markt Intern* case).

Consensus

To all these uncertainties must be added another factor which is often taken into account in calculating the margin of appreciation: the question of whether there is a European 'consensus'. The basic idea here is, seemingly, very simple. Where there is agreement among most or all of the member states on some relevant factor, the margin of appreciation for any individual state shrinks accordingly; where there is disagreement, it expands. But things begin to look less simple when one examines the actual practice of the Court.

The first part of the passage quoted above from *Handyside* should be relevant here:

it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place ... By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements.²⁶

Here the point at issue was the lack of a European agreement on 'the protection of morals' (one of the justified limitations on the right to freedom of expression). Note that the term used was 'uniform ... conception'. This suggests unanimity, rather than the broad overall agreement conjured up by the term 'consensus', and the argument set out in the passage shows that that must be correct. The 'direct and continuous contact' of a government with the 'vital forces' of its country constitutes a positive reason for privileging the government's 'conception of morals', and this would remain a reason even if this country were out of step with all the other member states on a particular moral issue; for, after all, discovering that other countries take a different view is not going to change the fact that this government has a particular kind of contact with its own people. Only if there were a uniform standard, shared by every country, could the international judge feel confident about turning directly to that standard, without having to acknowledge the special relationship between this people and this government.

²⁶ See above, p. 46.

The doctrine of consensus, on the other hand, has never required unanimity in order to restrict or eliminate the margin of appreciation. There are several cases where the fact that a country was in a minority of one was used as a reason for finding against it: for example, the judgment in *Ünal Tekeli v. Turkey* against the Turkish law which required a wife to take the surname of her husband, or that in *S. and Marper v. UK*, against the British policy of retaining the fingerprints and DNA samples of suspects.²⁷ In the latter case the judgment declared: ‘In the Court’s view, the strong consensus existing among the Contracting States in this respect is of considerable importance and narrows the margin of appreciation left to the respondent State.’²⁸ But consistency in these matters is hard to find. In *Odièvre v. France* (the case, mentioned above, challenging the French law that gave anonymity to a mother who abandoned her child), seven judges signed a dissenting opinion complaining that the majority had allowed France a wide margin of appreciation, when it was the only country in Europe to provide such a strong legal guarantee of anonymity.²⁹

The consensus doctrine operates, typically, on the basis of a majority of states. It is true that the final judgment of the Court never depends simply on whether or not the practice of a state is aligned with that of the majority; but it is one factor which, by reducing the margin of appreciation, can influence the final decision. This should give some pause for thought to those who believe that the essential moral justification of human rights law is to guard against the ‘tyranny of the majority’.

But what level of majority is required, in order to show that there is a consensus? No general answer to this question has ever been given. Some of the case-law suggests that a substantial majority is needed. In *Sheffield and Horsham v. UK*, a case concerning the UK’s refusal to change the birth certificates of people who became transsexuals, it was noted that 33 out of the then 37 member states (89%) did allow such a change, but the Court said that there was ‘no generally shared approach’ to these matters.³⁰ In another case against the UK, where one of the issues raised was the age threshold for criminal responsibility, it was pointed out that only four member states had an age as low as the UK’s (ten years old) or lower, whereas the other 37 of the then 41 states put it between thirteen and eighteen; this majority

²⁷ *Ünal Tekeli v. Turkey* (16 November 2004), esp para. 61; *S. and Marper v. UK* (4 December 2008), esp. paras 47, 110, 112.

²⁸ *S. and Marper v. UK*, para. 112.

²⁹ *Odièvre v. France*, Joint Dissenting Opinion of Judges Wildhaber ... [etc.], paras 12-13.

³⁰ *Sheffield and Horsham v. UK* (25 June 1998), paras 35 (33 out of 37) 58 (quotation). The Joint Partly Dissenting Opinion of Judges Bernhardt ... [etc.] refers to para. 35 and gives the figure of 23 out of 37, but ‘23’ there is clearly a misprint for 33.

(90%) was not sufficient to weigh against the UK's practice.³¹ Yet, on the other hand, in the *Hirst* case (on prisoners' votes), no heed was paid to the fact that 13 member states did not allow prisoners to vote; 34 out of 47, a majority of 72%, was taken to constitute a significant consensus.

Whilst majorities of 89% or 90% have been dismissed as inadequate, in some other cases the barest majority has been regarded as sufficient. In 2010, in *Schalk and Kopf v. Austria*, the claim that Austria's failure to provide for same-sex marriage was a violation of Article 8 (on the right to respect for private and family life) was turned down, largely on the grounds that 'there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation.'³² Five years later, in *Oliari and Others v. Italy* (a case brought on essentially the same grounds against the Italian Government), the situation had just tipped the other way, and the Court was able to note the existence of what it called 'a thin majority' of states accepting some kind of official same-sex union: 24 out of 47 states (51%). This contributed significantly to its finding that 'the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation.'³³

A particularly thought-provoking judgment was given in the case of *Christine Goodwin v. UK*, one of a series of cases brought by transsexuals demanding the right to have their birth certificates altered. In the previous cases (of which *Sheffield and Horsham*, mentioned above, was then the most recent) the Court had upheld the UK Government's refusal to do this. Four years later, in *Goodwin* (2002), it changed its mind. Relying on a submission by the civil rights organisation Liberty, it noted that the number of member states permitting such alteration of birth certificates remained exactly the same. (In fact, since the number of member states had risen in the meantime from 37 to 43, the majority in favour of such a policy had fallen, from 89% to 77%.) But Liberty also emphasised that this policy had been adopted by other countries around the world: 'there had been statutory recognition of gender re-assignment in Singapore, and a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America.'³⁴

This point was given some prominence in the Court's judgment:

³¹ See van Drooghenbroeck, *La Proportionnalité*, p. 534.

³² *Schalk and Kopf v. Austria* (24 June 2010), para. 105.

³³ *Oliari and Others v. Italy* (21 July 2015), paras 55, 178, 185 (quotation).

³⁴ *Christine Goodwin v. UK* (11 July 2002), para. 56.

Already at the time of the *Sheffield and Horsham* case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment ... The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition ...

In the later case of *Sheffield and Horsham*, the Court's judgment laid emphasis on the lack of a common European approach ... While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising ... in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach ... than to the clear and uncontested evidence of a continuing international trend in favour ... of legal recognition of the new sexual identity of post-operative transsexuals.³⁵

Several aspects of this argument deserve attention. First, there is the concept of an 'emerging consensus' – something based apparently on preceding changes, but projected by implication into the future (and with complete disregard for the awkward fact that, since the time when that emerging consensus had become apparent, the actual majority of those consenting had declined). Although the emerging consensus in itself did not dictate the change of mind by the Court, it seems to have been cited in order to provide a kind of contextual justification for the fact that the Court now looked elsewhere for reasons to disallow the UK's policy. It found those reasons not in any consensus, actual or emerging, of member states, but rather in an 'international trend' – a trend which was considered merely as a trend, without any reference to majorities or minorities, as the overall set of potentially relevant countries was never defined, and the existence of comparable countries with the opposite policy was never investigated. And, having confirmed that the lack of an actual European consensus meant that member states 'must enjoy a wide margin of appreciation', the Court immediately used the 'international trend' to close down that margin.

³⁵ *Ibid.*, paras 84-5.

(Readers will recall that the *Hirst* judgment also paid special attention to some rather selectively cited international evidence, emphasising recent Canadian and South African case-law in favour of prisoners voting, and ignoring comparable states in which such voting was forbidden. In passing it may also be noted that the phrase ‘all except two of the States of the United States of America’, given prominence here in the *Goodwin* judgment, coincidentally applies in the *Hirst* case, but the other way round: all except two US states deprive convicted prisoners of the vote.)

The Consensus Doctrine and Abortion

Finally, one other difficult issue deserves special mention in relation to the ‘consensus’ doctrine: abortion. General declarations of human rights have mostly avoided saying anything that would prove decisive in an argument about the legality or illegality of abortion. The one major exception is the American Convention on Human Rights of 1969, which governs the Inter-American Court of Human Rights: its Article 4 specifies that the right to life ‘shall be protected by law and, in general, from the moment of conception’. This convention is far from negligible, being legally binding on 23 countries; so it is worth noting that the phrasing of its Article 4, which goes significantly beyond that of the European Convention and seriously conflicts with the approach taken by the European Court of Human Rights, does pose a problem for those who believe that the major international human rights documents, and their legal expositors, state objective truths. To put it bluntly, the contents of human rights seem to depend here on whether the statement of rights has been drawn up by what is essentially a group of Catholic countries, or by one with a more mixed religious character.

Where the European Court is concerned, cases relating to abortion have been brought either under Article 2 (on the right to life) or under Article 8 (on the right to respect for private and family life). The former is generally regarded as more absolute, as it is liable neither to limitation nor to derogation; a finding under this article against the legality of abortion would have a strong and disruptive effect on the laws of many member states, and it is not surprising that the Court (or, in the early period, the Commission) has avoided such an outcome. Responding to an application under Article 2 in 1979, the Commission said that it was not clear whether Article 2’s phrase ‘Everyone’s right to life shall be protected by law’ applied to an unborn child or not; and it added that even if the right were taken to extend to a foetus from the moment of conception, the countervailing right of the mother

could still justify an abortion, in the early part of the pregnancy, if there were a risk of serious harm to the mother's health.³⁶ Given the wording of the Convention, this judgment was both cautious and sensible.

The case of *Vo v. France* (2004) was brought by a woman who had reluctantly agreed to the abortion of her unborn child after it was seriously harmed by medical incompetence. Her attempt to bring criminal proceedings against those responsible failed in the French courts, so she went to Strasbourg to complain about the French law under which the unintentional killing of a foetus could not be counted as a type of homicide. The Court was asked to consider whether a foetus was protected under Article 2 of the Convention. In its judgment it said:

the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere ... The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves ... and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life.'³⁷

Since it found that, in any case, the French legal system was not at fault, it felt able to evade the fundamental question, declaring that 'it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention.'³⁸ (Some may feel that this declaration sits uneasily with the role of the Court as a protector, above all, of the rights of vulnerable persons; as an unborn child is certainly vulnerable, one might have expected the judges to make a special effort to decide whether or not it is a person.) But the main significance of the Court's comments in this case, so far as they went, lies in the two-fold approach taken towards the question of a 'European consensus'.

³⁶ See P. Sieghart, *The International Law of Human Rights* (Oxford, 1983), p. 132, and the summary of previous case-law in *Vo v. France* (8 July 2004), paras 75-7.

³⁷ *Vo v. France*, para. 82. The judgment gave no sign whatsoever that the Court had investigated whether there was a scientific consensus on this issue. The only evidence pointed to in the judgment (para. 84) consisted of a) a report by a recent 'Working Party ... on the Protection of the Human Embryo *in vitro*', quoted (in para. 39) as saying, specifically about an embryo *in vitro*: 'the definition of the status of the embryo remains an area where fundamental differences are encountered, based on strong arguments', which was a statement about legal or moral status, not the scientific definition of life; and b) a report by 'The European Group on Ethics in Science and New Technologies at the European Commission', quoted (in para. 40) as saying: 'Existing legislation in the Member States differs considerably from one another regarding the question of when life begins and about the definition of "personhood". As a result, no consensual definition, neither scientifically nor legally, of when life begins exists', where the phrase 'as a result' (viz, as a result of legislation) seems to render the use of the word 'scientifically' quite meaningless.

³⁸ *Ibid.*, para. 85.

Six years later, in *A, B and C v. Ireland*, three women challenged the draconian Irish law on abortion, which makes it illegal in most circumstances. Here the Court's judgment took what might seem a rather paradoxical turn. It noted that only four member states had such restrictive laws, resolutely declaring that 'there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law.' Yet it immediately went on to say: 'However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.'³⁹

The reason it gave for this surprising turn of argument was stated as follows: 'Of central importance is the finding in the above-cited *Vo* case that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life.' Therefore, it argued, any question about the balance between the rights of the foetus and the rights of the mother must be left largely to the state authorities, as one element in that balance was essentially a matter for the state to decide.⁴⁰ And, allowing the state its wide margin of appreciation in that part of the equation, it noted that the Irish law expressed 'the profound moral views of the Irish people'.⁴¹

Where the question of consensus – and of the relationship between consensus and margin of appreciation – is concerned, this argument puts all the emphasis on the absence of consensus on an essentially scientific or philosophical question, and then uses that absence to discount altogether the firm consensus that does exist as to what the overall legal position should be. In a dissenting opinion, six judges set out a strong objection to this way of proceeding:

the Court was not called upon in this case to answer the difficult question of 'when life begins' ... The issue before the Court was whether, regardless of when life begins ... the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: there is an undeniably strong consensus among European States ... to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries'

³⁹ *A, B and C v. Ireland* (16 December 2010), paras 235-6.

⁴⁰ *Ibid.*, para. 237.

⁴¹ *Ibid.*, para. 241.

legislation, her well-being and health, are considered more valuable than the right to life of the foetus.

... it is the first time that the Court has disregarded the existence of a European consensus on the basis of ‘profound moral views’. Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure.⁴²

The main criticism set out in the first of those two paragraphs would be hard to gainsay; the relative value attached to the interests or rights of the mother was clearly expressed in the laws of a large majority of states, and it is that sort of valuation of interests (not an opinion about a scientific or philosophical matter) that is normally the point at issue in any invoking of ‘consensus’. The conclusion of one legal expert (a Professor of Human Rights, and former adviser on human rights to the Council of Europe) who has scrutinised this judgment is damning: ‘It is obvious that the Court did not apply the consensus test in a principled manner, but instead chose to bend it for strategic purposes, i.e. keeping Ireland and other pro-life States on board.’⁴³

Consensus, the Margin of Appreciation and Democracy

When it discussed the Irish law on abortion, the Court did pay special attention to the fact that it had been upheld by the Irish people, voting in referendums (though, as we have seen, this concession was seen as a betrayal of the principles of the Court by the six dissenting judges). So – to return to the main theme of this chapter – is it the case that the doctrine of the margin of appreciation does give special weight to the legitimacy of a policy that has been arrived at or endorsed democratically?

There are a few cases in which something of that kind has been said by the Court. In *James and Others v. UK* it declared: ‘The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is “in the public interest” unless that judgment be manifestly without

⁴² *Ibid.*, Partly Dissenting Opinion of Judges Rozakis ... [etc.], paras 2, 9.

⁴³ T. Zwart, ‘More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How it Can be Done’, in S. Flogaitis [Phlogaites], T. Zwart and J. Fraser, eds, *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Cheltenham, 2013), pp. 71-95, at p. 92.

reasonable foundation.’⁴⁴ This point was made specifically about social and economic issues. In a more recent case, *Draon v. France*, the judgment generalised as follows: ‘The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions ... In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.’ Here, instead of pausing to define the term ‘general policy’, the judgment referred back to *James and Others v. UK*.⁴⁵

A former President of the Court, Luzius Wildhaber, has written that ‘national authorities enjoy an area of discretion which derives from their role in the expression of the democratic will of the people’; but this statement appears in a book, not in a judgment of the Court.⁴⁶ The Court itself does not use the phrase ‘the democratic will of the people’, and references by it to the special legitimacy conferred on laws or policies by their democratic enactment are in fact extremely rare. The usual tendency is to refer, as in the *Handyside* judgment, to ‘Contracting States’, ‘State authorities’ or ‘national authorities’ (the term used by Wildhaber too). These ‘authorities’ are referred to in a quite undifferentiated way, which means that they typically include, or may primarily mean, the judiciary: as one recent judgment has put it – again picking up the phrasing of *Handyside* – the Court needs to pay attention to ‘the views of the national courts, as being in direct and continuous contact with the forces of their countries’.⁴⁷ Whilst the judiciary in a modern democracy no doubt derives an important element of its legitimacy from the democratic nature of the state, this sort of remark about paying respect to the national courts (which in countries such as the UK are now obliged to apply the Convention directly, so far as they can) does not really engage with the idea that there may be many issues on which democratic decision-making would be better, in principle, than decision-making by judges applying human rights law.⁴⁸

A striking statement of the Court’s general approach was given in the last part of its judgment in *Oliari* – the case, mentioned above, concerning same-sex unions in

⁴⁴ *James and Others v. UK* (21 February 1986), para. 43.

⁴⁵ *Draon v. France* (6 October 2005), para. 108.

⁴⁶ Cited in A. von Staden, ‘The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review’, *International Journal of Constitutional Law*, 10 (2012), pp. 1023–49, at p. 1041.

⁴⁷ *Al-Skeini and Others v. UK* (7 July 2011), para. 99.

⁴⁸ As Conor Gearty has written: ‘the Court has not developed the concept of the margin of appreciation in a democratically sensitive way ... This failure distinctly to locate the margin of appreciation in a coherent theory of representative democracy is a missed opportunity’ (‘Democracy and Human Rights in the European Court of Human Rights: A Critical Approach’, *Northern Ireland Legal Quarterly*, 51 (2000), pp. 381–96, at p. 387).

Italy. It emphasised that the Italian Constitutional Court had ‘repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions ... a measure which could only be put in place by Parliament’. Nevertheless, it complained, ‘despite some attempts ... the Italian legislature has been unable to enact the relevant legislation.’ Thus ‘the legislature, be it willingly or for failure to have the necessary determination, left unheeded the repetitive calls by the highest courts in Italy.’ It concluded: ‘this repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein ... potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty.’ Hence its judgment that ‘the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation.’⁴⁹

The treatment of the Italian legislature in this final part of the judgment is noteworthy. Bills for the legal recognition of same-sex unions had been introduced into the Italian Parliament in 2002, 2007 and 2008, and had been opposed, successfully, by elected representatives, who were exercising their rights as parliamentarians. But in the eyes of the European Court of Human Rights, it was not the job of those parliamentarians to make up their own minds about an apparently contentious piece of legislation; rather, their only duty was to comply with the ‘recommendations’ or ‘pronouncements’ of their judges. This is not at all untypical of the Court’s lack of interest in the special kind of legitimacy that democratic legislatures may possess.⁵⁰

Consensus and the Margin of Appreciation: Final Thoughts

There are, it seems, no clear principles behind the Court’s use of ‘consensus’. Sometimes a very small majority suffices to establish it; sometimes a large one is declared insufficient. In some cases a survey of the existing situation among the member states is used; in others, appeal is made to an ‘emerging consensus’; beyond that, the principle can sometimes be extended to, or overridden by, an ‘international trend’, invoking conditions outside Europe, though on the basis of no

⁴⁹ *Oliari v. Italy*, paras 180, 183-5. The reference to ‘legal uncertainty’ here is puzzling. There was no uncertainty about what the law was at any given time; the only doubt was about how and when the law might be changed at some point in the future. This is not what is normally described as legal uncertainty.

⁵⁰ Recently one judge, Robert Spano, has been quoted as saying that since 2012 the Court has shown a new interest in valuing the ‘democratic legitimisation’ of decisions by national authorities (Leach and Donald, *Parliaments and the European Court*, pp. 135-7). A few cases are cited, which may be straws in the wind; or they may just be temporary reactions to the attempt during that year by the British Government to put pressure on the Court (on which see below, pp. 61-62).

statistical survey at all. Usually the consensus is about legal conditions and policies; sometimes, when it suits the Court, it can focus on scientific or philosophical issues instead. And the degree to which the consensus affects the margin of appreciation is itself quite variable.

Experts on this subject have reached very negative conclusions. Professor McHarg writes that the Court's 'tendency to rely on the presence or absence of a European consensus provides a flimsy basis on which to assert human rights standards'; she also notes that its method of establishing the relevant facts is 'unsystematic and unscientific'.⁵¹ Jeffrey Brauch puts it even more strongly: 'the ECHR [European Court of Human Rights] cannot apply a consensus standard that is clear, predictable, and workable. Despite hundreds of cases ... the ECHR still has not made clear what a European consensus is, or even how one would identify the consensus if it existed.' He concludes: 'Because no one knows how to apply the standard, or even what precisely it is, the ECHR can use, change, or even ignore the consensus standard almost without restraint as it decides cases. It is a standard that tempts the ECHR to rationalize policy judgments rather than to reach decisions under a clear legal framework.'⁵²

The key point is, as we have noted earlier, the importance of clarity and predictability in the working of the law. As Brauch points out, the Court itself has emphasised that 'legal certainty, foreseeability and equality before the law' are, or should be, important principles guiding its operations.⁵³ 'Predictability' or 'foreseeability' here is of course not absolute; judges would have much less interesting work to do if the results of litigation were always predictable. But those who are subject to a legal system are entitled to expect that the principles on which the laws will be applied should be knowable, and that similar cases will be judged similarly. The fluctuating use of the consensus doctrine does not meet that expectation.

The same must be said, overall, about the 'margin of appreciation' doctrine, of which the consensus principle is only one out of several unstable components. More than 20 years ago Lord Lester (Anthony Lester QC) complained: 'The concept of the "margin of appreciation" has become as slippery and elusive as an eel. Again and again the Court now appears to use the margin of appreciation as a substitute for

⁵¹ McHarg, 'Reconciling Human Rights', p. 691.

⁵² J. Brauch, 'The Dangerous Search for an Elusive Consensus: What the Supreme Court *Should* Learn from the European Court of Human Rights', *Howard Law Journal*, 52 (2008-9), pp. 277-318, at pp. 278, 291.

⁵³ *Ibid.*, p. 282; *Christine Goodwin v. UK*, para. 74.

coherent legal analysis of the issues at stake.’⁵⁴ Other lawyers have concurred, including some of the most eminent judges of the Court itself: Rolv Ryssdal, a former President of the Court, has said that it suffers from a ‘lack of precision’, and is used ‘without principled standards’.⁵⁵

Commentators who have studied the doctrine express varying degrees of puzzlement or dismay. Nicholas Lavender notes that while the Court sometimes mentions the factors which have led it to grant a wide or a narrow margin, it seldom explains ‘what role the “margin of appreciation” (whether “wide” or “narrow”) actually plays in its reasoning.’⁵⁶ Susan Marks writes that the precise principles on which the doctrine works are ‘disturbingly elusive’.⁵⁷ Aileen McHarg observes that it is ‘very difficult to define in any precise way the conditions of its application’. Where the triple relationship between democratic necessity, proportionality and the margin of appreciation is concerned, she finds ‘radical indeterminacy both in the formulation of each element and in the way they relate to one another’; in the actual practice of the Court they supply ‘a set of highly imprecise justificatory strategies which can be used to support a number of approaches to the issue’.⁵⁸ This verdict comes very close to Jeffrey Brauch’s phrase about the Court being tempted to ‘rationalize policy judgments rather than to reach decisions under a clear legal framework’.

The most thorough study of the doctrine of proportionality, and of its relation to the margin of appreciation, finds that there is ‘a very extensive confusion’ between the two, and that the range of possible factors that might enter into the calculation of the margin of appreciation is such that the actual calculation is entirely unpredictable. And as for the doctrine of the margin of appreciation itself, this expert concludes: ‘there is no “doctrine” at all.’⁵⁹

In 2012, when the United Kingdom held the six-monthly rotating presidency of the Council of Europe, the British Government convened a conference at Brighton to discuss the reform of the European Court of Human Rights. The draft proposals it circulated, which were aimed in part at shifting the balance, to a moderate extent, in favour of national courts, met with strong opposition. In the diluted version of them, which was eventually accepted, it was agreed that a new Protocol would

⁵⁴ Cited in P. Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism?’, *Human Rights Law Journal*, 19 (1998), pp. 1–6, at p.1.

⁵⁵ Cited in van Drooghenbroeck, *La Proportionnalité*, p. 529.

⁵⁶ Lavender, ‘The Problem of the Margin of Appreciation’, p. 384.

⁵⁷ Marks, ‘The European Convention’, p. 218.

⁵⁸ McHarg, ‘Reconciling Human Rights’, pp. 686–8.

⁵⁹ van Drooghenbroeck, *La Proportionnalité*, pp. 485 (‘de “doctrine” il n’y a point’), 538 (‘une très large confusion’), 539.

include references to the margin of appreciation (a term which had never been used in the text of the Convention or the protocols) and to subsidiarity. The British Government wanted the Protocol to add these to the text of the Convention itself, but in the end it had to accept that they would be added to the Preamble, which has only a secondary, guiding role.

So, under Protocol no. 15 (2013), the Preamble to the Convention is now deemed to include an extra passage, asserting that the member states 'enjoy a margin of appreciation'. This passage has no direct force. But, even if it did, it would be hard to see what benefit it would confer, given the near-impossibility of stating, in any generally applicable terms, what that margin of appreciation might actually be.

4 Rights Expansion

The Problem of Rights Expansion

Where the scope of human rights is not clearly defined, and where the methods and principles used in applying them are at best flexible and at worst vague to the point of ‘radical indeterminacy’, it is not surprising that the range of things said to be protected by those rights grows over time. (Of course, in strict logic one could argue that in conditions of indeterminacy the range might equally shrink; but there are strong and constant factors, both institutional and moral or ideological, that push in the direction of expansion. And once a right has been established by the Court, it is very rare indeed for it to be reduced in any way thereafter, even though the Court does not have a strict doctrine of precedents.) All general surveys of human rights law comment in some way or other on this process of continuous growth – some in a celebratory ‘onwards and upwards’ style, but others sounding a note of caution.

Grounds for caution certainly do exist. Whilst a degree of expansion from an initial starting-point is to be expected in any new body of law, the human rights protected under the Convention have in some areas gone far beyond what was envisaged by the authors of that document. Some commentators talk about ‘rights inflation’, implying that particular rights are applied to less and less deserving objects; others refer to ‘rights proliferation’, suggesting that new unit rights (so to speak) are added to the list. Both processes happen, and perhaps others too; the general term ‘rights expansion’ will be used here to embrace all of them.¹

People are understandably glad, of course, to possess rights, so should we worry if they possess more and more of them? There are three obvious reasons, all of them matters of basic principle, why rights expansion should cause concern. Two

¹ Note, however, that the use of ‘protocols’ to add specific new rights is not embraced by this term; such additions are openly and consciously accepted by the contracting states, and become part of the Convention itself.

have been mentioned already. First, uncertainty and unpredictability are bad for a legal system; where there is a constantly moving frontier of expanding rights, it is more difficult for people to know, where any particular issue is concerned, on which side of that frontier they currently stand. Secondly, the more areas human rights law begins to occupy, beyond its original intended scope, the more likely it is that it will be encroaching on decisions that could and should be made by democratic means.

The third point of principle relates to the original legal basis of the human rights law. The Convention was a treaty, entered into in good faith by governments who were committing themselves to the terms of that particular document. The interpretation of such documents may be open to some ongoing change, as we shall see; but to extend the scope of the protected rights to things that were clearly not envisaged or intended by the signatories, or to add entire new rights that were not on the original list, is to drift into illegality, and thereby to jeopardise the legal authority of the whole enterprise.

Even strong supporters of the Court have recognised that there is a serious danger here. In the words of Franz Matscher, an eminent judge who served on the Court for more than 20 years: ‘the Convention organs have ... on occasion reached the limits of what can be regarded as treaty interpretation in the legal sense. At times they have perhaps even crossed the boundary and entered territory which is no longer that of treaty interpretation but is actually legal policy-making.’²

An Example: Article 8

To give an idea of the ways in which rights can expand over time, it may be helpful to look at the uses made of one particular article. As we have seen, the first paragraph of Article 8 sets out the ‘pure’ right as follows: ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’ And the second introduces the list of limitations with the words, ‘There shall be no interference by a public authority with the exercise of this right except ...’. This article was broadly modelled on Article 12 of the Universal Declaration, which says: ‘No one shall be subjected to arbitrary interference with his privacy, family, home

² F. Matscher, ‘Methods of Interpretation of the Convention’, in R. St J. Macdonald, F. Matscher and H. Petzold, eds, *The European System for the Protection of Human Rights* (Dordrecht, 1993) pp. 63-81, at pp. 69-70. Lord Sumption, a less committed supporter of the European Court, but also a judge who is obliged to take note of its case-law when considering human rights cases in the Supreme Court, has written that the European Court has become ‘the international flag-bearer for judge-made fundamental law extending well beyond the text which it is charged with applying’ (*Limits of the Law*, p. 20).

or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.’

During the first stage of the drafting of the European Convention one of the leading figures, Pierre-Henri Teitgen, had proposed ‘Inviolability of privacy, home, correspondence and family, in accordance with Article 12 of the United Nations Declaration’; this was changed first to ‘Immunity from arbitrary interference in his private life, his home, his correspondence and his family as laid down in Article 12 of the Declaration of the United Nations’ (because ‘inviolability’ was thought too absolute a term), then to ‘No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence. Everyone has the right to the protection of the law against such interference’, and then (at the suggestion of the UK representative) to ‘Everyone shall have the right to freedom from governmental interference with his privacy, family, house or correspondence.’³ The final version was arrived at after a few more minor changes.⁴

By referring to Article 12 of the Universal Declaration, the drafters were showing some awareness of the fact that they stood in a longer tradition. For it was well known that Article 12 was partly inspired by the words of the Fourth Amendment (1789) to the US Constitution, ‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.’⁵ Historically, therefore, the essential concern had been with arbitrary intrusions by governmental power into private life and the family home. But more recent history, involving Fascist and other totalitarian governments, had also added to this concern: as we shall see, it was the oppressions and injustices conducted by such regimes that weighed most heavily in the minds of those who drafted both the Universal Declaration and the European Convention.

Some landmark judgments of the Court, including *Marckx v. Belgium* (1979), *Airey v. Ireland* (1979), *Johnston and Others v. Ireland* (1986) and *Hokkanen v. Finland* (1994) have duly emphasised that – in the words of the last-named – ‘The essential object of Article 8 ... is to protect the individual against arbitrary interference by the public

³ Preparatory Commission, *Travaux préparatoires*, i, pp. 168, 172; iii, p. 222; iv, p. 202.

⁴ The penultimate version was ‘The right to privacy in respect of family, home and correspondence shall be recognised.’ All drafting was done in both English and French, and the French version here began with ‘Le droit de toute personne au respect de sa vie privée et familiale ...’ (*ibid.*, iv, pp. 222-3). Some linguistic clumsiness must have led either to that translation from the English (putting ‘au respect de’ for ‘in respect of’) or, more likely, the other way round. It was the French meaning that prevailed in the final wording, ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’

⁵ The other sources were a Chilean proposal on ‘the right to freedom of family relations’ and a Panamanian one, proscribing interference in someone’s ‘person, home, reputation, privacy, activities, and property’ (Morsink, *The Universal Declaration*, pp. 134-5). The Fourth Amendment in turn was partly inspired (though the drafters at Strasbourg may not have known this) by Section 10 of the Virginia Declaration of Rights (1776), which prohibited searches and seizures under ‘general warrants’.

authorities.’⁶ But they have done so, in several cases, as a concessionary remark while arguing that the Article can and should be used more widely than that. In any case, over the years, the notion of what constitutes ‘arbitrary interference’ has undergone some expansion. So too has the interpretation of terms such as ‘private life’ and ‘home’. As one scholar has put it, ‘Privacy-related rights have extended beyond their original concern – threats to private space, particularly the home – to encompass personal security, self-fulfilment, and identity, including ... some business activities.’⁷

A few particular instances may be given here. In some of these cases the Court’s judgment may well strike the reader as beneficial in its effects; but the point here is not to assess the benefit to the applicants, but to consider how the use of Article 8 has developed beyond its original primary goal of protecting private life, the family and the home from being violated by arbitrary governmental interference.

- The term ‘private life’ has been taken to include ‘activities of a professional or business nature’, with ‘home’ being interpreted as ‘business premises’.⁸
- In another case, a person’s right to respect for ‘private life’ was found to have been violated because a contact between the Soviet Embassy and his business was recorded in the files of the national security services.⁹
- Respect for ‘private life’ was also violated by the covert recording (for purposes of voice identification) of two suspects inside a British police station.¹⁰
- The same conclusion was reached over the covert filming, for visual identification purposes, of a suspect inside a police station, after that person had failed to attend several identification parades.¹¹
- In a case which went to the Supreme Court in London, it was found that the right under Article 8 to respect for one’s private life covered the sphere of employment, and that in principle this right could be violated when a

⁶ *Hokkanen v. Finland* (24 August 1994), para. 55.

⁷ D. Feldman, ‘The Developing Scope of Article 8 of the European Convention on Human Rights’, *European Human Rights Law Review* (1997), pp. 265-74, at p. 266.

⁸ A. Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights*, 3rd edn (Oxford, 2012), p. 489, citing *Niemietz v. Germany* (1992), paras 29-30.

⁹ *Ibid.*, p. 506, citing *Amann v. Switzerland* (2000), para. 80.

¹⁰ *Ibid.*, p. 509, citing *PG and JH v. UK* (2001), paras 59-60.

¹¹ *Ibid.*, p. 512, citing *Perry v. UK* (2003), paras 40-3.

person was, for some reason, excluded by an employer from a particular job.¹²

- In another case at Strasbourg it was found that a Lithuanian law which prevented people who had worked for the KGB from getting jobs in the public sector (and some parts of the private sector) for ten years violated their right to respect for their private life, because although they had remained free to take some other jobs, the ban had created difficulties for them, ‘with obvious repercussions on their enjoyment of their private life’.¹³
- The right to respect for family life includes a right to legal aid, in order to pursue a decree of judicial separation.¹⁴
- The right to respect for family life also now includes, as we have seen, the right of a prisoner to conceive a child by artificial insemination.
- A person who lived in the night club district of Valencia complained that the city council tolerated breaches of its own by-law on noise levels; Spain was found guilty of violating the human right to respect for home life.¹⁵
- Likewise, in Sofia, noise from visitors to a 24/7 computer club disturbed five nearby residents; Bulgaria was found guilty of violating their right to respect for home life, because the city authorities, having decided to close the club, failed to implement their decision.¹⁶
- In a domestic case in the UK, noise from a new traffic scheme was similarly found to be a violation of Article 8.¹⁷
- The right to respect for a person’s home now covers, in principle, a gypsy who is living illegally on non-residential land, having been explicitly denied official permission to reside there.¹⁸

¹² Gearty, *On Fantasy Island*, p. 146, referring to *R(L.) v. Commissioner of Police of the Metropolis* (2009).

¹³ van Dijk et al., eds, *Theory and Practice of the European Convention*, p. 665, citing *Sidabras and Dziautas v. Lithuania* (2004), para. 48.

¹⁴ Mowbray, *Cases, Materials*, p. 573, citing *Airey v. Ireland* (1979), paras 32-3.

¹⁵ T. Drupsteen, ‘Environmental Protection under Article 8 of the European Convention on Human Rights’, in M. van Roosmalen et al., eds, *Fundamental Rights and Principles: Liber Amicorum Pieter van Dijk* (Cambridge, 2013), pp. 115-29, at pp. 124-5, discussing *Moreno Gómez v. Spain* (2004).

¹⁶ *Ibid.*, p. 127, discussing *Mileva and Others v. Bulgaria* (2010).

¹⁷ D. Hoffman and J. Rose, *Human Rights in the UK: An Introduction to the Human Rights Act 1998* (Harlow, 2013), p. 278(n.), citing *Andrews v. Reading Borough Council* (2005).

¹⁸ Mowbray, *Cases, Materials*, p. 545, citing *Buckley v. UK* (1996), para. 54 – though the Court found the interference with this right was, in this case, justified under the limitations in Article 8, paragraph 2.

- In another case it was found that there exists ‘a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life’.¹⁹
- In a case brought by Lapps in northern Norway, protesting at the loss to a hydroelectric scheme of one part of the large area used by them for herding reindeer, it was found that ‘under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular life style it may lead as being “private life”, “family life” or “home”’.²⁰

When Pierre-Henri Teitgen and his colleagues incorporated the word ‘home’ in their drafts of Article 8, we are entitled to doubt whether they had in mind several square kilometres of tundra used for the grazing of reindeer.

Three Guiding Principles

To attempt a general survey of all the ways in which human rights are subject to expansion would go far beyond the scope of the present work. What follows is just a summary account of some of the most obvious methods and devices that have been used. But before turning to those, it is necessary to look at three interrelated principles that play guiding roles.

(i) Autonomy

The first of these is ‘autonomy’. Some of the key terms used in the Convention, such as ‘arrest’, ‘witness’, ‘criminal offence’ or ‘punishment’, may have slightly different meanings in the legal systems of the different member states. For the Court to operate consistently, it must develop its own meanings – so-called ‘autonomous’ ones. These autonomous meanings are found not by averaging out the practice of the member states but, as the Court put it in *König v. Germany*, by trying to establish what the term should signify ‘within the meaning of the Convention’; otherwise, it said, ‘any other solution might lead to results incompatible with the object and purpose of the Convention.’²¹ The main emphasis is indeed on the ‘object and purpose’, the dominant factors considered by the Court when it tries to work out what ‘the meaning of the Convention’ is. Applying this principle may lead to a situation in which more and more key concepts – ‘home’, for example – are given

¹⁹ A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, 2004), p. 177, citing *Chapman v. UK* (2001), para. 95.

²⁰ *G. and E. v. Norway* (3 October 1982) – though the Court found that the taking of the land was justified under the limitations.

²¹ *Neumeister v. Austria* (27 June 1968), ‘As to the Law’, para. 18; *König v. Germany* (28 June 1978), para. 88.

meanings derived from a teleological understanding of the Convention. Indeed, they may acquire meanings which they do not bear in the legal systems of any of the member states.²²

(ii) Effectiveness

The second principle is that of ‘effectiveness’. The underlying idea here is a long-standing rule of law, known as ‘*effet utile*’, which says that where there are two possible interpretations of a law, of which one would achieve the purpose of the law and the other would not, it is better to adopt the one that will have real effect. But the Court has also defended its invoking of effectiveness on the basis that a human rights convention is a treaty of a special kind: ‘the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.’²³

Here too we see an invocation of the ‘object and purpose’. That the Convention aims to provide ‘safeguards’ for human rights can easily be agreed; but it should also be borne in mind that this applies to the specific rights which are actually set out in the Convention. One commentator has written that ‘The principles of effective protection and non-abuse require rights to be interpreted broadly’; this may need some qualification, to avoid misunderstanding.²⁴ Where the interpretation of the right is inherently ambiguous, it is indeed better, under the rule of ‘*effet utile*’, to go for the interpretation that produces effectiveness. But the first task must be to see whether the right has a clear meaning and, if it does, apply that meaning – even if doing so yields an ineffective result in a given case. To take ‘effectiveness’ as a requirement in the first place would be to subvert the whole nature of human rights law, defining rights in terms of desired outcomes rather than deciding outcomes on the basis of rights.²⁵

(iii) Evolutive Interpretation: the ‘Living Instrument’

The most general principle, to which both ‘autonomy’ and ‘effectiveness’ contribute, is that of ‘evolutive’ or ‘evolutionary’ interpretation – the idea that the

²² On the need for caution about the use of teleological principles to develop ‘autonomy’ see F. Sudre, ‘Le Recours aux “notions autonomes”’, in F. Sudre, ed., *L’Interprétation de la Convention européenne des droits de l’homme* (Brussels, 1998), pp. 93–131.

²³ *Soering v. UK*, para. 87.

²⁴ S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge, 2006), p. 208.

²⁵ Professor Zwart draws attention to a controversial judgment about an asylum-seeker, *M.S.S. v. Belgium and Greece* (2011), and quotes from a subsequent newspaper interview given by one of the judges, Egbert Myjer: ‘Somebody had to act and the Court did.’ He comments that this attitude can lead to ‘a situation in which the end justifies the means’ (‘More Human Rights than Court’, p. 79).

Convention has a meaning which was not fixed at the point of time of its original drafting, but rather is subject to ongoing development. This idea is also expressed by the phrase ‘a living instrument’, used about the Convention since a famous judgment in 1978 which said: ‘The Court must also recall that the Convention is a living instrument which ... must be interpreted in the light of present-day conditions.’²⁶

What sort of changing ‘conditions’ count as things that can change the interpretation of an international convention? Evolutive interpretation is quite commonly applied to long-lasting treaties of various kinds, and the standard view is that relevant changes can take place in two areas: the rules of international law, which develop over time, and the meanings of specific terms used in the treaty. Examples of changes in the former affecting the European Convention are quite rare, but there are many cases where it has been felt that the meanings of terms needed to be updated in the light of ‘present-day conditions’.

Where most other sorts of treaties are concerned – commercial ones, for example – this may be just a matter of factual, descriptive terms: phrases about operating a railway have needed to be reinterpreted in the light of technical developments, for instance, and the meaning of ‘sound recordings’ in a trade agreement has required updating.²⁷ The European Convention, on the other hand, operates with more basic terms relating to human behaviour, terms which often have some normative assumptions built into them: for example, having long taken a traditional view of the meaning of the word ‘family’, the Court has now accepted, rather belatedly, that this can include homosexual relationships.

In some cases the term in question is essentially evaluative: ‘degrading’ treatment, for instance. Corporal punishment might not have seemed degrading – not all kinds of it, at least – to many people when the Convention was originally written, but opinion has changed over time. (The phrase quoted above about the Convention needing to be ‘interpreted in the light of present-day conditions’ comes, in fact, from a landmark judgment against corporal punishment on the Isle of Man.) Where normative terms are involved, there is certainly scope for rights to undergo expansion. What is less certain is how one is to determine the relevant ‘present-day conditions’. There might perhaps be a place here for some interaction with the ‘consensus’ principle, although that principle is, as we have seen, highly problematic, and a survey of national laws or policies is not quite the same thing as

²⁶ *Tyler v. UK* (25 April 1978), para. 31.

²⁷ These two examples are from E. Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford, 2014), pp. 119, 126.

an assessment of Europe-wide moral values. Alternatively, the relevant new 'conditions' may turn out to be, in practice, the changing moral opinions of the judges, largely unsupported by empirical evidence of any kind. Rights expansion is likely to follow more easily from this approach.

As with 'autonomy' and 'effectiveness', the evolutive interpretation of the Convention has always been based on a teleological way of thinking. It is in order to fulfil the 'object and purpose' of the Convention, namely the continuing protection of rights, that adaptation to contemporary conditions must take place. Traditional writings on treaties have tended to distinguish rather sharply between 'contract' treaties (such as commercial agreements) and 'law-making' ones (such as those which establish rules of international law, or create law-making or law-administering institutions). It was often said that with the former, one should stick where possible to the original meaning of the text and adopt the interpretation which put the least onerous obligation on the signatories, whereas with the latter, a more expansive – because teleological – interpretation was required. The Court itself has said this about the Convention: 'Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.'²⁸

Recent legal scholarship, however, has eroded or even collapsed this distinction.²⁹ The central problem is that it is not possible to treat the 'meaning' of the treaty's text and the 'purpose' of the treaty as two separable things; the meaning of the treaty is a complex, organic thing, into the assessment of which there enter the literal meanings (original and, where necessary, updated) of the terms used, the sense conveyed by the text as a whole, and also the 'object and purpose' of the treaty, which will be expressed in the treaty itself, whether by overall implication or in some specific statements of aims (or both). The meaning of the treaty is what the treaty-makers intended it to mean, and this includes how they intended it to be read and used; in some cases they intended that it be taken more restrictively, and in others more expansively. Only a careful study of the text itself (which may be supplemented in certain ways) will show how far along the spectrum of restriction and expansion any particular treaty lies.

The Vienna Convention on the Law of Treaties summarises the basic rules of interpretation in its Articles 31 and 32: 'A treaty shall be interpreted in good faith in

²⁸ *Wemhoff v. Germany* (27 June 1968), As to the Law, para. 8.

²⁹ See Bjorge, *Evolutionary Interpretation*, esp. pp. 34-48.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’ The ‘context’ for interpreting the treaty includes first of all the entire text ‘including its preamble’, and then any separate explicit agreements made about it. Together with the context, other things can be taken into account, including subsequent practice by the parties to the treaty, and the relevant rules of international law. Use may be made of ‘supplementary means of interpretation, including the preparatory work of the treaty’, in order to determine the meaning where it would otherwise be ‘ambiguous or obscure’.³⁰

‘Developing’ Rights: A Misunderstanding

Where the European Convention is concerned, we have seen that particular terms may acquire new meanings – the more human and value-laden equivalents of terms about railway technology or sound recording devices – and that the ways in which they do so may be guided teleologically. However, the general attitude of the Court has been that its task is teleological in a much larger sense: it is under a duty to ‘develop’ the substance of the rights themselves. The basis for this argument is located in the Convention’s Preamble. As Jean-Paul Costa (a former President of the Court) has written:

the Preamble of the Convention shows that the aim of the Council of Europe, and therefore of the Court, is not only the protection of rights and freedoms, but also their *development*. That implies an evolutive and progressive conception of the contents of the rights that are recognised, and the Court would be failing in part of its duties if it attended only to the protection of the rights, and ignored the imperative to develop them.³¹

This is such an important claim that it deserves closer investigation. The relevant part of the Preamble says:

³⁰ Although the Vienna Convention came into force after the European Convention, the Court has always accepted the applicability of these articles, on the grounds that they summarised existing principles of international law: see Matscher, ‘Methods of Interpretation’, p. 65.

³¹ J.-P. Costa, *La Cour européenne des droits de l’homme: des juges pour la liberté* (Paris, 2013), p. 43 (‘le Préambule de la Convention indique que le but du Conseil d’Europe, et donc de la Cour, est non seulement la sauvegarde des droits et libertés, mais encore leur *développement*. Cela implique une conception évolutive et progressive du contenu des droits reconnus, et la Cour manquerait à une partie de ses devoirs si elle ne veillait qu’à la sauvegarde des droits en négligeant l’impératif de leur développement’).

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms...

A normal interpretation of this, sticking to what the Vienna Convention calls the ‘ordinary meaning’, would go as follows. ‘Maintenance’ means maintaining something that is already in effect, and ‘realisation’ means bringing something into effect. So the meaning is that (a) there is a set of rights and freedoms; (b) some of them are currently observed, and their observance should be maintained; but (c) some of them are not yet observed, and so their observance should be further realised.

On that basis the passage might have either of two meanings. It could mean that the entire set of human rights referred to here is listed in the text of the Convention, in which case it implies that the member states are currently failing to implement some of them. Or it could be a much broader statement, putting the Convention itself in a wider context. On this view, it would be sketching a kind of two-phase process. In the first phase some rights, the ones listed in the Convention, are to be maintained; thereafter the long-term goal of the Council of Europe is to implement further rights.

The second interpretation is much more likely, given that the signatory states can hardly have been expected to sign, at the outset, a sort of admission that they were in breach of some of the Convention rights. In confirmation of this, we may note also that the whole passage is about the aim of the Council of Europe; it is not – as Judge Costa wrongly claims – about the aim of the Court, which is not itself tasked with ‘the achievement of greater unity’ between the member states.

To the question ‘why mention a post-Convention phase, in the Preamble to the Convention itself?’, the obvious answer is that the Council of Europe wanted to make it clear that the list of human rights in the Convention was not an exhaustive one, and that further additions – presumably, by means of protocols – were to be expected in due course. The Universal Declaration, for example, specified a number of socio-economic rights (such as ‘the right to work’, ‘the right to rest and leisure’ and ‘the right to a standard of living adequate for ... health and well-being’) about which the Convention was deliberately silent. Later in the Preamble, it was again emphasised that the Convention covered only a selection of human rights: its function was ‘to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’.

There is, however, a complication here: the French text of the Convention, which has equal authority, is different. It says:

Considérant que le but du Conseil de l'Europe est de réaliser une union plus étroite entre ses membres, et que l'un des moyens d'atteindre ce but est la sauvegarde et le développement des droits de l'homme et des libertés fondamentales...

which means:

Considering that the aim of the Council of Europe is to realise a closer union between its members, and that one of the methods for attaining that aim is the protection and the development of human rights and fundamental freedoms...

So here the term 'développement' ('development') is used. For such cases of divergence between two versions of the same text, the Vienna Convention's Article 33 lays down the following principle: 'when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

It is possible to interpret the French text in line with the preferred meaning of the English text, as set out above, with 'développement' used as a somewhat approximate term for the second phase. It is not possible to interpret it as calling for the substantive 'development' by the Court of the actual rights listed in the Convention, if that means changing their nature in any significant way (in Jean-Paul Costa's phrase, 'an evolutive and progressive conception of the contents of the rights') because Article 1 of the Convention – a textual statement, not a preambular one, governing the whole document – says that the signatories 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention', and 'defined' implies quite a precise degree of specification.

At this point we are entitled to turn to the 'travaux préparatoires'. What we find is that they confirm the two-phase interpretation given above. Reporting to the Consultative Assembly of the Council of Europe in September 1949, after the drafting committee had done the basic groundwork for the Convention, Pierre-

Henri Teitgen explained: ‘The Committee unanimously agreed that for the moment [emphasis added] only those essential rights and fundamental liberties could be guaranteed which are, today, defined and accepted after long usage, by the democratic regimes.’³²

So the ‘développement’, or the ‘further realisation’, of human rights was a later task which the Council of Europe had set for itself – not for the Court as such. The job of the Court was to implement the actual rights defined in the Convention. In doing so, it was entitled to update the meanings of particular terms when those meanings had clearly changed over time. The ‘object and purpose’ of the Convention authorised that much evolutive interpretation – but, it must be emphasised, no more than that.

How Rights Grow

(i) Expanding Abstractions

Human rights law is founded on very general abstract terms, such as ‘life’, ‘private life’ and ‘freedom of thought’. As the years go by, more and more implications are drawn from these, and more and more of the content of the law is filled in. These are generative abstractions, from which implications can be made to ramify and multiply in all kinds of new and sometimes unexpected ways. It is this inherent problem that led Lord Denning, somewhat uncharitably, to say that the Convention was ‘drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation ... as so often happens with high-sounding principles, they have to be brought down to earth.’³³

Defenders of this style of jurisprudence will naturally wish to say that, at a certain level, all judicial interpretation works like this: laws are stated in general terms, and interpretation then fills in the details, as the laws are applied to particular cases. So what is unusual here? Part of the answer must be that normally laws are drafted in an on-going legal system, in terms that are already rich in established meanings within the traditional law of the state; whereas this was a conscious attempt to set up a new jurisprudence almost from scratch, with a minimal set of open-ended abstract terms.

³² Preparatory Commission, *Travaux préparatoires*, i, p. 194.

³³ In *Ahmed v. ILEA* (1978), cited by A. Clapham, ‘The European Convention on Human Rights in the British Courts: Problems Associated with the Incorporation of International Human Rights’, in P. Alston, ed., *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford, 1999), pp. 95-157, at p. 97.

Another part of the answer is that ordinary legislation typically has some quite specific, intrinsically limited purpose in mind: the control of an abuse, the criminalising of a particular practice, the granting of a special power or immunity, and so on. Human rights law is conceived as protecting general values, and this means that when judges expand, over time, their notions of those values, they can read those expanded ideas of them into the abstract terms. In this process, the terms themselves do not act in any way as limits or controls.

The closest thing in the Anglophone world to European human rights law is the jurisprudence arising from US Bill of Rights. Most American lawyers would admit that this has been a peculiarly problematic area of their legal system. But their rights law has at least been embedded in a generally coherent Common Law system of legal understanding, which, for much of its history, for some rights at least, has set some reasonable constraints on meanings.

(ii) Autonomising Legal Terms

The abstractions mentioned above are of a more or less philosophical kind. But there are also general terms that belong to a much more familiar legal vocabulary. Here any domestic legal system would normally set significant constraints on how they could be changed or developed; yet where the European Court is concerned, such constraints (to the extent that they exist at all) can simply be dispensed with, by applying the principle of ‘autonomous’ interpretation. Such a process has happened, for example, to the meaning of the term ‘possessions’ in Article 1 of Protocol no. 1.³⁴ This is the article which protects the human right to the enjoyment of property, and which states, in its first paragraph, ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest ... [etc.]’

In a series of judgments, beginning in 1996, the Court has found that non-contributory welfare benefits should be included in the concept of ‘possessions’, even though it is hard to find any national legal system that takes such a view. (This development followed a change in the Court’s interpretation of another concept, the term ‘civil rights’ in Article 6; at first the Commission had said that non-contributory benefits were excluded, but in 1993 it changed its mind, and the idea that they were civil rights then seems to have transmogrified into the idea that they were possessions.) In a judgment on the admissibility of a case in 2005 the Court

³⁴ ‘Possessions’ is, admittedly, not a traditional term of English law. But while that word is used in the first paragraph of the article, ‘property’ is used in the second; and in the French version the same word, ‘biens’, is used for both.

said that if a state has legislation giving people a right to a welfare benefit (of any kind), ‘that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1.’³⁵ When that case was finally decided, one of the judges protested: ‘the notion of “possessions” is widened here to include “interests”.’³⁶

As Marc Bossuyt, former President of the Constitutional Court of Belgium, has observed, this means that the European Court of Human Rights is now ‘competent to review the implementation of all social security regulations in Member States’.³⁷ A similar view is expressed by Janneke Gerards, a Professor of Rights Law and deputy Judge at the Appeals Court at The Hague. The consequence, she writes, ‘is that typically “national” policy domains such as social security are increasingly Europeanised. This can create the impression with national authorities that they have lost the freedom to design their own policies.’³⁸

Meanwhile another development was taking place, involving the idea of ‘expectations’. In an admissibility judgment in 2002, the Court decided that the term ‘possessions’ could include ‘claims by virtue of which the applicant can argue that he or she has at least a “legitimate expectation” of acquiring effective enjoyment of a property right’.³⁹ The same wording was used by the Court in *Stretch v. UK* in the following year.⁴⁰ In that case the expectation at issue was that a lease would be extended, when it was known that the local authority which had promised such an extension had had no legal authority to do so. Discussing *Stretch v. UK*, Lord Scott (Richard Scott QC, a former Lord of Appeal in Ordinary) has said that the Court’s reasoning is ‘extraordinary’, and that it has shown itself ‘willing to expand the Article 1 concept of “possessions” to a startling extent’.⁴¹

This is not the place to examine all the ways in which the ‘autonomous’ interpretation of the abstract term ‘possessions’ has developed. One scholar who has done so has identified various guidelines at work, ‘whose interplay and scope remain baffling’. He concludes: ‘Ultimately, one cannot avoid observing an

³⁵ *Stec and Others v. UK, Decision as to Admissibility* (6 July 2005), para. 54.

³⁶ *Stec and Others v. UK* (12 April 2006), Concurring Opinion of Judge Borrego Borrego (both quotations).

³⁷ M. Bossuyt, ‘Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations’, *Human Rights Law Journal*, 28, nos 9-12 (2007), pp. 321-32, at pp. 321-3 (cases), 324 (quotation).

³⁸ J. Gerards, ‘Judicial Minimalism and “Dependency”: Interpretation of the European Convention in a Pluralist Europe’, in M. van Roosmalen et al., eds, *Fundamental Rights and Principles: Liber Amicorum Pieter van Dijk* (Cambridge, 2013), pp. 73-91, at p. 79.

³⁹ *Silvenko v. Latvia, Decision as to Admissibility* (23 January 2002), para. 121.

⁴⁰ *Stretch v. UK* (24 June 2003), para. 32.

⁴¹ Lord Scott, ‘Property Rights and the European Convention on Human Rights’, paper delivered to the Property Bar Association, 19 November 2009, cited in J. Fisher, *Rescuing Human Rights* (London, 2012), p. 43.

analytical method which comes too close to mere hair-splitting enriched more or less with massive doses of speculation.’⁴²

(iii) Annexing Neighbouring Concepts

The previous methods involved drawing new implications directly from one of the concepts contained in the right, or directly attributing some new content to that concept. This third method, on the other hand, identifies an extra element which, according to the Court, stands in some relation to the right itself, and then says that because of that relationship the right should be taken to include it.

One example of this was briefly mentioned above: the case in which the Court found that there exists ‘a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life’.⁴³ The complainant was a gypsy who had bought a piece of land on which to station her caravan. But the land was in the Green Belt, and was also subject to an order forbidding the stationing of caravans; when she applied for planning permission, her request was turned down. Remaining on the site, she was then fined for ignoring an enforcement order. She took her case to Strasbourg under several articles of the Convention, including Article 8.

The Court said that ‘the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy.’ It went on: ‘Measures affecting the applicant’s stationing of her caravan therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a Gypsy and to lead her private and family life in accordance with that tradition.’⁴⁴ Proceeding on that basis, it found that there was an interference with the Article 8 right to respect for private life.⁴⁵

To talk about leading one’s private life in accordance with an ethnic tradition is to link together two terms; the connection between the two may be strong in any particular case, but that does not mean that latter must be subsumed under the former. Different people express, in and through their private lives, different values and interests of all kinds – some of them culturally inherited, but also some chosen. Should all of those values and interests be awarded the protection which is given, as a human right, to private life in itself? Thanks to the Court’s ruling here, however, it

⁴² S. van Drooghenbroeck, ‘The Concept of “Possessions” within the Meaning of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms’, *The European Legal Forum / Forum iuris communis Europae*, 7 (2000-1), pp. 437-44, at p. 437.

⁴³ Above, p. 67.

⁴⁴ *Chapman v. UK*, para. 73.

⁴⁵ *Ibid.*, para. 78.

is in principle possible that any form of behaviour that expresses ethnic identity may be so identified with private life – because the person wishes to lead his or her private life ‘in accordance with’ it – that it is protected under the right to respect for private life, even if it involves a breach of the law. (The ‘positive obligation ... to facilitate the gypsy way of life’ is a further step in the argument, which need not concern us at this point.)

Another case in which this Article 8 right was able to incorporate a neighbouring concept has also been briefly mentioned: *Sidabras and Dziautas v. Lithuania*, where the Court found a violation of Article 8 because two men who had worked for the KGB were banned from all public (and some private) employment for ten years.⁴⁶ The Court did not argue that their private life as such was directly harmed by not having access to a certain range of jobs, and it also noted that they were able to seek other employment in some parts of the private sector. However, the difficulties they had experienced in finding suitable employment had had ‘repercussions on their enjoyment of their private life’, primarily by affecting their income. So there was a *consequential* connection, which was apparently enough for a finding in their favour.

That a person’s ability to have an enjoyable private life will be affected by a drop in income is clear. It is much less clear that such a change damages the person’s right to ‘respect for private life’. People who normally live at that lower income level presumably have private lives, and those private lives are presumably respected. In this case there was no governmental interference in the two men’s private lives as such, merely a governmental action which, by consequence, affected the degree of ‘enjoyment’ with which those private lives were led. In legal terminology, a person enjoys a right when he or she possesses, exercises or is the beneficiary of that right. Enjoying the right to respect to one’s private life is not the same as enjoying – in the sense of taking enjoyment in – the private life itself.

(iv) Presupposing Other Rights

The *Sidabras and Dziautas* case has received special attention from those interested in developing what is now called an ‘integrated’ or ‘holistic’ approach to human rights.⁴⁷ The implications of this approach are extremely far-reaching. Its underlying idea is that although the authors of the European Convention deliberately excluded

⁴⁶ Above, p. 67

⁴⁷ See V. Mantouvalou, ‘Work and Private Life: *Sidabras and Dziautas v. Lithuania*’, *European Law Review*, 30 (2005), pp. 573-85, at p. 574.

social and economic rights, some of those rights (in this case, the right to work) can be brought into the Convention, or enforced by means of it, on the grounds that they are instrumentally necessary for the 'enjoyment' of the essentially civil and political rights which the Convention does protect. The civil or political right is thus said to presuppose one or more other rights of a different kind, and on this basis the whole field of rights protected by the Convention can be hugely extended.

One of the earliest advocates of this approach put it in terms of making human rights norms 'permeable', in order to put into effect 'the interdependence of human rights'. As he explained: 'By permeability I mean ... the openness of a treaty dealing with one category of human rights to having its norms used as vehicles for the direct or indirect protection of norms of another treaty dealing with a different category of human rights'.⁴⁸ This is a far cry from the clear wording of Article 1 of the European Convention, where, as we have seen, the signatories undertake to 'secure to everyone within their jurisdiction the rights and freedoms *defined* [emphasis added] in Section 1 of this Convention'.

The broad project of incorporating other rights by presupposition has not yet had any major direct influence on the Court; but it is quite widely supported in academic writings on human rights, and such writings can have an effect on the underlying assumptions of the judges. Supporters of this project often defend it in strangely hyperbolic language. Typical statements are that 'Freedom of speech or assembly are of little use to a starving or homeless person'; 'It is hard to see how, for example, anyone can enjoy the right to free speech if he or she is homeless, has not eaten for days ... and has not received treatment for advancing diabetes'; or even 'the enjoyment of civil and political rights is rendered *meaningless* [emphasis added] if social rights are neglected.'⁴⁹

Surely, it should not be hard to see how basic civil and political freedoms might still matter to a homeless person. It must be better that such people should be able to go to a public meeting and talk freely about their situation, or speak without fear to an investigative journalist who is exposing failures of social care, than that they should live under a regime where such things are forbidden. In these respects, indeed, we might want to say that the right of freedom of speech can have greater value for such people than for those who lead comfortable and untroubled lives. Similarly, where the right to respect for private life is concerned, a person living in a

⁴⁸ C. Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', *Osgoode Hall Law Journal*, 27 (1989), pp. 769-878, at p. 771.

⁴⁹ S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, 2008), p. 67; Morsink, *Universal Declaration*, p. 192; Mantouvalou, 'Work and Private Life', p. 574.

shack in a shanty town may surely value the right to protection from arbitrary interference by police goons no less – and quite possibly more – than a middle-class house-dweller.

To anticipate a point which will be developed further below, one key aspect of a civil and political right is that it expresses the wrongness of the kind of governmental action that it opposes. To talk of the right to a fair trial is thus to express the basic idea that it is wrong for the state to interfere in a trial, for example by ordering the judge to find the accused guilty. Specifying the nature of the wrongness may often help to clarify what is really at stake in the right. For example, academic writers on rights sometimes cite, as a sort of *reductio ad absurdum*, the right to dine at the Ritz. To assert this as a positive right (in the sense of a claim) for everyone would indeed be absurd; but it is possible to look at it in a non-absurd way, by considering the sense of wrongness one would feel if people who wanted to dine at the Ritz were arbitrarily prevented by government agents blocking their path or ordering them to go elsewhere. (Non-absurdly, it thus turns out to be a subset or application of some more general rights concerned with freedom of movement, freedom to spend one's money legally as one wishes, and so on.)⁵⁰

In this way, it is possible to have a clear sense of the wrongness of a state arbitrarily suppressing freedom of speech or freedom of assembly, or interfering arbitrarily in people's lives in a way that denies them respect for their private life, regardless of the economic conditions of the victims. This is certainly not to deny that their conditions may represent, in themselves, a wrong of another kind. That there is something morally bad about letting people live in conditions of great misery is easily agreed; that they have a right to 'an adequate standard of living ... including adequate food, clothing and housing' is also a simple fact under international law, if they are citizens of a country which has signed and ratified the International Covenant on Economic, Social and Cultural Rights. But the civil and political rights specified by the European Convention are what they are, and do not include other rights, however much one might regard those other rights as instrumentally useful for their trouble-free 'enjoyment'.

As mentioned above, this whole approach is for the time being more an academic programme than a policy of the Court. But in some smaller (though still

⁵⁰ The point made here is concerned with rights vis-à-vis the state. On a Hohfeldian analysis, concerned only with rights vis-à-vis others within the legal system, my right to dine at the Ritz consists of a lack of duty to refrain from dining there, and correlates with other people's lack of claim that I should refrain from dining there. (See, with slightly different terminology, W. N. Hohfeld, *Fundamental Legal Conceptions*, ed. W. W. Cook (New Haven, CT, 1946), esp. pp. 35-50.)

significant) ways the Court has adopted a similar strategy, incorporating an extra right by claiming that it is presupposed.

In *Golder v. UK* a prisoner had wanted to write to a solicitor, in order to instruct him to start libel proceedings against one of the prison guards; the Home Office, acting under its statutory authority, denied him permission to send such a letter. The key question considered by the Court was whether Article 6 (on the right to a fair trial) confers a right of access to the courts. The final judgment decided that it did – by a process of presupposition, given that no such right of access is actually mentioned in the text of Article 6.

One judge issued a dissenting opinion, with some thoughtful remarks on this point. He began by referring to Article 1, with its phrase about ‘the rights and freedoms defined in this Convention’, commenting: ‘As “to define” means to state precisely, it results, in my view, from Article 1 ... that among such rights and freedoms can only be numbered those which the Convention states in express terms or which are included in one or other of them. But in neither of these cases does one find the alleged “right of access to the courts”.’ He continued:

It is true that the majority of the Court go to great lengths to trace that right in an assortment of clues detected in Article 6 para. 1 ... and other provisions of the Convention.

However, such an interpretation runs counter, in my opinion, to the fact that the provisions of the Convention relating to the rights and freedoms guaranteed by that instrument also constitute limits on the jurisdiction of the Court. This is a special jurisdiction, for it confers on the Court power to decide disputes arising in the course of the internal life of the Contracting States. The norms delimiting the bounds of that jurisdiction must therefore be interpreted strictly. In consequence, I do not consider it permissible to extend, by means of an interpretation depending on clues, the framework of the clearly stated rights and freedoms.

As for the right of access to the courts itself:

The above conclusion is not upset by the argument, sound in itself, whereby the right to a fair hearing before an independent and impartial tribunal, secured to everyone by Article 6 para. 1 ... assumes the existence of a right of access to the courts. The Convention in fact appears to set out from the idea that such a right has, with some exceptions, been so well implanted for a long time in the national legal order of the civilised States that there is absolutely no need to guarantee it further by the procedures which the

Convention has instituted. There can be no other reason to explain why the Convention has refrained from writing in this right formally. In my opinion, a distinction must be drawn between the legal institutions whose existence the Convention presupposes and the rights guaranteed by the Convention. Just as the Convention presupposes the existence of courts, as well as legislative and administrative bodies, so does it also presuppose, in principle, the existence of the right of access to the courts in civil matters; for without such a right no civil court could begin to operate.⁵¹

(v) Resorting to Underlying Principles

The drawing of implications out of generative abstractions such as ‘private life’ was discussed above. But as if those were not generative enough, or not sufficiently abstract, it has become a common practice of the Court to resort to even more general (and potentially more productive) principles which, it claims, underly the terms used in the Convention. The procedure might be described as ‘one step back, two steps forward’. You start with a particular piece of wording in the Convention; you then claim to have intuited some prior principle at work, and go back to that; and then you use that principle to generate an implication which may go beyond what the original piece of wording would have entitled you to say.

A classic example of this was given in the *Niemietz* judgment, which expanded the meaning of ‘home’ in Article 8 to include business premises: ‘More generally, to interpret the words “private life” and “home” as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8 ... namely to protect the individual against arbitrary interference by the public authorities.’⁵²

The reasoning presented in that sentence is quite extraordinary, given that the first paragraph of Article 8 specifies a particular right (‘the right to respect for his private and family life, his home and his correspondence’), and the second paragraph refers to interference by a public authority as follows: ‘There shall be no interference by a public authority with the exercise of this right’ [emphasis added]. There is no general purpose expressed here to protect the individual from all kinds of arbitrary interference here, there and everywhere. This piece of reasoning from *Niemietz* shows how the misuse of a teleological approach (invoking ‘the essential object and purpose of Article 8’) can subvert the clear meaning of the text.

⁵¹ *Golder v. UK*, Dissenting Opinion of Judge Verdross.

⁵² *Niemietz v. Germany*, para. 31.

That is an egregious case, but there are many examples of the general tendency. In *Tyrer*, the Court ruled that birching a convicted teenager violated Article 3 because it ‘constituted an assault on precisely that which it is one of the main purposes of Article 3 ... to protect, namely a person’s dignity and physical integrity’.⁵³ The text of Article 3 simply says ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’, without any mention of dignity or physical integrity. So, once again, an underlying principle is invoked, on the basis that it is a ‘purpose’ of the Article. Commenting on the phrase quoted here from the judgment, the dissenting opinion of Sir Gerald Fitzmaurice trenchantly observed:

These are tautologies that do not advance matters and defeat their own ends, since they beg the question at issue, which is not whether the punishment was physically violent or was inflicted compulsorily, or even involved loss of dignity (as most punishment does), but [whether it] was in the actual circumstances ‘degrading’, and degrading to a degree which – to use the Court’s own language – took it to a level above that ‘usual ... element of humiliation or degradation’ which is an ‘almost inevitable element’ of ‘judicial punishment generally’ – (Judgment, paragraph 30, *passim*). It is only this kind of degradation of which it can properly be said to be ‘one of the main purposes of Article 3’ to condemn – or protect against – and mere affirmations that such is the case cannot of themselves carry conviction.⁵⁴

This questionable reversion to the underlying principles of dignity and physical integrity has continued, both in cases relating to Article 3 and in the arguments of human rights lawyers. One notable example comes in an article by the jurist Antonio Cassese, who had served as Chairman of the Council of Europe Steering Committee on Human Rights. The article discussed a case where a local electricity company in Brussels had cut off a woman’s power supply for reasons of non-payment; she had brought an action against the Belgian state under Article 3, alleging inhuman and degrading treatment. The Commission at Strasbourg found against her, on the grounds that the treatment was not severe enough to be described as inhuman and degrading, but, as Cassese noted, it did not rule out the idea of extending the scope of this Article to such cases, where ‘social and economic

⁵³ *Tyrer v. UK*, para. 33.

⁵⁴ *Tyrer v. UK*, Separate Opinion of Judge Sir Gerald Fitzmaurice, para. 8.

conditions' were at issue, rather than any direct, oppressive actions by public authorities. Cassese commented:

On this score the decision of the Commission cannot but be approved ... Plainly, the concept of human dignity underpinning Article 3 and the prohibition of any treatment or punishment contrary to humanitarian principles embrace any measure or action by a public authority, whatever the specific field to which this measure or action appertains. Article 3 ... could constitute the bridge between the area traditionally covered by the Convention ... – that of civil and political rights – and the broad field of social and economic rights.⁵⁵

In this way, a new line of approach beckons to those who are keen to introduce into the Convention a whole category of rights deliberately excluded from it by its authors and signatories.

But the most active use of this method of invoking 'underpinning' concepts has been in relation to Article 8, on private and family life. In *Botta v. Italy* the Court declared that private life 'includes a person's physical and psychological integrity', and that 'the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.'⁵⁶ Such a statement of what was 'intended' by means of the Article goes significantly beyond what the Article actually says, or what can be reasonably taken to be a necessary implication of what it says. There is no mention in the Convention either of the development of the personality or of physical and psychological integrity.

The idea that the purpose of the Article is to ensure personal development is now well entrenched, however. In *von Hannover v. Germany* (a case brought by the Prince of Monaco's daughter and her husband, after German courts had denied them an injunction preventing the publication of photographs taken of them by *paparazzi* in public places), having repeated from *Botta* the phrase just quoted about what is guaranteed by Article 8, the Court was reduced to constructing a peculiarly tortuous argument in order to connect the control of photographic images with 'personal development':

⁵⁵ A. Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?', *European Journal of International Law*, 2 (1991), pp. 141-5, at p. 143.

⁵⁶ *Botta v. Italy* (24 February 1998), para. 32.

a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development...⁵⁷

One final example must suffice here. In *Christine Goodwin* the judgment contained the following words:

the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual.⁵⁸

Here we find not only another underlying principle for Article 8, unmentioned in the text itself ('the notion of personal autonomy'), but also a very general example of applying this method to the entire Convention, drawing away from the actual words of the Convention in order to isolate its 'essence', which is said to consist of 'respect for human dignity and human freedom'.

At such moments one must hope that the Court is capable of reasoning in terms of simple syllogisms. 'Everything protected by the Convention is to do with respect for human dignity and human freedom' may indeed be true. But it does not follow that everything to do with respect for human dignity and human freedom is protected by the Convention.

(vi) Lowering Thresholds

Another way in which the scope of rights can be extended is by lowering the thresholds for applying certain key terms in the Convention. The most striking examples here are concerned with Article 3, which, as we have seen, simply states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' This is often described as one of the most absolute articles; its text does not include any limitations, and Article 15 says that states are not allowed to

⁵⁷ *von Hannover v. Germany (no. 2)* (7 February 2012), paras 95, 96. Note, however, that for various reasons, including freedom of expression, the Court found in favour of Germany in this case.

⁵⁸ *Christine Goodwin v. UK*, para. 90.

derogate from it in time of emergency. One might expect that special care would be taken, in the Court's jurisprudence, to maintain a consistently high threshold for the application of Article 3, given that any process of debasing its value would also undermine its absolute status. But that is not the case.

First, there is the question of, so to speak, the relative internal thresholds: at what point does a worsening of degrading treatment turn it into inhuman treatment, and at what point does that turn into torture? The broad principles that emerge from the practice of the Court and the Commission are as follows. Degrading treatment grossly humiliates, or drives people to act against their conscience or will; inhuman treatment 'deliberately causes severe suffering, physical or mental, which in the particular situation is unjustifiable'; and torture inflicts even more severe suffering, and is for a purpose (such as extracting information).⁵⁹

The essential decision in an Article 3 case is about whether or not the Article itself has been violated. Sometimes the Court declares that it has, without specifying which level of maltreatment was involved.⁶⁰ Usually it does assign a level (though quite often it runs 'inhuman and degrading' together in a single description); whether or not the level rises to that of torture is a significant matter, as there can be few stronger condemnations of a state than convicting it of inflicting actual torture on its citizens. According to the Court itself, however, these levels can change their nature over time. As it said in its judgment on *Selmouni v. France*:

The Court has previously examined cases in which it concluded that there had been treatment which could only be described as torture ... However, having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' ... the Court considers that certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.⁶¹

⁵⁹ A. Cassese, 'Prohibition of Torture and Inhuman or Degrading Treatment or Punishment', in R. St J. Macdonald, F. Matscher and H. Petzold, eds, *The European System for the Protection of Human Rights* (Dordrecht, 1993), pp. 225-61, at pp. 229, 241-3.

⁶⁰ For an example, concerning the caning of a child by its stepfather, see Mowbray, *Development of Positive Obligations*, p. 43.

⁶¹ *Selmouni v. France* (28 July 1999), para. 101.

That there might be some change over time in the threshold for ‘degrading’ treatment, given that the notion of degradation is to some degree subjective and culturally relative, seems a reasonable proposition (as was noted above, in the discussion of evolutive interpretation). Where ‘inhuman’ treatment is concerned, one of the criteria, unjustifiability, may have a rather subjective character in practice, while the other seems much more objective: severe suffering. However, in the case of torture, both of the key criteria have an objective nature: very severe suffering, and the fact – which should be demonstrable – that the suffering is inflicted for a purpose.

So it is not clear at first sight why an ‘increasingly high standard being required in the area of the protection of human rights’ should have any effect on the assessment of torture. Nor is it easy to see why ‘greater firmness in assessing breaches of the fundamental values of democratic societies’ is required: if the ‘fundamental values’ (note that, once again, there is a reversion to underlying values here) remain the same, any new action that breaches them to the same extent as a previous action should surely be assessed – if elementary rule-of-law principles are to be observed – in the same way.

But one of the problems here is that, as elsewhere in the Court’s decision-making, the cult of circumstance comes into play. In an early landmark judgment, *Ireland v. UK*, the Court said: ‘ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 ... The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.’⁶²

This weighing of circumstances is a complicating factor, but in itself it does not invalidate the point just made about severe suffering being an objective fact; it merely makes it more difficult to ascertain whether that fact exists in any particular case. (And, if it does, the point just made about ‘greater firmness’ not having the power to change that fact should still stand.) Yet in practice appealing to many different circumstances supplies an easy way of lowering thresholds, by means of attaching greater weight to some special features of the case.

Some movement in that direction can be observed in the Court’s judgments in cases involving asylum-seekers. As is well known, the concept of inhuman and/or degrading treatment now extends beyond the narrow field of treatment meted out to prisoners and detainees; it can include ways in which asylum-seekers are treated,

⁶² *Ireland v. UK* (18 January 1978), para. 162.

outside the police station or the prison cell. The Court has stated that the threshold for applying Article 3 is lower for asylum-seekers, because they are a category of vulnerable people: this is a way of characterising them that weights one of the ‘circumstances of the case’ in their favour. (In the short period following that statement, from 2010 to 2012, four extra categories of this kind were also added by the Court in its consideration of asylum-seekers: Roma people, the mentally disabled, Afghan women, and minors. Commenting on this, the President of the Belgian Constitutional Court wondered out loud: ‘If the Court succeeded in the last two years in identifying five vulnerable categories, how many more may be expected?’)⁶³

A very different case concerned a mentally ill UK citizen who committed suicide while in prison. Here the Court said that those in custody are a ‘vulnerable’ category, and evidently accepted the argument of the applicant (the mother of the deceased) that mentally disturbed people were another such category. Mr Mark Keenan, a mentally disturbed man who was in prison for assault, attacked prison hospital officers and was sent to a segregation unit, where he was visited each day by a doctor, a chaplain and the prison governor; but despite being put on a 15-minute watch for self-harm, he hanged himself in his cell. The Court found the UK Government guilty of inhumane and degrading treatment, because of a ‘lack of effective monitoring’, the fact that one prison doctor who had treated him was unqualified in psychiatry, and the fact that there was a gap in his medical notes, which indicated ‘an inadequate concern to maintain full and detailed records of his mental state’.⁶⁴ Here the threshold has been lowered to such an extent that the article covers something – a responsible prison regime, conscientiously applied overall, but with some unfortunate slip-ups – which most reasonable readers of the Convention would surely not expect to see included under an article primarily designed to outlaw torture and punishment beatings.

Where asylum seekers are concerned, there has in any case been a progressive lowering of thresholds in such simple matters as the length of time for which a person’s inhumane treatment has lasted. In some recent cases, the duration of the ‘unacceptable conditions’ – meaning here not punishment beatings or anything of that kind, but having to live in a detention centre that was overcrowded or

⁶³ M. Bossuyt, ‘Is the European Court of Human Rights on a Slippery Slope?’, in S. Flogaitis [Phlogaites], T. Zwart, and J. Fraser, eds, *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Cheltenham, 2013), pp. 27-36, at pp. 29-31 (Court’s doctrine on ‘vulnerable’ people; quotation: p. 31).

⁶⁴ *Keenan v. UK* (3 April 2001), paras 85, 91 (‘vulnerable’), 114-16 (findings). See also the discussion in Mowbray, *Development of Positive Obligations*, pp. 57-8.

unhygienic – has been as little as two days (*Rahimi v. Greece*) or even two hours (*Tehrani and Others v. Turkey*).⁶⁵ Commenting on the former case, involving a 15-year-old Afghan who had travelled to Greece, Marc Bossuyt has written:

Despite his young age and the fact that, according to the Court, he was not accompanied ... Mr. R. Rahimi had succeeded, without having the required travel documents, to travel from Afghanistan to the island of Lesbos in Greece. The judgment of the Court implies that the Greek State should be organized to be capable of ensuring decent accommodation for asylum seekers on whatever island they choose to land, even if they arrive without notice and without authorization. A failure to do so, even for only two days in the case of minors, is considered to be a violation of the absolute prohibition contained on Article 3 of the Convention. Is this not stretching that absolute prohibition beyond any reasonable interpretation?⁶⁶

One other case, also discussed by Bossuyt, will give a further idea of how the threshold for Article 3 can be lowered. In *Hussain v. Romania* (2008) the applicant was an Iraqi who had lived in Romania since 1977. His ex-girlfriend had behaved violently towards him, and two unknown people had come up to him and hit his face and his feet, perhaps at her instigation. He had reported this to the authorities; later they told him that the police had been instructed to investigate, but they gave him no documentation showing that the investigation had been diligent or that any judicial authorities had considered its findings. The Court found Romania guilty of a violation of Article 3 because the state authorities had not carried out a thorough and effective investigation.

Here Bossuyt comments: 'If the new threshold of seriousness [for Article 3 violations] is located merely at this level, there is a risk that findings of violations of Article 3 will become so frequent, and so banal, that they will be received with the utmost indifference.'⁶⁷

His general observation on such cases is as follows:

⁶⁵ M. Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court', *European Constitutional Law Review*, 8 (2012), pp. 203-45, at pp. 228-30.

⁶⁶ *Ibid.*, p. 230.

⁶⁷ M. Bossuyt, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant* (Brussels, 2010), p. 114 ('Si le nouveau seuil de gravité [for Art 3 violation] ... ne se situe qu'à ce niveau, les constatations de violations de l'article 3 risquent de devenir d'une fréquence et d'une banalité telles qu'elles seront accueillies dans la plus grande indifférence').

In the name of dynamic and teleological interpretation, the Court is progressively going down the route of an ever-increasing juridicalisation of European society, without bothering itself too much about what the states intended when they became parties to the Convention.⁶⁸

(vii) Using the Leverage of Non-Discrimination

It was briefly mentioned above that, following the listing of the substantive rights in the Convention, there are two articles setting out general rights or meta-rights, applicable to all of them. The second of these, Article 14, prohibits discrimination. It says:

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 or other opinion, national or social origin, association with a national minority, property, birth or other status.

At first glance the meaning of this is clear: it refers to the specific rights listed in the Convention, and says that they must be applied in a non-discriminatory way. Further thought might cause the reader to puzzle over this. If a regime has a policy of torturing black people but not white people, surely the Article 3 prohibition of torture is in itself sufficient to deal with the situation, without invoking a rule of non-discrimination? If the law gives less freedom of expression to Catholics than to Protestants, surely the former can frame their demand to exercise that right in absolute, not relative, terms?

The answer must be that Article 14 is aimed essentially at the 'limitations' which govern many of the rights in the Convention. When states invoke, as they may, 'the public interest' or 'the protection of morals', they are not allowed to frame those things in discriminatory ways; if rights are restricted for some people, the reason cannot be just that those people belong to a racial, religious or linguistic (etc.) category. Given the power of the limitations in the deliberations of the Court, this is an important protection.

A landmark case of 1968 concerned the rather complicated arrangements for giving education in different languages in Belgium. Some French-speaking parents,

⁶⁸ *Ibid.*, p. 103 ('Au nom de l'interprétation dynamique et téléologique, la Cour s'avance progressivement sur la route d'une juridisation toujours plus grande de la société européenne, sans trop se soucier de ce qu'ont voulu les États en devenant parties à la Convention').

living in Flemish-speaking areas, complained that they were prevented from sending their children to French-speaking schools. The relevant right was one added to the Convention by Article 2 of Protocol no. 1:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

(Note, by the way, the deliberately cautious phrasing of the article, which does not impose on the state any actual duty to supply education; its duty under the first sentence is essentially to refrain from stopping people from being educated.)

The Court found, by a majority, that there was no breach of the first sentence of that article taken in itself, and, by unanimity, that there was no breach of the second. However, it decided that if the first sentence were taken in conjunction with Article 14, there was a breach of the Convention. In other words, a policy which would not be wrong if generally applied was wrong when it was applied to some people, if they belonged to a certain kind of category. The Court explained as follows:

persons subject to the jurisdiction of a Contracting State cannot draw from Article 2 of the Protocol ... the right to obtain from the public authorities the creation of a particular kind of educational establishment; nevertheless, a State which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.⁶⁹

Discrimination on grounds of race, religion (etc.) is an ugly phenomenon, and it is to be hoped that in the legal system of every modern liberal democracy there will be strong safeguards against it. Where the safeguards are weak, they should be strengthened. But the Convention should not be used to correct or fortify the legal system of a state in every area of life; its scope is confined to the actual substantive rights set out in articles 2 to 12 (and the subsequent protocols). So everything depends on the correct application of the opening words of Article 14: 'The

⁶⁹ Case '*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*' v. *Belgium (Merits)*, also known as *Belgian Linguistic Case*, No. 2 (23 July 1968), B, 'Interpretation adopted by the Court', paras 8-9.

enjoyment of the rights and freedoms set forth in this Convention ...'. Given the rights listed in the Convention, what sort of thing is to be described as the 'enjoyment' of them?

It is perhaps unfortunate that this case, which became a lodestar for so many later cases involving Article 14, involved a right that had been phrased in such a sidelong and potentially misleading way. The drafters had deliberately avoided saying 'Everyone has a right to education', because, given that the rest of the article guaranteed the parents' right to 'ensure ... education ... in conformity with their own religious and philosophical convictions', a positive statement of the right might have implied that states were obliged to supply whatever religious or philosophical type of teaching the parents desired.⁷⁰ Instead, the wording put a prohibition on the state: 'No person shall be denied the right to education.' So while Article 2 of Protocol no. 1 did contain a reference to 'the right to education' (implying, though not with utter clarity, that that was a liberty-right, not a claim-right), the specific human right conferred by the article was the individual's right not to be denied the right to education.

Whether that specific right was treated in a discriminatory way in this case is much less clear; after all, the Belgian state appears to have carried out its duty, where all the children were concerned, to refrain from stopping them from being educated. The overall significance of the *Belgian Linguistic Case* is that it set up a broad expectation that the principle of non-discrimination would be applied to anything the state did that came within the *general subject-area* of any substantive right in the Convention. (The phrase later used by the Court was that 'the facts ... fall within the ambit' of one or more of the substantive articles.)⁷¹ And that made possible a much wider use of the strategy of argument that links a given right with the Article 14 right to non-discrimination.

So, for example, in a case involving a request by a lesbian for permission to adopt a child (which had been rejected by the French authorities, partly because her female partner expressed no desire to adopt and no interest in bringing up the child), the Court declared:

The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but

⁷⁰ See Preparatory Commission, '*Travaux préparatoires*', vii, pp. 186, 200-2; viii, pp. 190-4.

⁷¹ See for example *Abdulaziz, Cabales and Balkandali v. UK* (28 May 1985), para. 71.

it is also sufficient for the facts of the case to fall ‘within the ambit’ of one or more of the Articles of the Convention ...

The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide.⁷²

Thus a new phrase, ‘falling within the general scope’, was introduced. And so, if the rejection of this person’s request by the French authorities could be found to be based on discrimination against homosexuals (as it was in this case), the Court could guarantee – as, in effect, a human right – a right to adopt, even though it admitted that no right to adopt was provided by Article 8, which was the source of the substantive rights linked here to Article 14. Indeed, it emphasised that ‘the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt ... The right to respect for “family life” does not safeguard the mere desire to found a family; it presupposes the existence of a family.’⁷³

The issue here is not about whether the effects of any such judgment are good or bad. Still less is it about whether discrimination is acceptable. Rather, the question is whether a human rights convention, drawn up to protect a specific set of rights, should be used to solve other problems. And that is a question which can only loom larger as time goes by, given that the Court has adopted a concept of discrimination which includes indirect or unintended effects: ‘Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group.’⁷⁴ In the words of Frédéric Sudre, Professor of Law at Montpellier and Director of the Institute of Human Rights Law, it is quite wrong of the Court to seek to ‘break the link which, according to the very terms of Article 14, formally unites this provision to the other normative clauses of the Convention. At this point, constructive interpretation of the Convention reaches its limits.’⁷⁵ Indeed, it goes beyond them.

⁷² *E.B. v. France* (27 January 2008), paras 47-8.

⁷³ *Ibid.*, para. 41. (The Court did, however, seek some support – though without supplying any proper argumentation – from the very general principle that the right to respect for private life encompassed ‘the right to establish and develop relationships with other human beings’: para. 43.)

⁷⁴ *Hugh Jordan v. UK* (4 May 2001), para. 154; cf. also *D.H. and Others v. Czech Republic* (13 November 2007), para. 175.

⁷⁵ F. Sudre, ‘La Portée du droit à la non-discrimination: de l’avis d’Assemblée du Conseil d’État du 15 avril 1996, *Mme Doukouré*, à l’arrêt de la Cour européenne des droits de l’homme du 16 septembre 1996, *Gaygusuz c/ Autriche*’, *Revue française de droit administratif*, 13 (1997), pp. 966-76, at p. 976 (‘rompre le lien qui, selon les termes même de l’article 14, unit formellement

(viii) Developing Positive Obligations

The general character of most of the articles in the European Convention seems to be that they place ‘negative obligations’ on the state authorities – obligations not to act in certain ways. The government must not torture or enslave people, it must not deprive them of their liberty except on specified grounds, it must not suppress freedom of expression except under certain justifications and so on.

There is a traditional view that such charters of rights should confine themselves to expressing negative obligations. Pierre-Henri Teitgen apparently shared this view.⁷⁶ Where the US Bill of Rights is concerned, a classic statement of this position was given by William Rehnquist, Chief Justice of the United States, in 1989. Commenting on the ‘due process’ clause (which appears in the Fifth and Fourteenth Amendments), he said: ‘The Clause ... forbids the State itself to deprive individuals of life, liberty, or property without “due process of law”, but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.’⁷⁷

But if Teitgen and his colleagues intended the European Convention to be read narrowly in this way, they were less than entirely successful in embodying that intention in the actual text. The crucial wording here is that of Article 1: ‘The High Contracting Parties shall *secure* [emphasis added] to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.’ With that one word they made it possible – whether intentionally or (more likely) not – for subsequent interpreters of the Convention to insist on a much broader view of the states’ duties: not just refraining from violating the rights, but taking positive measures to guarantee and protect them.

It is possible, of course, that Teitgen himself paid attention only to the drafting of the French text, which instead of ‘shall secure to everyone’ has the more general and ambiguous ‘reconnaissent à toute personne’. But in any case further support for the broad approach has also been drawn from the wording of Article 8, which asserts not a right to private and family life (etc.), but a right to *respect* for private and family life (etc.).⁷⁸ As the Court said in a landmark ruling in 1979 relating to Article 8, ‘the object of the Article is “essentially” that of protecting the individual against arbitrary interference by the public authorities ... Nevertheless, it does not merely

cette disposition aux autres clauses normatives de la Convention. L’interprétation constructive de la Convention connaît ici ses limites’).

⁷⁶ Preparatory Commission, *Travaux préparatoires*, i, p. 219.

⁷⁷ Quoted in Fredman, *Human Rights Transformed*, p. 94.

⁷⁸ Though here too some linguistic confusion may have played a part: see above, p. 65, n. 4.

compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective “respect” for family life.’⁷⁹

Any proper interpretation of the Convention must therefore allow for the possibility of ‘positive obligations’ on the state – requirements to take action, adopt procedures, legislate, or make provision in various ways.⁸⁰ Several of the cases mentioned above depend on this principle: so, for example, under Article 8 the state must supply legal aid to an impecunious person who wishes to pursue proceedings for judicial separation from her husband, and under Article 3 it must go to quite elaborate measures to supervise a mentally disturbed person in the segregation wing of a prison.

One other principle can come into play here: that of ‘horizontal effects’ or ‘third-party effects’ (known also by the German word ‘Drittwirkung’). Here the idea is that there may be cases where the violation of an individual’s right is carried out not by the state but by another individual – the caning of a child by its stepfather, for example.⁸¹ Since cases can be brought at Strasbourg only against states, not individuals, and since the whole nature of the Convention is that it lays obligations on states, the principle of horizontal effects implies that the state has some positive duty to protect the violated from individual violaters, and to set up and enforce adequate laws against such violations.⁸²

Some of the Court’s pronouncements have given the impression that it can determine breaches of a state’s positive obligations in just the same way, and just as easily, as it does breaches of negative ones. In a 1972 case it declared that ‘In questions of liability arising from the failure to observe the Convention there is ... no room to distinguish between acts and omissions.’⁸³ Discussing a case brought under Article 8 in 2010, the Court said: ‘The principles applicable to assessing a State’s positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole...’⁸⁴

⁷⁹ *Marcx v. Belgium* (13 June 1979), para. 31.

⁸⁰ For different ways of categorising positive obligations see D. Spielmann, ‘Obligations positives et effet horizontal des dispositions de la Convention’, in F. Sudre, ed., *L’Interprétation de la Convention européenne des droits de l’homme* (Brussels, 1998), pp. 133-74, at p. 137; van Drooghenbroeck, *La Proportionnalité*, pp. 137-9; Mowbray, *Development of Positive Obligations*, p. 5.

⁸¹ See above, p. 87, n. 60.

⁸² On horizontal effects see A. Clapham, ‘The “Drittwirkung” of the Convention’, in R. St J. Macdonald, F. Matscher and H. Petzold, eds, *The European System for the Protection of Human Rights* (Dordrecht, 1993), pp. 163-206; A. Clapham, *Human Rights in the Private Sphere* (Oxford, 1993); Spielmann, ‘Obligations positives’, pp. 151-66.

⁸³ *De Wilde, Ooms and Versyp v. Belgium* (10 March 1972), para. 22.

⁸⁴ *A, B and C v. Ireland*, para. 247.

Yet it immediately went on to say: ‘The notion of “respect” is not clear cut especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case.’⁸⁵ This might just mean that the margin of appreciation is larger when it comes to considering how the positive obligations are calibrated to local conditions; but it could also mean that it is intrinsically harder to establish how far a positive obligation, derived from the concept of ‘respect’, should go at all.

Indeed, it obviously should mean that – because the list of positive measures that could potentially be taken, not just to carry out a duty of ‘respect’, but to facilitate, protect, advance or otherwise ‘secure’ any right, will be not just long, but open-ended by its very nature. As Steven Greer has observed, ‘even when a positive obligation has been officially recognized, its scope may be difficult to predict.’⁸⁶ (Whilst it is doubtful, for example, whether the UK Government could have predicted, when it was taken to the Court over its enforcement of planning law against a gypsy, that it would be told that it was under a ‘positive obligation ... to facilitate the gypsy way of life’, the full scope of this obligation must be even more unpredictable.) And the problem can only be compounded when the principle of ‘horizontal effects’ is at work, since both the extent and the very status of this principle are obscure. As one of the most authoritative guides to the Convention puts it, such a rule ‘does not imperatively ensue from the Convention’; it is ‘a multifarious phenomenon about which general statements are hardly possible’.⁸⁷

We have already seen how an argument has been constructed for bringing social and economic rights into the Convention, by saying that their fulfilment is instrumentally necessary in order to secure the rights that are actually stated in that text.⁸⁸ Social and economic rights typically do take the form of positive obligations on the state. So far, the Court has been relatively restrained in its promotion of them. In *Chapman* (the case involving the gypsy’s caravan) it even said:

It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does any of the jurisprudence of the Court acknowledge such a right. While it is clearly desirable that every human being have a place where he or she can live in dignity and which he or she

⁸⁵ *Ibid.*, para. 248. This phrasing was taken from *Johnston and Others v. Ireland*, para. 55.

⁸⁶ Greer, *The European Convention*, p. 215.

⁸⁷ van Dijk *et al.*, *Theory and Practice*, p. 32.

⁸⁸ Above, pp. 79-80.

can call home, there are unfortunately in the Contracting States many persons who have no home. Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision.⁸⁹

Yet although that denial of a direct positive obligation seems secure at present, it is not at all clear why it should remain so; the flexibility and fluidity of the concept of 'respect' could easily ensure that 'respect for home life' comes, eventually, to encompass the provision of a home. Writing just as the Human Rights Act was coming into force, Professor Gearty observed:

Does the country spend enough on health care? on facilities for the disabled? on education? Such questions could be answered in the negative by the courts and different priorities imposed through the deployment of Articles 2, 3, 8, the right to education in the first protocol, and the notion of positive state duties. But if this were to happen, what would there be left for the legislature to do? ... Of course there will always be grey areas ... But well-meaning though so many human rights practitioners are, the Human Rights Act neither is nor should become a substitute for politics.⁹⁰

⁸⁹ *Chapman v. UK*, para. 99.

⁹⁰ C. Gearty, 'Tort Law and the Human Rights Act', in T. Campbell, K. D. Ewing and A. Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford, 2001), pp. 243-59, at pp. 256-7.

5

The Nature of Human Rights

Minimal Standards

Several reasons were given above why large-scale rights expansion is undesirable. One more should be added here. As human rights law concerns itself with solving more and more problems (some of them quite minor) in different areas of human life, it goes increasingly against one of the basic principles of human rights: their ‘minimalist’ nature.

To begin with, it is obvious that human rights are concerned with only some special parts of the general field of moral actions. As writers on this subject have long recognised, there are many things that are morally good – promise-keeping, gratitude, respect for one’s parents, to give just a few examples – that do not belong to the special area of human rights. When the person I have taken trouble to help shows no gratitude, or the person who has made me a promise breaks it, I suffer from morally bad actions, and we can say that I am morally wronged; but my human rights as such are not infringed. To take human rights as embracing the whole range of things that are morally good would be not only impractical, but conceptually mistaken.

Even if the application of them gets enmeshed in policy judgments and assessments of countervailing interests, human rights are assumed in the first place to have an exceptional kind of value – that, after all, is the justification that is given for setting up a special human rights regime in law. And there is an obvious relationship between the ‘maximal’ nature of that value and the ‘minimal’ nature of the rights (minimal, that is, in comparison with the whole field of moral action). As David Miller has put it, the traditional assumption is that human rights are ‘powerful

demands that can only be overridden in exceptional circumstances. If they are to retain this force, they must be quite narrowly construed.’¹

This is evident in the case of the civil and political rights set out in the European Convention: only the most serious maltreatment is covered by Article 3, for instance, and the article on the right to a fair trial (Article 6) sets out the minimal conditions for justice in court, leaving many other aspects of the process to be decided.

One might expect that minimalism would be even more obviously displayed in documents stating social and economic rights, because of the open-ended quality of rights of that kind. Surprisingly, the International Covenant on Economic, Social and Cultural Rights expresses some of the rights in almost maximal terms: ‘the widest possible protection and assistance ... to the family’ (Article 10); ‘the continuous improvement of living conditions’ (Article 11); and even, extraordinarily, ‘the highest attainable standard of physical and mental health’ (Article 12). Huge difficulties would surround the implementation of these rights in any system of judicial enforcement of the Covenant – which may be one reason why the number of countries to have signed up even to the UN’s mild and non-judicial version of enforcement is so remarkably low.²

While the drafting of that document seems to have taken an exorbitant turn, most mainstream theorising about human rights, including social and economic ones, has stressed their minimal quality. Henry Shue, one of the most influential thinkers on the social and economic side of the argument, has written that the purpose of human (or, as he calls them, ‘basic’) rights is ‘to provide some minimal protection against utter helplessness to those too weak to protect themselves’. Such rights ‘specify the line beneath which no one is to be allowed to sink ... Basic rights, then, are everyone’s minimum reasonable demands upon the rest of humanity.’³ Allen Buchanan, summarising the standard view of modern theorists, writes that the doctrine of human rights is not a ‘comprehensive’ conception of morality or of the good, but only a theory about ‘minimal moral standards’.⁴

So: if this minimalist account states a general truth, derived from true propositions about the essential nature of human rights, one could hope that an argument based on such truths could be used to determine where exactly those

¹ D. Miller, ‘Joseph Raz on Human Rights: A Critical Appraisal’, in R. Cruft, S. M. Liao and M. Renzo, *Philosophical Foundations of Human Rights* (Oxford, 2015), pp. 232–43, at p. 240.

² See above, p. 10, n. 2.

³ H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd edn (Princeton, NJ, 1996), pp. 18–19.

⁴ A. Buchanan, ‘Taking the Human out of Human Rights’, in R. Martin and D. A. Reidy, eds, *Rawls’s Law of Peoples: A Realistic Utopia?* (Oxford, 2006), pp. 150–68, at p. 153.

minimal moral standards should be situated. It might then be possible to appeal from the legal to the philosophical, and to demonstrate that even if some forms of rights expansion are compatible with a possible legal reading of the text of the Convention, they run contrary to the first principles which should dictate to us what the real human rights are and where their limits lie. While this might not stop the lawyers or the judges, who have to work on an essentially legal-textual basis, it could inform a wider debate, leading perhaps to new protocols to bring the Convention into line with objective truths about human rights.

Maximal Uncertainty

All that is needed, then, is to set out the clear first principles, and establish the objective truths that flow from them. And this surely should not be difficult; eminent thinkers have been exploring the foundations of human rights theory for many decades. Besides, the assumption that statements of human rights express objective truths has been fundamental to the whole development of human rights law.

And yet, and yet ... it is possible to read large numbers of well-esteemed treatises and articles on the philosophical basis of human rights, without gaining any sense that there is even a widely accepted theory – still less a theory which has been demonstrated to be the only correct one. In 1999 Jeremy Waldron (one of the leading thinkers in this whole field) remarked that ‘No one in the trade now believes that the truth about rights is self-evident ... In the thirty years or so of the modern revival of the philosophical study of rights, there has been a proliferation of rival theories and conceptions’; nearly twenty years later, the proliferation is all the greater, and so is the lack of basic agreement.⁵

There are various theories deriving human rights from philosophical foundations (some of which will be briefly sketched below), but each is open to some objections, and none has commanded general assent. Quite often the theorists begin by commenting on the frustrating lack of certainty, and this may be one of the few things in their argument with which all their rivals can agree. Thus James Griffin writes: ‘It is not that the term “human rights” has no content: it just has far too little for it to be playing the central role that it now does in our moral and political life. There are scarcely any accepted criteria, even among philosophers, for

⁵ Waldron, *Law and Disagreement*, p. 225.

when the term is used correctly and when incorrectly.’⁶ Michael Rosen expresses a similar view: ‘Human rights are obviously deeply puzzling – almost everyone nowadays professes commitment to them, yet few people would claim that they had a good, principled account of what they are and why we have them.’⁷

If this situation is troubling for moral philosophers – some of whom have simply given up, concluding that it is not possible to set human rights on a philosophical foundation – it should be positively embarrassing for those people, both academic and professional, who defend and develop the principles of human rights law itself.⁸ The foundational legal instruments themselves offer little help – though, admittedly, one would not expect such documents to contain any extended theoretical disquisitions. As Michael Ignatieff has noted, the Universal Declaration (like all subsequent human rights instruments, including the European Convention) makes no attempt to characterise the foundations of the rights: ‘There is thus a deliberate silence at the heart of the human rights culture. Instead of a substantive set of justifications explaining why human rights are universal, instead of reasons that go back to first principles ... the Universal Declaration ... simply takes the existence of rights for granted.’⁹ Indeed, the story is told that Jacques Maritain, the prominent Catholic philosopher who took part in some of the discussions that led to the Universal Declaration, once said: ‘Yes, we agree about the rights, but on condition that no one asks us why.’¹⁰

The human rights specialists have had long enough, since 1948, to supply an answer and end the silence. Yet if we look at the classic works in this field, we find that the silence is broken only by what might be called whistling in the dark. Thus Louis Henkin writes: ‘The contemporary version [of human rights theory] does not ground or justify itself in natural law, in social contract, or in any other political theory ... The justification of human rights is rhetorical, not philosophical.’¹¹ And Jack Donnelly’s book, which bears on its back cover attestations that it is ‘The gold standard of human rights texts’ and ‘The preeminent introductory textbook’, deals with the problem as follows:

⁶ J. Griffin, ‘First Steps in an Account of Human Rights’, *European Journal of Philosophy*, 9 (2001), pp. 306–27, at p. 306.

⁷ M. Rosen, *Dignity: Its History and Meaning* (Cambridge, MA, 2012), p. 54.

⁸ Joel Feinberg gave up, concluding that the concept of ‘human worth’ on which human rights depended simply expressed an attitude of respect, ‘not grounded on anything more ultimate than itself’ (*Social Philosophy* (Englewood Cliffs, NJ, 1973), p. 94).

⁹ M. Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ, 2001), p. 78.

¹⁰ Quoted in J. Cohen, ‘Minimalism about Human Rights: The Most we can Hope for?’, *The Journal of Political Philosophy*, 12 (2004), pp. 190–213.

¹¹ Henkin, *The Age of Rights*, p. 2.

How does being human give rise to rights? To answer this question we need a theory of human nature ... Unfortunately, no philosophical theory of human nature has widespread acceptance. Furthermore, many moral theories, and their underlying theories of human nature, deny human rights ... In what follows I assume that there are human rights; that is, that we have accepted some sort of philosophical defense for the existence of human rights. This theoretical evasion is justified by the fact that almost all states acknowledge the existence of human rights.¹²

With some hard-to-pin-down concepts, tracing their history may be one way of getting an idea of the foundations on which they stand. But accounts of modern human rights theory which try to set out its historical origins have offered little or no help. One recent triumphalist history of human rights, which begins with the Vedas, the Upanishads and the Book of Genesis, treats the rights as essentially timeless, and pauses for the first time only after more than 200 pages to mention – though not in any way to answer – some ‘fundamental and not easily answered philosophical questions that had been asked for centuries and that continue today. What exactly are “human rights” and what is their source? Do they come from God, or Nature, or something else? ... How does one justify human rights?’¹³ A more sophisticated account of the modern history has, in the end, little more help to offer: ‘The language of human rights is fluid. The term has meant widely different things at different points in time. It may be too much to say that “human rights” is an empty signifier, but ... that seems to be a useful starting point.’¹⁴

It is of course the case that many very important issues – in morality, religion, etc. – are subject to general disagreement. It would be foolish to suppose that all true theories must be universally agreed, or for that matter that all universally agreed ones must be true; neither supposition is made here. But the lack of even elementary agreement on this topic is nevertheless troubling, for a particular reason. Human rights are presented as taking priority over ordinary law and democratic policy-making, not merely because our government happens to have signed a convention to that effect, but because it is thought that they are of such overriding importance, on an objective scale of values, that even democratic legitimacy should give way to them. That is a huge claim. One might expect, then, that if we ask ‘so what are these

¹² Donnelly, *International Human Rights*, pp. 23-4.

¹³ P. G. Lauren, *The Evolution of International Human Rights: Visions Seen*, 3rd edn (Philadelphia, 2011), pp. 208-9.

¹⁴ K. Cmiel, ‘The Recent History of Human Rights’, in A. Iriye, P. Goedde and W. I. Hitchcock, eds, *The Human Rights Revolution: An International History* (Oxford, 2012), pp. 28-51, at p. 35.

human rights, where do they come from, and what justifies their exceptional status?', we should get a clear answer that commands at least very widespread – if not universal – assent. Otherwise we may be left wondering why, if we do not really know what they are or why they have the particular specifications that they allegedly have, we should submit (intellectually, not just legally) to their peremptory force.

The Moral-Philosophical Approach to Human Rights

Almost all the available theories about the origins and nature of human rights treat this subject-matter as a branch of moral philosophy. In other words, they assume that we must start by looking at the nature of human beings, and use some method to deduce the values, norms, rules, etc., that should apply to human beings as such. Overall, this sort of approach may be expected to yield general moral principles, and human rights will emerge as a special category or sub-set within that field.

Immediately such theories come up against an obvious problem: if human rights are to be derived from the nature of human beings as such, they must presumably apply to all humans, in every time and place. As we have seen, Louis Henkin has confidently written that 'Human rights ... belong to every human being in every human society'.¹⁵ So the list of human rights which we currently use (including the International Covenant on Economic, Social and Cultural Rights) should have been equally valid for the inhabitants of Neolithic Africa, ancient Sumeria, Roman Britain and Ming Dynasty China. This hardly chimes with the way we actually use the concept of human rights today – still less, with the fact that the whole theory of human rights is itself such a recent phenomenon in cultural-historical terms. To cope with this problem, those who deduce human rights from fundamental features of human nature often struggle to incorporate some element of cultural relativism into their universalist account.¹⁶

Leaving that on one side, however, let us look at how these moral-philosophical deductions work. A wide range of current theories start from the idea that human beings have certain interests of a peculiarly human kind. It is the most important of these human interests, we are told, that create a situation in which others have duties towards us; in such cases – or, at least, a special sub-set of such cases – we have human rights, to which other people's duties towards us are the counterparts.

¹⁵ Above, p. 19.

¹⁶ See the discussion of this problem in J. Tasioulas, 'Taking Rights out of Human Rights', *Ethics*, 120 (2010), pp. 647-78, at pp. 668-72.

While the theorists do their best to find a place for basic physical needs in these accounts, the main focus is on ‘interests’ of a more abstract and value-laden kind. Thus it is said that human rights are concerned with the ‘interest’ of personhood, or dignity, or moral agency, or autonomy. On one rather expansive account, the human dignity which they protect requires no fewer than ten ‘human capabilities’, including emotional life, play, and control over one’s environment.¹⁷ Some theories, like that one, focus on multiple interests, while others try to trace the origin of human rights to a single one. In every case, what they are describing is some essential aspect or aspects of human nature. (Note that this is human ‘nature’ not in a narrow physical sense, but in a sense that includes those fundamental desires and values that are inherent in being human.)¹⁸

With all of these sophisticated theories about the basis of human rights, the essential human interests include – or in many cases focus on – a person’s ability to make choices. (Hence the prominence of terms such as ‘agency’ and ‘autonomy’.) It is a little confusing, therefore, that an older debate about the nature of rights in general has divided views into so-called interest theories and so-called choice (or will) theories. The argument of the choice theorists here was that there is some special extra element involved in the concept of a right, which is not captured just by talking about people having interests.

One way of putting the point is to ask what we would lose if we stopped talking about rights altogether, and referred instead only to the duties that are incumbent on others. A right which is a pure interest, such as a baby’s interest in being fed, can be expressed just as well in terms of the duty of the responsible adults to feed it; nothing, it seems, is lost if we switch the argument over in that way. A person’s right not to be subjected to severe pain, similarly, can be rephrased in terms of a fundamental duty not to inflict severe pain on people. But a person’s right to freedom of speech does have an extra element: it is a right which that person can exercise, making choices as he or she does so. To try to rephrase this simply in terms of other people’s duties to respect that freedom feels awkward, as the freedom itself remains the primary term in the argument.

Those modern theories (the majority) which emphasise this element of choice in human rights – on the grounds that agency or autonomy is a fundamental interest – have also to find room for rights to some elements of physical well-being. Sometimes the two types of right are just yoked together in an uncoordinated way,

¹⁷ M. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA, 2006), p. 77.

¹⁸ On this point see J. Griffin, *On Human Rights* (Oxford, 2008), p. 35.

but sometimes it is said that the physical claim-rights are there because they serve an instrumental purpose, providing the basic conditions for agency: you cannot begin to act properly as an agent unless certain physical requirements are already satisfied. (There are problems with such an approach, and this area is often something of a weak point in the theory.) But the two sides of the old ‘interest v. choice’ debate certainly do need to be brought together in any account of the basis of human rights, because the standard listings of human rights include both simple ‘claim-rights’, such as the claim not to be tortured, and ‘liberty-rights’, such as freedom of expression. However the equivalent list of duties is constructed, it must be able to contain the corresponding duties of both kinds.

But this is where the really difficult questions are located for all the modern ‘interest’ theories of human rights: why should my interests generate duties for others at all?¹⁹ And, if they do, how do we limit the field to those special duties that involve respect for human rights, as opposed to all the other duties that can flow from recognising and respecting people’s interests?

The first question raises some very general issues in moral philosophy, about how facts of human nature generate specifically moral values, and about why it should follow that if something is of value to me, I am bound to respect the value of it to other people too. Often, on closer inspection, one finds that the interest theory of human rights has smuggled the moral value into the premises of the argument (by using a term such as ‘dignity’, for example), and that the requirement to treat values as universal is similarly presupposed. What we are then looking at is really a pre-existent moral theory, applied here in terms of interests and rights but not in fact deriving from those concepts.

The question about how the field of interest-related duties can be limited to the ones that involve respect for human rights is a particularly troubling one for all these theories. One leading expert puts forward two primary conditions for recognising that there is a human right to X: having X must serve people’s ‘basic interests’, and ‘The interest in having X is, in the case of each human being and simply in virtue of their humanity ... of sufficient importance to justify the imposition of duties on others.’²⁰ Even if we possessed a compelling theory about how any interest can

¹⁹ For some penetrating critical remarks on this point, in relation to rights generally, see N. E. Simmonds, ‘Rights at the Cutting Edge’, in M. H. Kramer, N. E. Simmonds and H. Steiner, *A Debate over Rights: Philosophical Enquiries* (Oxford, 2000), pp. 113-232, at pp. 195-204.

²⁰ J. Tasioulas, ‘On the Foundations of Human Rights’, in R. Cruft, S. M. Liao and M. Renzo, *Philosophical Foundations of Human Rights* (Oxford, 2015), pp. 45-70, at pp. 50-1.

impose duties on others, we would still need some definite way of deciding which interests were 'basic' and which were 'of sufficient importance' here.²¹

The general implication of this type of theory seems to be that there is a continuous, rising scale of interests, and that there is a threshold or cut-off level, above which they are all so important that they must generate human rights, with powerful duties on others. This in itself is quite implausible. For many people, one of their very strong human interests is in being loved, with the enjoyment of reciprocal love among the strongest of them all; yet no one claims that this interest, however powerful, imposes a duty on anyone, still less that it generates a human right.²² For boys or girls with special musical talent, having high-quality tuition may be the strongest interest they have, something of crucial importance to what will be the greatest source of value in their adult lives; we can all agree that giving them scholarships to the best conservatoires is desirable, and can commend a government policy that makes that possible, but do we really think that failing to ensure such tuition is a violation of human rights?

If we do accept the 'ascending scale of interests' picture, we still need a way of deciding where the threshold level should be located on it. Sometimes it is just assumed to have a natural level, which need not be explained. If reasons are offered, the usual argument is that the important interests are in the things that are needed in order to protect or guarantee the essential human quality of moral agency, personhood or whatever. But this immediately throws the problem back to another question of level: what level of agency or personhood should we have in mind? After all, even a slave can exercise moral agency and responsibility in his or her personal life.

As the philosopher Joseph Raz has pointed out, if human rights operate as guarantees for personhood *tout court*, understood as a human being's capacity for intentional agency, then they may protect against being tortured or forcibly sedated, but they will not include rights against 'slavery, arbitrary arrest and the like, as these conditions do not affect our ability to act intentionally'. ('In fact', he comments,

²¹ This theorist virtually declines to answer the latter question, writing that 'it is doubtful ... that there is a great deal that can be helpfully said, at the abstract level ... about the threshold at which universal interests give rise to duties to deliver the objects of putative rights.' He goes on to argue for one limiting factor, that all the duties must be feasible and therefore compatible with one another, but hardly enters into the problem of the relative allocation of resources which would beset any attempt to assess compatibility (*ibid.*, pp. 57, 59-61).

²² The UN Convention on the Rights of the Child says that every child should grow up in 'an atmosphere of happiness, love and understanding'; but this is an aspirational statement in the Preamble, not a right conferred by an article. Tasioulas does note that romantic love is inherently incapable of being imposed by duty ('On the Foundations of Human Rights', p. 59), so that it fails his 'feasibility' test; but his general scheme implies an ascending scale (with, somewhere, a threshold) where all feasible satisfactions of interests are concerned.

'there could never have been any economic interest in having slaves but for the fact that slaves can act purposively, and thus be useful to their owners.')

²³

To bring the theory closer to the kind of things that human rights actually protect, it is necessary to raise the level of 'personhood', 'agency' or whatever, so that a richer kind of life is implied by it. This means not just living as a person, but living decently, or reasonably well, as a person – which involves, among other things, having a wider range of opportunities for expressing and exercising one's personhood. This applies just as much to 'autonomy', where, even if being enslaved is ruled out, there will still be various degrees of ability to express and fulfil one's autonomy. And with this one step the whole apparent merit of basing one's human rights theory on such a fundamental concept is undone, because it becomes clear that the concept on its own cannot do the work: it needs us to import some other assumptions, which may be arbitrary or at the very least subjective. (Of course, not every theory is founded on a single concept. As we have seen, some posit multiple interests as the basis of human rights; some talk more generally about human flourishing, or living well, which may take many forms. But then, if the theory is not to present a rag-bag assembled in an arbitrary or subjective way, it has to explain why some interests or goods are included and others not – at which point the explanation may revert after all to a single governing principle.)

On the other hand, if one of these fundamental concepts is so fruitful in implications that it can generate the whole range of human rights, it is hard to see why it should stop there. Personhood or autonomy might just as well be used to generate, in a Kantian way, an entire system of ethics.²⁴ So, for example: if I take trouble to help someone and he shows no gratitude, the reason why he thereby commits a moral wrong is that he is treating me as a mere mechanical means to his betterment, not as an autonomous person who chose to help him. Should we then say that I have a human right to gratitude? It might be more theoretically honest to do so, as its derivation would be qualitatively just the same as that of other human rights; perhaps we should just call this one a very minor human right, as opposed to very major ones such as the right not to be tortured. But then we should have parted company decisively with the way in which human rights discourse actually functions.

²³ J. Raz, 'Human Rights without Foundations', in R. Cruft, S. M. Liao and M. Renzo, *Philosophical Foundations of Human Rights* (Oxford, 2015), pp. 321-37, at pp. 324-5.

²⁴ The writings of one famous human rights theorist, Alan Gewirth, point in this direction: see for example his 'The Golden Rule Rationalized', *Midwest Studies in Philosophy*, 3 (1978), pp. 133-47.

The Moral-Philosophical Approach: A Further Problem

To summarise: there are reasons for thinking that this whole project of trying to deduce human rights from some basic feature or features of humanity is flawed and unworkable. But if it does work at all, it is likely to work too well: it will generate not just the body of special rights which was the QED, the thing to be demonstrated, but the whole field of morality. Kantian theories of human rights have a tendency to do this; so too do more old-fashioned theories based on an idea of natural law, which did traditionally serve as the framework for an entire system of moral duties.

One other problematic point needs to be mentioned. If human rights are part of a whole system of moral rights and duties, even if they constitute a special category of ‘important’ moral rights, they are presumably rights towards everyone, imposing duties on everyone. Some theorists accept this quite happily, writing for example that ‘every time a mother puts a baby to her breast’ she is fulfilling her duty to respect the baby’s human rights.²⁵ Some allow it, but with a sense of awkwardness, noting that ‘it may at first seem linguistically odd to speak about human rights being violated when one individual person murders or rapes another.’²⁶

But the oddity is surely more than just linguistic. No one doubts that murder is a terrible thing, and everyone can agree that the ‘right to life’ must stand at or near the top of any listing of human rights. Yet when an ordinary citizen, Mr Smith, kills his neighbour, Mr Jones, and is taken to court, no one talks about how he has violated Mr Jones’s human rights. People will do so only if Mr Smith is a government agent, or a police officer exceeding his powers, or if the framework of law erected by the state has allowed some loophole by means of which Mr Smith might get away with his action. Human rights are held and asserted, above all, against the state.²⁷

How do the theorists deal with this obvious fact, when they are deriving their human rights from general moral principles about how all people should behave towards all people? The standard method is to say that if we hold our human rights vis-à-vis the rest of society, we must hold them against the government because it represents society. In Louis Henkin’s words, ‘Human Rights ... are rights against

²⁵ J. Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia, 2009), p. 45.

²⁶ Miller, ‘Joseph Raz on Human Rights’, p. 241(n.).

²⁷ Some may say that this is merely a contingent consequence of the way in which human rights law has been set up, in terms of the duties of states. Such an argument would have force only if it could be shown that the concept of human rights had a much broader extension beyond and before the creation of such law. In fact it came into general currency only with those legal instruments, and has always been state-focused in its general meaning; the extension of these duties to all individuals has come only from some subsequent theorists, trying (unsuccessfully) to supply a philosophical basis for the existing usage.

society as represented by government and its officials'; for Samantha Besson, 'human rights are entitlements we all have equally against each other, and hence [emphasis added] against our public institutions.'²⁸

But if government is there in a secondary, representative role, surely we ought to be paying as much or even more attention to the human rights duties of the primary role-players: all the other individuals that make up our society. And this we do not do – not just for contingent historical or institutional reasons, but because we sense that this is not, essentially, what human rights are for. It is true that, as we have seen, the doctrine of 'horizontal effects' is now making some headway, in areas such as the maltreatment of people in care homes or the corporal punishment of children by adults; but this is still a fringe phenomenon, introduced in the service of a scheme of human rights enforcement which is concerned entirely with the responsibilities of states towards their citizens. It is not just a historical accident that human rights regimes have been set up in terms of obligations upon states. It is a reflection of some deeper truths about these rights, to which we shall shortly turn.

The Moral-Philosophical Approach: An Example

Before doing so, it may be useful, in order to illustrate some of the problems outlined above, to look in a little more detail at one particular representative of the moral-philosophical approach. When James Griffin, Emeritus Professor of Moral Philosophy at Oxford, published his treatise *On Human Rights* in 2008, it was praised – rightly – as one of the best modern books on the whole subject; the argumentation throughout is searching, lucid and undogmatic, displaying a keen sense of the problematic nature of many current claims (about both human rights and, especially, human rights law), and showing an admirable willingness to admit that some points remain obscure and unsolved. One eminent expert, John Tasioulas, has described it as 'not only the most powerful, fully elaborated contemporary philosophical contribution to the topic, but also one that has put in place many of the foundations on which any future work should build'.²⁹

Griffin begins by identifying the one feature of human nature that most importantly differentiates us from other animals: the fact that we think about values, adopt a conception of a good life, and try to arrange our lives to fulfil that

²⁸ L. Henkin, *The Rights of Man Today* (London, 1979), p. 2; S. Besson, 'The Legitimate Authority of International Human Rights: On the Reciprocal Legitimation of Domestic and International Human Rights', in A. Føllesdal, J. Karlsson Schaffer and G. Ulfstein, eds, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (Cambridge, 2014), pp. 32-83, at p. 51.

²⁹ Tasioulas, 'Taking Rights out of Human Rights', p. 678.

conception, as a long-term accomplishment. Higher mammals may have some kind of agency, and any human consciously performing a task has a kind of rational agency, but this value-driven path-of-life-choosing is special: it is what Griffin calls the 'normative agency' of humans, and for him it constitutes the essential principle of our 'personhood' – the status which each of us has as a human being.³⁰

Personhood, based on normative agency, is of such value that it is the ground of human rights; it is intimately connected with human 'dignity' (though Griffin is less than clear about the exact nature of that connection).³¹

There are three phases in his argument, as follows. First, to be an agent one must 'choose one's own path through life'. Secondly, 'having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes.' And thirdly, 'others must also not forcibly stop one from pursuing what one sees as a worthwhile life.'³² The idea is not that every particular life-choice that people actually make generates human rights, but rather that the human rights protect, in a more general way, the basic capacities that are involved here: autonomy, for making important life-choices; education and a certain level of welfare support, for being able to act on those choices; and liberty, i.e. not being interfered with, when one tries to live the life that one has chosen.

No reader of his book will doubt that Griffin is discussing aspects of human life that have great moral importance. But a reader may also sense that the way in which they give rise to a set of human rights remains rather unclear. Griffin's phrase about requiring 'at least the minimum provision of resources and capabilities that it takes' raises an obvious question about the criteria that will be used when fixing the level of provision guaranteed by human rights; he admits that there is a 'large middle ground' between bare subsistence and prosperous living conditions, and that his theory does not supply any clear way of deciding the matter.³³ He also admits that there are many other variables, to do with such things as 'quality of life' and what people may think can be reasonably expected of them; he bundles all these problematic issues together under the heading 'practicalities' and announces that practicalities are a second 'ground' of human rights.³⁴ That may seem a handy

³⁰ Griffin, *On Human Rights*, pp. 32-7, 44-5.

³¹ Compare *ibid.*, p. 151: 'autonomy's ... value, on my account, is related to its being a constituent of the dignity of the human person', with p. 200: 'The dignity is ... to be seen as deriving from the value we attach to our normative agency'. Is dignity the primary value (or generator of it), or the derivative one?

³² *Ibid.*, p. 33.

³³ *Ibid.*, p. 183.

³⁴ *Ibid.*, pp. 37-9, 73. While calling practicalities a 'ground', he retains a primary role for the other ground, personhood, noting that 'Personhood initially generates the rights ... From a well-developed form of the idea of personhood, we should be able to derive all human rights' (p. 192).

device for making sure that the theory accounts for everything; but it is really just a way of saying that in order to make his theory produce anything like a recognisable and determinate set of human rights, he must import a variety of other criteria that are left entirely unspecified by the theory itself.

Throughout the book, the emphasis is on ‘normative agency’, which is portrayed in terms of adopting values and making major life-choices, as opposed to the minor everyday decisions through which we normally express our autonomy. Sometimes it seems that for Griffin, human rights will come into play only when there is a threat to the major choice-making: so, for example, he rejects the Universal Declaration’s statement (in its Article 13) that freedom of movement and residence within one’s own country is a human right, on the grounds that, as he puts it, ‘one’s personhood would not be threatened if one were required to live in a particular place, so long as the basic amenities were provided.’³⁵

Yet in other parts of his argument there is a suggestion that the more minor forms of autonomy may also be protected insofar as they are part and parcel of being the sort of person who can make the major decisions: at one point he concedes the possibility that my being told which clothes to wear ‘might threaten my status as a self-determiner’.³⁶ There is much uncertainty here about where to locate the threshold of seriousness or significance above which human rights will exert their protection, and below which they will not.

Torture is of course above that threshold, and at first sight Griffin’s argument seems well qualified to explain why it breaches a human right. Torture aims at undermining a person’s will; to undermine someone’s will is to attack his or her normative agency, and that, Griffin argues, is what makes it a human rights violation – as opposed to the infliction of great pain, which is a serious moral wrong but does not raise the human rights issue.³⁷ But again, if that is the sole factor that makes torture a breach of human rights (as opposed to, say, the fact that it is a gross abuse of governmental power), might there not be many smaller-scale cases of psychological coercion in ordinary life, on a spectrum ranging downwards from abusive and controlling husbands to ingeniously manipulative advertising, where that same factor will also be involved? Will all of those be violations of human rights? And on the other hand, is not a lengthy prison sentence a very serious infringement of any person’s ability to make long-term life choices? Yet we generally assume that fifteen minutes of torture in a police cell is a human rights

³⁵ *Ibid.*, p. 195.

³⁶ *Ibid.*, p. 170.

³⁷ *Ibid.*, pp. 52-3.

violation, while a fifteen-year prison sentence lawfully handed down to a convicted criminal is not.

Similarly, Griffin's explanation of why freedom of expression is a human right is that normative agency, the making of major choices, requires the availability of information. As he puts it, 'to be a tolerably successful self-decider typically requires an ability to ask questions, hear what others think, and so on.'³⁸ That is true, but does it really capture what it is that we think is so wrong when this particular human right is violated? Suppose that my local newspaper is about to expose a local businessman for serious corruption; the businessman has powerful friends in the government, who send government agents to threaten and coerce the editor into dropping the story. Is this a human rights violation because information about that man's corruption might have been useful to me, or to other people, in forming our life-choices? (Perhaps it might, in a very marginal way; but then this act of suppression would seem to be a much less serious violation of Griffinian human rights than the closing down, for almost any reason, of a careers advisory service.) Surely the wrongness of the government's action is to be located not in that rather remote line of thought, but in the fact that the action is a fundamental abuse of state power.

Some defenders of Griffin's argument might wish to say at this point that the connection with normative agency does not have to be established in every particular case; Griffin has explained why the free flow of information is connected with human rights, and that should be enough to show that the general institution of a free press is protected by those rights. Yet at key points in his argument he does tie the human right much more closely than that to the nature of the thing it protects: he defines freedom of expression as 'freedom to state, discuss, and debate anything relevant to our functioning as normative agents', and the right to information as 'a right to the information needed to function as a normative agent'.³⁹ Again, either the rights will be significantly narrowed by this approach (perhaps excluding altogether the case of the newspaper article, for example), or the scope of the phrase 'normative agency' must be broadened to take in a much wider range of choosing and acting than just the long-term life-choices on which the theory is ostensibly built.

³⁸ *Ibid.*, p. 49.

³⁹ *Ibid.*, pp. 239-40. To his enumeration of the contents of the latter right he adds: 'and, in a democracy, [a right] to information about the issues before the public' (p. 240). But the relationship that may hold between his 'normative agency' and the further forms of activity and choice-making involved in citizenship is never clearly explained.

But then, in a further discussion of freedom of expression, Griffin adds a new element, with rather startling implications for his overall account. Freedom of expression generally is protected by human rights because we need it ‘to decide our ends in life’. Freedom of artistic expression may also enjoy that protection, for that reason. But even when, as may happen, it contributes nothing to that purpose, he argues that it will still be covered by human rights, since ‘it may be a part, not just of deliberating about, but also simply of having a good life.’⁴⁰ Suddenly a whole new prospect opens up in Griffin’s theory: there are some things, such as art, that have such an intrinsic value that they are ‘simply’ part of ‘a good life’; they are protected by human rights because they are valuable *per se*, not because they relate in any special way to normative agency. (People exercising normative agency will often choose them, of course, but they may also choose other things that are not simply part of a good life, and those will not merit this direct human-rights protection.) What seemed to be the main merit of the theory, its ultimate derivation of all rights from a single principle, is thus put in doubt; it now looks more like a hybrid of a single-principle theory and one based on multiple intrinsic goods – with no clear criterion for saying which goods are the intrinsic ones and which are not. And the reason for this unsettling development is quite clear: the ‘normative agency’ account on its own would not allow Griffin to say that artistic expression in general – like, perhaps, several other important elements of a good life – was protected by human rights.

Finally, it is worth pointing out that Griffin’s theory, for all the many uncertainties it generates, is quite clear on two points: extending the range of bearers of human-rights duties, and limiting the range of holders of the human rights themselves. Where the duty-bearers are concerned, governments may have some special reasons (hinted at but not explored by Griffin) for attending to positive ‘welfare’ rights, but the primary reason why those duties fall on them is simply that they have the ability to help.⁴¹ All these duties may also fall on individuals; the whole theory belongs to moral philosophy, so the duties it produces may apply to all the human beings – as individuals, or as members of groups or organisations – that are capable of fulfilling them. At one point, for instance, Griffin suggests that pharmaceutical companies in America or Europe have a human-rights duty to help AIDS sufferers in Africa by lowering their prices.⁴²

⁴⁰ *Ibid.*, p. 193.

⁴¹ *Ibid.*, p. 102.

⁴² *Ibid.*, p. 106.

Many people might agree that those companies are under some kind of moral duty, but Griffin's suggestion goes further than that: this is a human-rights duty, which means that by not reducing their prices they are actually guilty of a human rights violation. Current legal arrangements mean that it may not be possible to obtain a court judgment to that effect; but, given the huge importance of human rights, Griffin's argument could be taken to imply that the arrangements should be changed to make it possible. And while this particular example seems very specific, apparently resting on the special nature of those companies' products and a life-threatening disease, the general argument could be developed much more widely, to embrace many cases of one set of people somewhere in the world needing help to safeguard their normative agency, and another set, there or anywhere else, having the capacity – if only financial – to give it.

As for the holders of human rights: here Griffin follows the logic of his argument, and states that infants, people in irreversible comas, sufferers of advanced dementia and the seriously mentally defective do not have human rights – because they do not have the capacity for normative agency.⁴³ Of course, he emphasises, we all have strong moral duties of care towards them; but they are not holders of these special rights, so no maltreatment of them will be a human rights violation, even though it may be a grave moral wrong. Many readers, surely, will feel that Griffin's argument has parted company here with some of their own basic assumptions.

To conclude: these critical remarks are offered here not because there is anything about Griffin's theory of human rights that makes it, compared with other accounts, especially deserving of criticism. Quite the contrary: it is, as was said at the outset, one of the most impressive theories of its kind. The point is to illustrate a larger problem. Any theory which starts with trying to locate an essential value inherent in human nature, and then builds up the argument in order to reach a stage where it will map (at least roughly) on to the existing list of human rights, will be subject to all kinds of difficulties. To work at all, it must rely on the smuggling in of other criteria, which may derive from other, unstated reasons, or from more or less arbitrary choices; and thus the force of reasoning from those first principles – which, if they are agreed to be objectively true, is meant to confer objective truth on the conclusions – is hugely weakened. In any case, it seems likely that there is no one principle or value that will yield the desired results, even with the help of such manoeuvres. We are always left with an account which, even if some of it roughly

⁴³ *Ibid.*, pp. 92, 94-5.

correlates with the basic list of human rights that we do accept, either has some theoretical consequences which we are impelled to reject, or leaves us with the feeling that it has simply failed to capture our essential sense of what is wrong when we consider actual human rights violations.

A New Approach: Human Rights and Political Wrongs

In the old joke, the driver in rural Ireland who stops to ask a local person if he knows the way to Dublin receives the answer: 'Yes, but I wouldn't start from here.' In order to make sense of human rights, we need to find a different starting-point. To begin by studying the nature of a human being, in the hope of being able to derive all human rights from that initial point, is to guarantee innumerable difficulties and uncertainties. Indeed, to treat the problem as essentially a matter of moral philosophy is to misunderstand it from the outset. For human rights belong, fundamentally, not to moral philosophy but to political theory. Human rights are concerned with political wrongs.

We invoke human rights against the state, to criticise its actions, its policies and its laws – or to demand new policies and laws which it has failed to adopt hitherto. Human rights are so important because they summarise the deepest and the most urgent criticisms that we can make of a government. Any regime which regularly violates human rights is acting oppressively, tyrannically, despotically.⁴⁴ Particular actions of this kind must be quickly restrained and corrected. If there is a more general tendency or policy of acting in this way, it will lead to a situation in which disobedience by the citizens is justified – passive at first, perhaps, but in the end active too.

State power is special. It is hugely greater than the power of individuals or other ordinary legal persons within the state, and so its misuse can be quantitatively much greater in its effects. But the point is qualitative too. Because of the special authority it holds, the state exercises powers which would be quite illegitimate if exercised by others: a man who knocks down my door, seizes me and takes me off to be locked up somewhere is committing grave crimes if he is a gangster, but a public service if he is a policeman with proper grounds for my arrest. The legitimacy of such actions by officers of the state depends ultimately on the legitimate authority of the state itself, and it is that authority that becomes compromised when there is a pattern of human rights violations.

⁴⁴ These terms are used here as rough synonyms. In some contexts political scientists or historians will need to make distinctions between them, but here the usage is simply concerned with gross abuses of governmental power.

It is the concept of legitimacy that is central here. Why do we regard the state authorities as legitimate? There may in some cases be background considerations of a historical or traditional kind, but in any modern society of a broadly democratic or would-be-democratic nature, the essential reasons are to be located in what we require the state to do for us: it must provide a framework of security, it must supply a system of justice, it must respect our citizenship, and so on. ('Would-be-democratic' here is meant to cover those countries where the people want and expect democratic government, even if that is not what they currently experience – whereas a non-democratic society would be one in which a non-democratic government was generally accepted, on other grounds, as legitimate.) Of course, different societies may have slightly different lists of essential requirements; a basic framework of welfare provision is now thought to be essential in all developed societies, but was not so regarded a century ago. This way of looking at human rights makes it easy to see why a certain degree of cultural relativism must apply to how they arise and how they function.

So, these legitimating factors are the essential requirements – variable to some extent between different societies, but of fundamental importance – that constitute our human rights. It may be that not every essential duty of the state is to be expressed as a human right; the duty to maintain some kind of defence force for the protection of the people against external threats is not directly associated with a human right, though it has an indirect relation to the citizens' right to life. But overall, the essential duties of the state insofar as it acts on its citizens are included: the duty not to kill them, not to torture them, not to arrest them arbitrarily or hold them in detention without trial, the duty to let trials take place fairly without intervening to skew the result, the duty to let people express their opinions and gather in public meetings, protest marches and political parties, and so on.

It is because these are fundamental duties, on which the legitimacy of state authority depends, that they must be interpreted in a reasonably 'minimalist' way. A government may be sloppy, negligent and to some extent corrupt, and its incompetent economic policy, for example, may gradually weaken its provision of public services, but none of those things counts as tyranny or oppression. Internal political action by the citizens is needed, to remedy these defects. A government may pass laws that distribute some burdens in a less than perfectly proportionate way, yet that is not tyranny or oppression either – again, the appropriate response consists of citizens taking political action to change the law. Similarly, if the citizens of a modern developed state want it to supply a higher level of welfare, they can campaign and vote to bring that about. What would shake the legitimacy of the

regime would be if it deliberately reduced welfare to below the minimum level that citizens feel that it absolutely must provide.

A sceptical reader, or a committed moral-philosophical theorist of human rights, may by now be asking: but how does this theory explain the value of these important minimal things? If things such as justice, non-torture, freedom of expression and a basic level of welfare are so good that the failure to provide them undermines the legitimacy of government, surely the theory must say why they matter so much? And when it tries to do so, will it not find itself in the same position as all the moral-philosophical accounts of human rights, trying to set out the fundamental principle or principles from which the values of these important things can be demonstrated?

The answer, quite simply, is no: this approach to human rights does not need to explain why each of these important goods is in fact good. It is sufficient to know that they are held as special goods in a political context – that is, that they are valued so strongly by the culture and society in question that a regime which removes them undermines its own legitimacy. We do not need human rights theory to deduce, from first principles, that murder is wrong. We know that already.

By the same token, this approach is mercifully free from any requirement to prove that all of these important goods are somehow derivable from the same underlying principle. The whole range of essential things, from fair trials to basic welfare, can be adopted in a spirit of untroubled pluralism. (Whereas on the moral-philosophical approach, even those who talk about a plurality of basic interests are obliged to give some overarching reason why this particular set of diverse interests is to be included, and others excluded.) Likewise, this approach is fully at ease with the fact that the standard listing of human rights bundles together, in a theoretically untidy way, both claim-rights and liberty-rights; and it can also accept that some human rights are more absolute, less derogatable or limitable, than others.

Another point needs to be emphasised here. In saying that we all know that murder is wrong, we do not need to suppose that there is one theory of its wrongness to which all members of our society must subscribe. Some may see it as wrong because they are religious believers who think divine commandments must be obeyed; some may be Kantians, or virtue ethicists, or rule-utilitarians, and many will just be unreflective people who regard the idea of murder with horror. The only important thing is that they do think that murder is wrong and that a regime which sets about murdering its citizens loses legitimacy.

The same applies to other human rights: different citizens might have very different reasons for wanting freedom of expression, or at least a basic welfare system. Beyond their underlying agreement about the political importance of these things, there is no reason to expect them to have the same ethical beliefs, the same

idea of a good life, or the same vision of an ideal society. All that is required is what the political philosopher John Rawls called an 'overlapping consensus'.⁴⁵ So there is, in effect, a double pluralism here: this approach to human rights can accept that the rights themselves are inherently plural, and it can also recognise that there may be a plurality of ways in which people come to think that any given right is of essential significance.

And this, surely, is one reason why human rights are so important in modern societies. Our political and social life does not rest on a homogeneous culture or a monolithic system of beliefs. (Let us leave aside the question of to what extent it ever did – much less than is often supposed, no doubt, but still, more than it does now.) One of the chief merits of human rights is that they give us a way of talking about matters of essential value, without requiring all of us to share any particular set of religious or ethical beliefs. But while they do not make such a positive requirement, they do set some negative limits: there will be extremists whose beliefs lie some way outside the overlapping consensus.

There are some interesting theoretical questions to be pursued – though this is not the place to pursue them – about how those limits will be determined. The concept of 'legitimacy' used here also needs to be filled out in various ways. It will of course mean significantly more than just popular approval as measured by opinion polls; and it must be considered to be at stake in any situation where some citizens would have good reasons for withdrawing allegiance, reasons that are justified in the light of the basic assumptions current in that society about the duties of the state towards any of its citizens. The concept of the legitimacy of any broadly democratic system of rule includes, or presupposes, a basic requirement that citizens be treated equally. This theory, as has already been emphasised, is concerned with democratic or would-be democratic societies; and that suggests that some framework conditions can and should be derived from the nature of democracy itself. Beyond that, however, the set of value-judgments on which legitimacy is based will be subjective, in the sense that political consent is subjective: it depends on what the people think are the most valuable tasks that the state should perform for them, and on what they think will constitute unacceptable breaches of those duties. Yet while from our theoretical viewpoint we can call this subjective, we can be sure that, unless the population is bewitched or psychopathic, the values in

⁴⁵ J. Rawls, *Political Liberalism* (New York, 1993), pp. 133-5, 144-64; cf. also C. Taylor, 'Conditions of an Unforced Consensus on Human Rights', in J. R. Bauer and D. A. Bell, eds, *The East Asian Challenge for Human Rights* (Cambridge, 1999), pp. 124-44.

question will be chosen not arbitrarily, but on the most serious grounds available within their moral and political thinking.⁴⁶

In one important way the term 'legitimacy', as used here, has a more limited meaning, in comparison with its general use by those who write about rulers and the ruled. It applies not to every regime in history that has managed to gain the broad acceptance of its subjects, but only to ones based on the general modern democratic assumption that legitimacy will be maintained or lost in accordance with the way in which the government serves the people it governs. It is not by mere chance that serious attempts to use the notion of 'human rights' as a principle of politics or law are, historically, very modern, belonging only to the age of democracies (and, most of all, to the age of liberal democracies).

Thus, while historians or anthropologists may talk about the legitimacy of the Inca emperors, there is no real point in our talking about their human rights violations; this does not mean that no evil things were done by those rulers to their subjects, merely that if we are to identify and condemn those evils we should apply our own fundamental moral principles. When the term 'cultural relativism' was briefly invoked above, it was applied to the historically and culturally variable – but essentially modern – list of human rights, not to moral values in general.

For although the adjective in the phrase 'human rights' seems to insist that these rights must always have applied to every member of the human race, this is more a rhetorical strategy (devised very successfully by those who promoted the use of the phrase in the mid-twentieth century) than a real argument. 'Fundamental political rights' would have been a more accurate phrase; it would also have alerted people to the fact that such rights presuppose a certain kind of political context. Moral right and wrong are indeed universal. 'Human rights' are a special kind of right – a whole special programme of rights, in fact – to be asserted vis-à-vis the state, and implying a certain kind of relationship between the state and the people. They do not simply express the truth that the ruling power does something morally bad when it harms the people it rules. They declare that the ruled have a special kind of political claim not to be harmed in a range of ways, a claim which the rulers are under a duty to recognise and embody in laws and procedures.

⁴⁶ This kind of subjectivity is thus very different from the kind criticised earlier in this chapter, which involved the risk that theorists of human rights would just insert their own preferences into the theory.

The New Approach: Final Thoughts

Locating the foundations of human rights in political theory, rather than moral philosophy, thus solves some major problems. As we have just seen, it makes the 'minimalism' of human rights easy to comprehend; this was problematic on the moral-philosophical approach. It accounts easily for the pluralism (twice over) of human rights, whereas many of the moral philosophers struggled to reduce everything to a single underlying principle, and all of them should have been a little troubled by the idea that people might be valuing the actual contents of their human rights for different reasons – different, certainly, from the ones supplied by the moral philosophers. As we have also seen, this political theory approach makes room both for an element of cultural relativism and for an understanding of the essentially modern nature of the whole human rights programme – as opposed to the timeless universalism of a moral theory, which seemed to match up neither with how human rights have been used nor with the historically recent nature of their appearance.

Some traditional theorists – particularly those of a conservative disposition – adopt a purist attitude to human rights, according to which the basic civil and political ones are justified because they impose 'negative' obligations, and the socio-economic ones are highly suspect because (a) they impose positive obligations and (b) they are open-ended. The political theory approach, on the other hand, can easily add positive welfare rights to the classic negative ones, because providing some basic level of welfare is now generally seen to be an essential duty of the state. And at the same time it can solve problem (b), as it supplies good grounds for minimalism in the specification of the human right itself.

There may be other benefits too. For example, the International Covenant on Civil and Political Rights and its sister, the one on Economic, Social and Cultural Rights, both begin with an article setting out the same right:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Commentators have found this sudden and prominent intrusion of a collective right very unsettling. Otherwise, all the rights set out in the Covenants are the rights

of individuals – even minority rights are expressed in terms of the individual who is a member of the minority. Many would prefer that all rights be put in individual terms, though some have complained that the Covenants, and other such documents, were thereby committed to an ideology of Western liberalism.⁴⁷ The historical explanation of this anomalous article on self-determination has never been in doubt: it was a response to strong international desires for decolonialisation. But that has not reduced the theoretical sense of oddity, even among the practising human rights lawyers; and among the moral-philosophical theorists the feeling of awkwardness is or should be intense, as all their theories start by looking at the nature of an individual human being.

Approaching human rights on the basis of political theory deals simply and effectively with this problem. When a colonial regime presides over a population that wants to govern itself, it lacks the legitimacy that the population has the right to demand. The assumption here is that the population is seeking some kind of democratic self-government. A local warlord who just wants to supplant the colonial power and rule for his own benefit does not exercise this human right; for the right is one of ‘self-determination’, and belongs to the ‘people’. But a colonial power, standing against the people’s wish for self-rule, is always guilty of a human rights violation – even if, in all its other actions and policies, it is respecting a wide range of individual rights and freedoms, supplying a good level of welfare, and so on.⁴⁸

Another possible implication of this political theory approach – one that may be equally unwelcome to conservatives – should also be mentioned. At the European Court of Human Rights, the only individuals permitted by the European Convention to have the ‘standing’ required to bring an action are the people who can themselves claim to be victims of human rights violations. (The phrase ‘the only individuals’ is used here because, at the same time, the system does allow one state to bring an action against another one.) Yet a human rights violation is the commission of a wrong not only against that individual, but in some way against the society as a whole; it is, to use old-fashioned language, a breach of the implicit contract between the ruler and the ruled. If my neighbour-but-one Mr Jones is murdered by government agents, I have an interest in the matter in a special way that does not

⁴⁷ See for example the complaint of Conor Gearty and K. D. Ewing about the European Convention: ‘the European Convention is a deeply ideological document. Incorporation would guarantee supremacy to its narrowly individualistic view of society and would then make it impossible or extremely difficult to undermine or overthrow this ideology through the ordinary democratic process’ (‘Rocky Foundations for Labour’s New Rights’, *European Human Rights Law Review*, 2 (1997), pp. 146-51, at p. 150).

⁴⁸ It might be true, in a particular set of circumstances, that if the colonial power granted independence it would lead to civil war, mass-murder, etc. If that truth can be solidly established, it will become a good justification for a generally benign colonial power continuing to violate the right to self-determination; but this will still be a violation.

apply if he just happens to be killed by our mutual neighbour, the unfortunately homicidal Mr Smith.

When, in 1987, the African Commission on Human and Peoples' Rights began to function (that is, the body out of which the African Court on Human and Peoples' Rights later grew), its quasi-judicial procedure did allow for complaints to be sent in by any concerned person, so long as various conditions were met, including the exhausting of local remedies.⁴⁹ (The Indian Supreme Court, which considers human rights issues, also permits people to apply to the Court on behalf of others, but only on the grounds that those other people, the alleged victims, are disabled by poverty, helplessness, etc., from applying themselves.)⁵⁰ In English law, proceedings for judicial review can be brought by a trade union, pressure group or charity in a representative capacity.

The logic of the 'political theory' approach to human rights implies that any concerned citizen should in principle have standing to bring a case. Practicalities suggest otherwise, both because cases typically focus on the history of the state's dealings with one individual with a degree of detail that third parties can hardly be expected to manage, and because of the sheer quantitative problems that may arise if there are millions of potential applicants. But it might be possible – and, if so, it would be desirable – to allow a responsible organisation, with a *bona fide* interest in the matter (as in the law of judicial review), to bring an action concerning a general issue such as a law or a policy which is thought to violate human rights, without waiting for individual victims to come forward.

Finally, it is necessary to return to the point that human rights, on this 'political theory' basis, relate in a special way to more or less democratic societies. Those who think in terms of timeless and universal human rights have difficulties in this area; on the one hand it seems natural to assert a human right to democracy, but on the other hand it feels odd to denounce, for the non-stop violation of that human right, a pre-democratic, non-democratic society where the people are entirely content with their rulers.⁵¹ The political theory approach can reassert the importance of democracy for human rights without experiencing that dilemma.

But this also means that if a human rights system has a special relationship with democracy, it has a special duty not to undermine it. Legitimate democratic

⁴⁹ Sieghart, *International Law of Human Rights*, pp. 420-1.

⁵⁰ Fredman, *Human Rights Transformed*, p. 126.

⁵¹ For a discussion of democracy as a human right from a standard moral-philosophical point of view (with references to the large literature on this question) see S. Besson, 'The Human Right to Democracy – A Moral Defence with a Legal Nuance', in Venice Commission, *Definition and Development of Human Rights and Popular Sovereignty in Europe* (Strasbourg, 2011), pp. 47-75.

government is not merely government that is refraining from committing abuses and oppression; it is government that is carrying out a range of proper functions, including, centrally, the making and implementing of laws.

While it is of course hard to set out in an *a priori* way exactly what the scope of democratic decision-making should be, it is clear that in any democracy the people expect their elected representatives to make decisions on a wide range of important and contested issues. Arguably, indeed, that range should include all the policy issues on which reasonable disagreement can take place among people of good will who have a reasonable degree of understanding of the relevant facts. So when a human rights regime is seen, decade after decade, to draw areas of decision-making away from the democratic legislatures and make them the preserve of the judges – especially when those judges are operating with an unstable mix of partly subjective principles and criteria – there must be serious cause for concern. To undermine democracy is, in a particular way, to undermine the very system of legitimate rule which human rights are intended to preserve.

Other 'Political' Approaches

The approach that has been set out here is described as new, because I have not seen it set out anywhere else. This may reflect only ignorance on my part; I would merely plead that if another author has said all these things already, he or she must have been subjected to some quite systematic neglect, as I have found not the slightest echo of such a work in the standard modern literature on human rights and human rights law.

The standard literature does, however, refer from time to time to a 'political' theory of human rights. What it means by this is something very different. The key writer here was the philosopher John Rawls, who discussed the role of human rights in international law. According to Rawls, human rights 'restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy'. Thus, the fact that a regime is fulfilling the requirements of human rights is 'sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force'.⁵² Human rights are to be understood in terms of the role they play internationally.

⁵² J. Rawls, *The Law of Peoples* (Cambridge, MA, 1999), pp. 79-80.

Other American writers have accepted and developed this view, applying it to the realm of international politics as well as international law. Charles Beitz agrees with Rawls that human rights are ‘justifying grounds of interference by the international community in the internal affairs of states’, and bases his concept of those rights on ‘international political practice’; Joseph Raz likewise sees human rights as ‘rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena’.⁵³

As critics have pointed out, this approach (at least in its pure form), focusing so narrowly on possible reasons for intervening or otherwise acting against a foreign state, leads to a ‘notoriously parsimonious’ list of human rights.⁵⁴ Only the most extreme violations – the sorts of things covered by international humanitarian law and now justiciable at the International Criminal Court, such as genocide, mass-murder and ethnic cleansing – will be widely viewed as justifying armed intervention. It is true that Rawls also envisages other kinds of interventionist action, such as sanctions and blockades, below the threshold of military force; but still the list of rights must be a very short one, including, for example, the right of citizens not to be killed or tortured, but not their right to such things as unrestricted freedom of movement within the state. (And even in cases of killing and torture, intervention is unlikely to be triggered when the victims are not in large numbers.)

Where the violations of the items on that very short list are concerned, they can all be identified simply as gross breaches of basic moral principles, and it is on basic moral grounds – the protection of life and the ending of severe suffering – that another state may in any case justify its decision to intervene. So, whilst it is certainly true that the most important human rights embody or correspond to fundamental moral values, this Rawlsian so-called ‘political’ theory may amount, in effect, to no more than a moral theory applied to international relations, or an international theory based on moral values. It has almost nothing to say about the genuinely political nature of human rights – that is, about how they stand for essential features of the relationship between a ruler and the ruled within a broadly democratic state. The notion of legitimacy invoked here seems to be essentially just that of the privilege bestowed on any state by its sovereignty vis-à-vis the outside world. So this theory shows relatively little interest in how human rights might be

⁵³ C. Beitz, ‘Human Rights and the Law of Peoples’, in D. K. Chatterjee, *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge, 2004), pp. 193-214, at pp. 197, 202-3; cf. also his *The Idea of Human Rights* (Oxford, 2009), which builds on Rawls’s theory; Raz, ‘Human Rights without Foundations’, p. 328.

⁵⁴ Tasioulas, ‘Taking Rights out of Human Rights’, p. 653.

embodied in a state's own system of law, beyond the fact that making such an arrangement would satisfy international requirements.⁵⁵

Modern American writers tend, almost automatically, to think about human rights primarily as principles of foreign policy, as they have so little experience of what is involved in living under a regime of justiciable human rights (as opposed to the fundamental constitutional rights which they have enjoyed since the adoption of their Bill of Rights in 1789). This is true, for example, of Samuel Moyn, who takes as the seminal moment in the development of modern human rights Jimmy Carter's 1977 inaugural address, with its declaration that 'we can never be indifferent to the fate of freedom elsewhere ... Our commitment to human rights must be absolute.'⁵⁶ The invocation of these rights has certainly been an important feature of international affairs during the last 40 years or so; the role taken by human rights, in rhetoric but also in principled policy, needs to be looked at seriously. But doing so will not give us an understanding of these rights' essential nature.

Turning aside from this so-called 'political' theory, we can note that many writers have alluded to what I see as the genuinely political nature of human rights; but they have done so only in passing remarks, while continuing to follow the moral-philosophical approach more generally. Such remarks typically arise over the obvious fact that human rights are concerned with abuses of power by the state. Jack Donnelly has observed that 'human rights are held, or at least exercised, primarily in relation to the state', and Michael Ignatieff has written that human rights are political 'because they tacitly imply a conflict between a rights holder and a rights "withholder", some authority against which the rights holder can make justified claims'.⁵⁷ Carl Wellman defines a human right as 'an ethical right of the individual as a human being vis-à-vis the state', and notes correctly that 'all the important human rights documents ... have been essentially political documents'; but as soon as he comes to explain the nature of one specimen human right, privacy, he does so in a way that generates the individual's 'ethical claim' on all other people, state-related or not.⁵⁸

Finally, a handful of writers who have come a little closer to the genuinely political theory deserve mention here. Alan Dershowitz, Professor Emeritus at the

⁵⁵ Rawls does write that the fulfilment of human rights is 'a necessary condition of the decency of a society's political institutions and of its legal order' (*Law of Peoples*, p. 80). But this is not so much an analysis of human rights in terms of internal political legitimacy, as part of an argument about how to identify 'decent' societies, which, by virtue of their decency, should be left alone by other states. Rawls emphasises that a state's observance of human rights, and the morally obligatory character of its laws vis-à-vis its citizens, are two separate issues (pp. 65-7).

⁵⁶ S. Moyn, *Human Rights and the Uses of History* (London, 2014), p. 69.

⁵⁷ J. Donnelly, *The Concept of Human Rights* (London, 1985), p. 6; Ignatieff, *Human Rights as Politics*, p. 67.

⁵⁸ C. Wellman, 'A New Conception of Human Rights', in E. Kamenka, ed., *Human Rights* (London, 1978), pp. 48-58, at pp. 56-7.

Harvard Law School, has called for a simplified theory of human rights as ‘basic rights that have been shown (or can be shown) to serve as a check on tyranny and injustice’. His account is, however, deliberately under-theorised. He thinks that we just know great wrongs when we see them and is content to leave it at that; what matters is to have a threshold of moral outrage, and no more. Conceiving of rights as ‘restrictions on the power of government’, he also declares that rights are ‘quintessentially undemocratic, since they constrain the state from enforcing certain majoritarian preferences’; this seems a narrow and misleading view, as democracy is more than mere governance by majority, and human rights should in many cases constrain the state when it acts *against* the majority too.⁵⁹

Bernard Williams, Professor of Philosophy first at Cambridge and then at Berkeley, touched on these matters in a brief but suggestive essay, published posthumously in 2005. Here he treated human rights as an issue in basic political theory, and he also invoked the concept of ‘legitimation’. His aim, however, was not to make any vital link between the nature of human rights themselves and the conditions of legitimacy of the state. So far as he characterised the essential nature of those rights, it was in terms of how they would be violated by any major and harmful use of ‘the power to coerce’ – a characterisation that does not take us far beyond Professor Dershowitz’s idea of great, obvious wrongs, and would encompass the actions of any powerful non-state agent such as (in Williams’s words) a ‘band of brigands’. Rather, his main concern with legitimation arose when he thought about non-liberal states which might appear – to us liberals – to be guilty of permanent human rights violations (for example, in relation to the rights of women), but where the state enjoyed legitimacy in the sense that its values were those of the population as a whole. ‘Legitimation’ thus became, in these cases, a way of neutralising what would otherwise be human rights violations.⁶⁰

This account thus differs in some ways from the one presented here; and one sign of that difference is that Williams openly doubted whether any ‘positive’ socio-economic rights should be counted as human rights at all. Nevertheless, it is possible to agree with him when he wrote that all use of power by a political ruler requires a ‘justifying ... legitimation’, and that ‘Our conceptions of human rights are connected with what we count as such a legitimation; and our most basic

⁵⁹ A. Dershowitz, *Rights from Wrongs: A Secular Theory of the Origins of Rights* (New York, 2004), pp. 16, 82-3.

⁶⁰ B. Williams, ‘Human Rights and Relativism’, in his *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, ed. G. Hawthorn (Princeton, NJ, 2005), pp. 62-74, esp. at pp. 63, 69.

conceptions of human rights are connected with our ideas of what it is for the supposed solution, political power, to become part of the problem.’⁶¹

Thomas Pogge, Professor of Philosophy and International Affairs at Yale, has put forward an account more sophisticated than that of Dershowitz, and more wide-ranging than that of Williams, emphasising the way in which human rights are directed at state power. He points out that when a car thief steals a woman’s car, this is not a human rights violation. ‘An arbitrary confiscation of her car by the government, on the other hand, does strike us as a human-rights violation ... This suggests that human-rights violations, to count as such, must be in some sense official, and that human rights thus protect persons only against violations from certain sources.’

At one point in his argument he even observes that ‘only if they respect moral human rights do any governmental bodies have legitimacy, that is, the capacity to create moral obligations to comply with, and the moral authority to enforce, their laws and orders.’ This takes us close to the heart of the matter. Yet in the end Pogge falls back on a traditional deduction of human rights from the ‘basic needs’ of humans, and when this leads to the obvious conclusion that rights so deduced will impose duties on all other individuals, not just the state, he merely comments that he has to ‘leave open’ whether any breaches of those rights by individuals ‘should be considered human-rights violations’.⁶²

The American philosopher and jurist Ronald Dworkin, who held chairs at Oxford, London and New York, spent much of his career theorising about rights (we have already encountered his idea that rights are ‘trumps’); but his concern was with rights in the abstract, or with the basic political rights enshrined in the US Constitution, and in most of his works there is little or no discussion of human rights as such. In his last-but-one book, *Justice for Hedgehogs* – published in 2011, two years before his death – he did, however, devote several pages to this topic. Here he not only criticised both Griffin and Rawls, and proceeded on the assumption that human rights relate to the actions of governments, but also made an explicit link between human rights and legitimacy. Governments, he wrote, ‘can be legitimate if their laws and policies can ... reasonably be interpreted as recognizing that the fate of each citizen is of equal importance and that each has a responsibility to create his own life.’ A government which failed this test would be found guilty of contempt

⁶¹ *Ibid.*, pp. 63-4. The ‘problem’ alluded to is the fundamental problem of how people can enjoy order, security and safety.

⁶² T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd edn (Cambridge, 2008), pp. 58, 63-4, 71.

for the dignity of its citizens; that would mean that it violated their human rights, and it would also involve losing its legitimacy.⁶³

On the face of it, this matches quite closely the position I am advocating. But there are some significant differences. Dworkin's underlying theory is in fact a classic example of the moral-philosophical approach. He begins by identifying two fundamental 'ethical principles': 'a principle of self-respect' and 'a principle of authenticity'. Together, they form 'a conception of human dignity', and this helps to 'identify the content of morality: acts are wrong if they insult the dignity of others.'⁶⁴ In this way he progresses from ethics (in his limited sense of self-regarding principles and values) to morality (other-regarding ones); from there he goes on to derive basic political rights, including freedom of expression, the right to a fair trial, and so on – in fact, many or most of the things that would appear on a list of human rights. Only at a final stage does he invoke human rights as such – or rather, to be accurate, just one super-right, which is the right of every citizen to be treated by the government with an attitude of respect for the citizen's dignity. This 'right to an attitude' is 'the basic human right'; a government may be found to honour this even when it gets particular political rights wrong (for example, by imposing an unjust tax system), if it is still sincerely trying to treat its citizens with respect.⁶⁵ Dworkin's point here is apparently similar to that of Rawls, when the latter tries to make room for 'decent' societies which should not be accused of violating human rights even if they can be charged with failing to meet some standards of equality or justice.

How far, or in what way, Dworkin's super-right should be taken as embracing all the particular political rights is not entirely clear. A gross violation of at least some of those rights would no doubt be a breach of the super-right, putting legitimacy in jeopardy. But his test of legitimacy is in the end an objective moral-philosophical one, derived from his notion of dignity. In the theory I advocate, on the other hand, the substantive human rights are all directly correlated with legitimacy (all of them – not just some super-right of an 'attitude of respect towards dignity' hovering over them); the legitimacy is specifically that of the government of a democratic or would-be democratic political community (whereas Dworkin tries to extend his theory to medieval kings and priestly rulers, whose actions are to be judged in terms of their respect for the two Dworkinian dignity-principles); and

⁶³ R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA, 2011), pp. 321-2 (quotations), 333-4 (Griffin, Rawls).

⁶⁴ *Ibid.*, pp. 203-4.

⁶⁵ *Ibid.*, p. 335.

what people believe to be fundamental among their claims on government is fundamental – for the purposes of human rights and legitimacy – by virtue of the fact that they believe it to be fundamental, regardless of the reasons (no doubt firmly linked to their moral beliefs, whatever the derivation of their moral views may be) which they hold for thinking so. In other words, my theory is essentially political, while Dworkin’s is essentially moral-philosophical.

Joshua Cohen, former Professor of Political Science, Philosophy and Law at Stanford, is the theorist who has perhaps come closest to the view presented here. His starting-point is Rawls’s internationalist position, with its attempt to work out a minimal list of shared standards, making up what Cohen calls ‘global public reason’. But in trying to characterise the actual contents of those rights, he does move towards a more ‘internalist’ political view: he proposes that human rights ‘are associated with an idea of membership or inclusion in an organized political society’, and that the vital feature of membership is that ‘a person’s interests are taken into account by the political society’s institutions.’ Hesitantly, he suggests that what corresponds to this membership may perhaps be the duty of the state to ‘attend to the common good’, and that this may be essential ‘if the requirements that a political society imposes on people under its rule are to have the status of genuine obligations and not mere forcible impositions’.⁶⁶ Here we do come very close to the idea that the observance of human rights and the legitimacy of the government vis-à-vis its citizens – not just vis-à-vis other states – are intimately connected. But the argument is tentative; it is based on a rather general invocation of the common good; and it is developed no further.

The Political History of Human Rights

The concept of human rights has an essentially political nature. It also has an essentially political history; for the development of human rights in the twentieth century had a strongly political purpose, and the precursor elements which were brought together in that development had themselves been political in the past. A few comments on this may be of some value here, though only by way of a supplementary confirmation of the theory offered above.⁶⁷

⁶⁶ Cohen, ‘Minimalism about Human Rights’, pp. 197-8.

⁶⁷ To assume that a concept must be essentially political *because* it had originally a political history would be to commit the genetic fallacy. I do not do so here. My reasons for thinking that the concept of human rights is essentially political have been given above; while they necessarily engage with what the term ‘human rights’ has been used to mean during its rather brief history, they are not primarily historical.

When looking at the precursors – the prehistory, as it were, of human rights – we need to distinguish between two different kinds of thing. Historically, the first (by a long way) is what might be called ‘bill-of-rights’ rights: basic civil or legal rights within the structure of a particular state. These rights were often found to be sufficiently important to warrant some special kind of promulgation. However, while the introductory rhetoric may have varied in these documents, there was no attempt to argue that they applied to all human beings, or derived from human nature as such. They were simply the most important rights that were held by members – or at least some members – of that society.

Thus Magna Carta (1215) guaranteed that free men would not be imprisoned, expropriated or exiled unless a due legal process had condemned them. The Petition of Right (1628) affirmed that English subjects would not be subjected to extra-parliamentary taxation, or the imposition of martial law and forced billeting of soldiers in peacetime. The Bill of Rights (1689) declared that all subjects had the right to petition the King, that elections to Parliament must be free, and that no one should be subjected to excessive bail or cruel and unusual punishment – and so on. Such rights were clearly political, and at the same time there was no attempt to show that they were universal.

Beginning to arise in the minds of political philosophers in the early modern period, on the other hand, was a very different notion of rights: natural rights. These were indeed attributed to all human beings as such, and were put to work in abstract theories about the origins of all state authority. The most radical early theory was that of Thomas Hobbes, who argued that each human being, considered in a ‘state of nature’ (that is, as if detached from political society), had an almost unlimited ‘natural right’, and that the basis of political life was that people surrendered almost all of this natural right, as irrevocably as possible, to a sovereign authority.

John Locke, reverting in some ways to a more traditional ‘natural law’ theory, saw people’s natural rights not as things to be surrendered absolutely, but as formulations of the substantive purposes for which people came together in political societies: the protection of life, liberty and property (the last of these in a broad sense, including a person’s own body). Those purposes could never be abandoned by human beings, so the rights remained always potentially in play: if a government failed to satisfy them, the people could exert their rights by overthrowing it. All rule thus became conditional, and the natural rights were statements of the conditions. But they were few, broad and simple, capable of being stated only at a high level of generality – as one might expect of any principles claimed to have been derived

philosophically from elementary human nature itself (or rather, ultimately, from God's design for that nature).

'Natural rights' and what I am calling 'bill-of-rights' rights were thus very different things. Yet what happened in the late eighteenth century was that the two were rather artificially run together. The main rhetorical purpose of invoking natural rights was to imply that if they were not respected, the foundations of legitimate rule would be removed, and rebellion would be justified. But that rhetoric could be applied only to a handful of very vaguely defined abstract principles; whereas the actual concerns of rebels and revolutionaries, first in America and then in France, were mostly with much more specific violations of 'bill-of-rights' - type rights - rights which, by their particular nature (bordering in some cases on legal privileges) were not so well suited to serving as justifications for general rebellion. Clothing the particular rights in the rhetoric of fundamental, universal 'natural rights' was a highly effective manoeuvre.

Thus the 'Declaration and Resolves' (also known as the Declaration of Rights) of the First Continental Congress (1774) began by grandly declaring that the American colonists were 'entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever a right to dispose of either without their consent'; but it went on to demand a series of particular rights, including 'the protection of the common law of England' and law-making and taxation by their own legislatures, as well as an end to a range of quite specific abuses, such as the billeting of soldiers and the removal of the right to trial by jury. By means of the capacious term 'liberty', some very particular items were thus included, at least implicitly, in the concept of natural rights, even though the drafters of this document would never have argued that jury trials were the right of all human beings everywhere - still less, the protection of the common law of England.

As this way of combining universal natural rights and more particular civil-legal rights was taken up first by other American declarations and then by French ones, it never lost sight of the basic political nature of the exercise: these rights were asserted in order to characterise the duties of governments and the proper limits of their power. As Thomas Jefferson put it: 'Governments are instituted among Men to secure these Rights'; in the words of the French Declaration of the Rights of Man and the Citizen, 'The purpose of all political association is the preservation of the natural and imprescriptible rights of man.'⁶⁸

⁶⁸ L. Hunt, *Inventing Human Rights: A History* (New York, 2007), p. 31. The French Declaration is the least narrowly particularist of these documents; but it does include such things as the rights of citizens in relation to the raising of taxes, and the right to

After the eventual failure of the French revolutionary experiment, grand political programmes based on assertions of rights, whether universal or local, had little work to do in the European context. In America, the Bill of Rights did find plenty of work; but it did so as a set of provisions of the US Constitution, drawing its authority from the Constitution itself, and requiring to be interpreted in the same way as any other parts of that national legal document. It was only in the mid-twentieth century that the combination of particular civil-legal rights and general natural rights was revived, and seriously universalised, by the drafters of the Universal Declaration.

Following the horrors of Nazism, and with some growing awareness in the West of the oppressive nature of Stalin's rule, it was natural that as much emphasis as possible should be put on the idea that all the rights to be asserted in the international declarations and covenants were moral absolutes, 'human' because they were derived ineluctably from human nature. Moral authority was needed, and at the same time moral revulsion at the crimes of the fascist regimes was present in abundant quantities. So while the universal claims were strengthened, to the point that the human rights defended in these documents seemed to have an independent and objective moral-philosophical status, the reason for this was in reality strongly political: the overwhelming priority was to protect people from tyrannical regimes.

The records of the committees which drafted the Universal Declaration make it clear that Nazi crimes were never far from the drafters' thoughts. Discussing the article which would ban slavery and servitude, for example, René Cassin (the French jurist who played a leading role in the process) insisted on the inclusion of the term 'servitude' because it would cover those people who had been deported to Germany for forced labour. When considering the article against torture, he sought assurance that this would include medical experimentation on concentration camp inmates. The clause 'without any limitation due to race, nationality or religion' was added to the article on the right to marriage specifically with Hitler's racial laws in mind.⁶⁹ And so on. When the UN Department of Public Information issued a booklet in 1950 to explain the meaning of the Universal Declaration, it said that the most

demand accounts from public officials. Its distinction between rights of 'man' and of 'citizen' shows, at least, a commendable theoretical awareness.

⁶⁹ Morsink, *Universal Declaration*, pp. 41-2, 89.

important thing that the Declaration sought to counter was ‘absolute power of the state’ and the ‘disappearance of political freedom’ under fascism and Nazism.⁷⁰

Exactly the same is true of the making of the European Convention. During the first debate on it in the Consultative Assembly of the Council of Europe in August 1949 one of the British representatives, John Foster (later to be a distinguished human rights lawyer), said:

The concentration camps in Eastern Europe are not too far away for us to be able to say that this is merely an academic exercise. We have had totalitarian dictatorships only too recently in Europe which have ground down the people and disregarded the rights, to which the ordinary man must be able to look forward, of free speech, free religion, freedom to express himself, freedom from arrest...⁷¹

Reporting to the Assembly in the following month, Pierre-Henri Teitgen explained that while some had thought it superfluous to include three ‘family’ rights (family life, marriage, and parental choice in education), as they were not ‘essential for the functioning of democratic institutions’, nevertheless ‘the majority of the Committee thought that the racial restrictions on the right of marriage made by the totalitarian regimes, as also the forced regimentation of children and young persons organised by those regimes, should be absolutely prohibited.’⁷²

But what is most important of all to note here is that the drafting committee regarded its primary task as listing those rights which were ‘essential for the functioning of democratic institutions’. For this was the purpose of the European Convention: to defend democracy by stigmatising and penalising those abuses of state power that would undermine and destroy it. Robert Schuman said that it was directed ‘against all tyrannies and against all forms of totalitarianism’.⁷³ Lynn Ungood-Thomas, a British member of the Consultative Assembly who would later become UK Solicitor General, declared in the Assembly debate of September 1949: ‘What we are concerned with is not every case of injustice which happens in a particular country, but with the question whether a country is ceasing to be

⁷⁰ *These Rights and Freedoms* (New York, 1950), p. 2, cited in G. D. Cohen, ‘The Holocaust and the “Human Rights Revolution”’, in A. Iriye, P. Goedde and W. I. Hitchcock, eds, *The Human Rights Revolution: An International History* (Oxford, 2012), pp. 53-71, at p. 54.

⁷¹ Preparatory Commission, *Travaux préparatoires*, i, p. 96.

⁷² *Ibid.*, i, p. 220. In the end parental choice in education was not included in the Convention; a version of it later appeared, as we have seen, in Article 2 of Protocol no. 1.

⁷³ G. D. Cohen, ‘Holocaust’, p. 64.

democratic.’⁷⁴ And when the Convention was finalised in the following year, Sir Hartley Shawcross, the Attorney General, told British Government ministers that it was a statement of ‘the general principles of human rights in a democratic community, in contrast with their suppression under totalitarian government’.⁷⁵

Let the last word go to Pierre-Henri Teitgen, when he submitted his first full report on the work of the drafters in September 1949:

The Committee unanimously agreed that for the moment only those essential rights and fundamental liberties could be guaranteed which are, today, defined and accepted after long usage, by the democratic regimes.

These rights and liberties are the common denominator of our political institutions, the first triumph of democracy, but also the necessary condition under which it operates. That is why they must be the subject of a collective guarantee.⁷⁶

This was the real ‘object and purpose’ of the European Convention on Human Rights. It was intended not to enter the nooks and crannies of local life, not to serve as an all-purpose device to correct minor injustices, not to develop questionable doctrines to enable the generation of rights at an ever greater level of detail, and above all not to undermine democracy by taking more and more areas of policy-making out of the hands of democratic legislatures. It was intended, on the contrary, to strengthen and guarantee the conditions of democracy itself.

⁷⁴ Preparatory Commission, *Travaux préparatoires*, ii, p. 166.

⁷⁵ Cited in Fisher, *Rescuing Human Rights*, p. 66.

⁷⁶ Preparatory Commission, *Travaux préparatoires*, i, p. 194. ‘The first triumph’ here translates ‘la première conquête’.

6

Conclusion

Fundamental Problems

This work has tried to do two things: first, to analyse some of the key problems that arise in the activities of the European Court of Human Rights and the jurisprudence it has generated; and secondly, to set out a more basic argument about the nature and role of human rights, in order to guide their better application. It is not the purpose of this study to present any kind of detailed blueprint of an alternative system to the one that currently operates both in Strasbourg and – thanks to the Human Rights Act – in the courts of the UK. That is really a job for experienced lawyers and skilled legislators.

Yet of course the reason why the whole subject of human rights law needs especially serious scrutiny at this time is that there is a widespread feeling that things have gone wrong, and that they cannot continue as they are. In the UK, the publicity generated by the *Hirst* affair, and by a number of high-profile cases where the Government was prevented from deporting a foreign criminal or a suspected terrorist, has led to much popular distrust of the current human rights system. In an opinion poll in May 2010, when asked if they would prefer to replace the Human Rights Act with a British Bill of Rights, only 24% of respondents wanted to keep the former, while 53% said they would prefer the latter.¹ In September 2011, 67% of those asked said that the European Court had too much power to intervene in British laws, with 73% wanting to see the final ruling on human rights laws in the UK made by the Supreme Court and not the European one. The same result was

¹ M. Pinto-Duchinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK* (London, 2011), p. 58.

achieved by another poll in 2012.² A survey in 2014 indicated that 41% of the British people were in favour of leaving the Convention altogether.³

This dissatisfaction with the Court was not peculiarly British. There have also been complaints in Nordic countries about the Court's interference in their domestic legislation. In 2010-12, there was a serious public discussion in the Netherlands, leading to debates for and against the Court in both houses of parliament; the Senate adopted a resolution defending the Court, but the lower house rejected it. In Switzerland, in 2013, the Swiss People's Party proposed leaving the Convention, and the Free Democratic Party put down a motion to oblige the Court to focus on its 'core purpose'.⁴ Nevertheless, at meetings of the Council of Europe in Interlaken (2010), Izmir (2011) and Brighton (2012) calls for reform of the Court, supported by a number of member states, were strongly rebuffed; as we have seen, when the UK Government, chairing of the last of those meetings, presented a reformist declaration to be adopted, the text was watered down and the desired insertion of a reference to the margin of appreciation in the main body of the Convention was diverted, out of harm's way, into the Preamble.

But we have also seen that, in any case, the doctrine of the margin of appreciation is no magic cure to the ailments of the Court. Any careful study of the ways in which the Court's jurisprudence has developed, and is still developing, exposes a mass of uncertainties, unpredictable outcomes, inscrutable 'balancing' acts, and applications of arbitrary or subjective criteria. It also reveals an extraordinarily wide range of methods and devices for engineering the continuous expansion of rights. Academic lawyers who have studied these matters have issued damning judgments on one point after another, using terms such as 'vague and unsatisfactory', 'radical indeterminacy', 'disturbingly elusive' and 'massive doses of speculation'. And yet – whether out of a well-meaning sense of professional solidarity, or from a fear of getting into trouble – they have held back from drawing the obvious conclusion. This unclear, indeterminate, subjective and unpredictable system of human rights adjudication can barely meet some of the most basic

² E. Faulks (Lord Faulks) and J. Fisher, 'Unfinished Business', in Commission on a Bill of Rights, *A UK Bill of Rights? The Choice before Us*, 2 vols (London, 2013); <http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>, i, pp. 182-91, at pp. 185-6.

³ Leach and Donald, *Parliaments and the European Court*, p. 115.

⁴ *Ibid.*, pp. 8-9; J. Gerards and A. Terlouw, 'Solutions for the European Court of Human Rights: The Amicus Curiae Project', in S. Flogaitis (Phlogaites), T. Zwart, and J. Fraser, eds, *The European Court of Human Rights and its Discontents: Turning Criticism into Strength* (Cheltenham, 2013), pp. 158-82, at pp. 180-2.

requirements of the rule of law. It was the European Court itself that defined ‘certainty’ and ‘foreseeability’ as two of those requirements.⁵

That is the fundamental problem which the legal theorists need to address. But it is not the only one. The undermining of democracy is a no less important issue. Here one might look to the political theorists. Yet they have said little about this, either because they have developed such sophisticated theories of democracy that they have lost sight of the central importance of law-making by elected representatives, or, more simply, because they do not want to be labelled (however unjustly) as hostile to human rights.

Some politicians have taken up this cause, but their concerns have been focused on particular issues to do with prisoners’ votes and the blocking of deportations, which has given a rather narrow – and, to some tastes, politically unpalatable – quality to their arguments. The fundamental problems are not fully addressed, therefore. They do not go away.

What Is To Be Done?

Might there be a compromise solution? In 2014 the Conservative Party proposed repealing the Human Rights Act, declaring that the European Court’s judgments were merely ‘advisory’, and incorporating the text of the Convention into UK primary legislation.⁶ The first of these proposals can be justified on grounds that have been familiar since the original debate surrounding that Act: by requiring all UK courts to interpret existing UK laws as if they were compatible with the Convention rights, ‘so far as it is possible to do so’, it demands that judges treat some laws as if they contained special conditions or qualifications that are not visible in the text. As Lord Cooke of Thorndon said in one of the debates in the House of Lords, ‘Traditionally, the search has been for the true meaning; now it will be for a possible meaning.’⁷ It is essential for the rule of law that people should know what laws they are subject to; in the past they could do this by reading the text of the laws, but now they must wait until the judge tells them what extra conditions – unknowable with any precision in advance – those laws must be deemed to contain.⁸

⁵ Above, p. 60.

⁶ Conservative Party, *Protecting Human Rights in the UK: The Conservatives’ Proposals for Changing Britain’s Human Rights Laws* (London, 2014), p. 5.

⁷ Cited in Wadham and Mountfield, *Blackstone’s Guide*, p. 30.

⁸ Conor Gearty gives an example of a lengthy condition which was ‘read in’ to a provision of a UK immigration law, and comments: ‘Three years later the provision was finally removed, but during that whole intervening period no lawyer would have had a clue about what the law required by looking only at how it appeared in the statute books’ (On *Fantasy Island*, p. 94).

However, to declare that the European Court's rulings are merely advisory is a compromise of an awkward kind. It states a *de facto* truth: as the stand-off over the Hirst case demonstrates, it is of course possible simply to ignore the Court's judgments. But *de jure* the UK is subject to those judgments under international law, as it has signed a covenant – a multilateral treaty – to that effect.

Some might suggest finessing this problem, by saying that in future the UK will obey only those judgments that adhere to a proper interpretation of the Convention, and by insisting (as it could do where its own Supreme Court is concerned) that the interpretation be a narrow, 'ordinary meaning' one. To make this justifiable in international law it would be necessary to show that the narrow interpretation was required by the Vienna Convention on the Law of Treaties. Yet the Vienna Convention's rule ('in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose') does open the possibility, as we have seen, of some teleological interpretation; it offers no solid safeguard against the methods adopted by the Court. In any case, the same article of the Vienna Convention (Article 31) also says that one should take into account 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'; decades of acquiescence in the interpretative practices of the European Court would now weigh heavily in the balance.

As for incorporating the text of the Convention in primary UK law: here the proposal was to do so while also 'clarifying' and adding 'more precise definitions'.⁹ Very much would depend on the status and force of those clarifications. After decades of interpretation by the European Court, the key provisions of the Convention have acquired a huge body of presumed meanings and implications. These naturally dominate in the minds of human rights lawyers, and will exert a strong gravitational force.

To any patient reader who has followed the argument of this work, it will not come as a surprise if I affirm my own commitment to two basic ideas: that human rights are of great importance, and that the current system under the European Convention is so dysfunctional and counter-productive that it should be abandoned. With regret, I see no alternative to leaving the Convention. But then it will become important to set up a Bill or Charter of Human Rights for the UK.

On the general problem of 'possible' interpretation see G. Marshall, 'Interpreting Interpretation in the Human Rights Bill', *Public Law* (1998), pp. 167-70.

⁹ Conservative Party, *Protecting Human Rights*, pp. 5-6.

Such a proposal will no doubt be branded as nationalistic, or even (absurdly) as anti-human rights, by some critics. In fact it would make the UK no more nationalistic than, say, Canada – a responsible democracy which runs its own human rights regime. And its essential purpose would be to preserve and strengthen the protection of human rights, and save the very idea of human rights from the genuine and mounting risk of becoming discredited in the eyes of the people of this country.

If the arguments presented in this work are correct, a Charter of Human Rights should be concerned only with the real, essential human rights – those rights the violation of which would count as oppression and tyranny. It should be stated, where possible, not in open-ended generative abstractions, but in specific prohibitions on the government and all its public officials. (So, for instance, instead of just stating the right to a fair trial, it should characterise what governments are forbidden to do that would prevent or undermine the fairness of a trial.) Definition and clarification should be built in; the drafters should free themselves from the idea that they must produce lapidary statements in utterly general terms. And guidance should be given, so far as possible, about the threshold of seriousness that would trigger the application of the Charter.

By focusing as strictly as possible on the abuse of governmental power, this approach would move some matters out of the ambit of human rights law and into that of ordinary law-making. Many of the cases that now appear before the Strasbourg Court arise over apparent clashes between the competing rights of individuals (as in, for example, the *von Hannover* case, where the privacy rights of celebrities were at odds with the freedom of expression rights of journalists); these are framed as accusations against the state, which is said to be violating human rights by having laws which do not embody the correct balance between those competing rights. With such difficult balancing exercises, the best solution is most likely to be the one adopted by a democratic legislature, where ideas about the rights on both sides can be set in the larger matrix of values held by the democratic community at large. The Charter of Human Rights should be phrased in such a way as to exclude such cases, which, even if the balance is perceived to be wrong, do not constitute acts of oppression by the state.

The real, essential rights – rights held against abuses of governmental power – deserve, on the other hand, the fullest possible protection. At the very least, there should be a strong (or preferably, stronger) version of the present regime, with its ‘declarations of incompatibility’ by the judges. In the new system, for the Supreme Court to make such a declaration would be a very grave matter, as it would mean that the law or measure in question was found to be oppressive and tyrannical. The law establishing the Charter of Human Rights could dictate that whenever such a

declaration was made, the Government would be obliged to hold a debate in the House of Commons on the matter within, say, 60 Parliamentary working days, and that it would also be obliged to present for discussion, in that debate, a possible way of amending or replacing the law. The final decision would still be for Parliament to make, on a free vote, and the Government itself would be at liberty to argue against the possible change in the law; but it would at least have to present proper reasons in a public debate.

Some may wonder whether, if the Supreme Court has found a law to be oppressive, the Government should be allowed any possibility at all of ignoring that finding. Does letting the Government off the hook in this way not undermine the very purpose of human rights law? That is of course the argument in favour of giving the Supreme Court the power to strike down Acts of Parliament, in the manner of its US counterpart. Such a move would be revolutionary, given the constitutional traditions of this country; among strong reasons for opposing it, one of the strongest would be the inevitable politicisation of appointments to the Supreme Court. But still, that may be a debate worth having.

One fundamental caveat, however, must always be borne in mind. Legal statements and definitions of human rights, however carefully made, will never be entirely free of the interpretative problems outlined in the earlier part of this work. There will always be some balancing acts to perform, some weighing of limitations where the judges' focus must shift from matters of pure principle to the benefits and 'disbenefits' of policies. A degree of uncertainty will always be present, and the overall system – including the relationship between the judges and the legislators – must make allowance for that. If the arguments put forward earlier in this work are correct, there should be at least a presumption in favour of the legislators in such cases.

It is an unavoidable fact that, to some observers, the reforms sketched here will look like a quantitative reduction in rights. It is true that many of the things that have been protected by judgments of the European Court will no longer be protected as essential human rights: the right not to be left in poor conditions in an asylum centre for two hours, for example, or the right to demand, as a 'positive obligation' on the state, that the Government should facilitate one's gypsy identity. But such things can always be turned into rights, by the ordinary processes of reforming the law. Rights do not have to be proven to be 'human' rights in order to merit legal protection. People in the UK do already have a huge range of rights under the law, protecting innumerable aspects of their lives.

So, to counter the inevitable complaints that the changes suggested here would involve reducing the British people to 'minimal' rights, it would also be useful to

promulgate a much more general Code of Protected Rights. This would gather together, from existing UK law, all the key rights – including the ‘human’ ones, but ranging far beyond them – that apply to people in every walk of life: the rights of children, women, old age pensioners, workers, the unemployed, the disabled, the arrested, the accused in a trial, prisoners, asylum-seekers, and so on. It would also set out general principles from existing law, such as the principle of non-discrimination. The rights would be stated as specifically as possible – as they appear in the current laws, or in established common law principles. And they would not be confined to things that happen to have had the word ‘right’ attached to them; many would be prohibitions on government, and on ordinary citizens.

The Code would act as a kind of handbook of existing rights, referenced at each point to the actual law. It would cover, often in much greater detail, all the areas dealt with by the European Convention. Length would not be a problem, as it would be searchable in a widely publicised online format; consulting it, people could become aware of what a panoply of legally protected rights already surrounds them.

Whether it will be possible to bring about such changes will depend to some extent – unfortunately – on political contingencies. Departure from the European Union simplifies the matter in one way, given that the EU is currently pledged to become a signatory in its own right to the European Convention, but it may raise other difficulties: in the context of Brexit, to withdraw from the European Convention would attract all-too-predictable accusations of xenophobia, isolationism and so on. (Note, however, that being a signatory to the Convention is not a condition of belonging to the Council of Europe, of which the UK would continue to be an active member.) What has been sketched in this work is a serious argument which presents its own reasons, and they have nothing whatsoever to do with xenophobia or isolationism; but abusive political rhetoric will go its own way, regardless.

At the same time, no doubt, rhetorical arguments will be made that such a change will involve a removal of human rights. It is an unfortunate fact that a mentality has grown up which assumes that since human rights are a good thing, the more their number increases, and the wider they grow, the better. But these rights are not like money in the bank, to be accumulated as far as possible. Beyond a certain point, increasing the extent of these rights means reducing the extent of the one thing they are particularly designed to protect: a decent, well-functioning democracy.

Even though some sections of the public are becoming disillusioned and sceptical about the very idea of human rights, the rhetoric of rights expansion (‘giving you more rights’) will always find ready listeners. The fundamental problems outlined in these pages will not become soluble, in practice, until there is

a change of attitude among the commentators, the theorists, the politicians and the ordinary citizens of this country – and, indeed, of other countries too. The aim of the present work is simply to contribute, in however small a way, to bringing that change about.

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