THE EU AND HUMAN RIGHTS

edited by
Philip Alston
Professor of International Law, European University Institute, Florence
with the assistance of
Mara Bustelo and James Heenan
European University Institute

Academy of European Law
European University Institute

OXFORD
UNIVERSITY PRESS

3

The Effect of Rights on Political Culture

MARTTI KOSKENNIEMI

I wish to make two arguments. First, while the rhetoric of human rights has historically had a positive and liberating effect on societies, once rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalizes values or interests that resist translation into rights-language. In this way, the liberal principle of the 'priority of the right over the good'[1] results in a colonization of political culture by a technocratic language that leaves no room for the articulation or realization of conceptions of the good.

Secondly, I will argue that rights-rhetoric is not as powerful as it claims to be. It does not hold a coherent set of normative demands that could be resorted to in the administration of society. To the contrary, despite its claim for value-neutrality, rights-rhetoric is constantly reduced to conflicting and contested arguments about the political good. The identification, meaning, and applicability of rights are dependent on contextual assessments of 'proportionality' or administrative 'balancing' through which priorities are set among conflicting conceptions of political value and scarce resources are distributed between contending social groups. Inasmuch as such decision-making procedures define what 'rights' are, they cannot themselves be controlled by rights. To this extent, the 'priority of the right over the good' proves an impossible demand, and insisting upon it will leave political discretion unchecked. The problem lies in how to move from an uncritical postulation of legal rights into a political culture in which delegated authority would be actively controlled by a condition of civic public-mindedness in the community at large.

Let me stress what I do *not* claim. I do not hold the Benthamite view that rights talk is 'nonsense upon stilts'. I do not think that rights have absolutely no value or that they encapsulate a bourgeois ideology in contrast to some deeper truth. In a thoughtful contribution to this volume Klaus Günther argues that rights have significance inasmuch as they open political culture to experiences of injustice and fear, and provide a voice through which the pain of torture, for example, can be articulated and listened to and the social practice of torture condemned and perhaps eradicated. I have no quarrel with that. Günther concedes, however, that rights sometimes degenerate into 'human rights talk' that aims at a legitimation of the

[1] J. Rawls, *A Theory of Justice* (1973), 31.

status quo. But while he thinks this is a marginal problem, I shall argue that it is the central focus of human rights in Europe today: the banal administrative recourse to rights language in order to buttress one's political priorities. The experience of pain and injustice are again on the margins—as part of history, or embedded in Europe's geographical fringes (former Yugoslavia)—while the anxious question must be: might such banalization at some point do away with the ability of human rights language to convey any sense of pain and injustice? The strength of Günther's argument lies in its being made at a philosophical level. I shall counter it by drawing on the practice of European institutions in order to highlight the mundane experience of rights constantly deferring to political priorities.

The usefulness of rights lies in their acting as 'intermediate stage' principles around which some communal values and individual interests can be organized. As the German and Italian Constitutional Courts, in a series of well-known cases in the late 1960s, challenged the supremacy of European Community (EC) law over the fundamental rights provisions included in the constitutions of those Member States this was precisely so as to distinguish and emphasize national core values, the overriding of which by a European-wide community policy seemed inadmissible. But rights often remain insufficiently normative to ground a sense of community and insufficiently concrete to be policy-orienting. The majority of United Nations (UN) Member States, for instance, have no difficulty in subscribing to most of the annual resolutions of the UN Commission of Human Rights and the Third Committee of the General Assembly without this indicating that we are any nearer to a world federation than, say, fifty years ago.

Finally, a political culture that officially insists that rights are foundational ('inalienable', 'basic'), but in practice constantly finds that they are not, becomes a culture of bad faith. A gap is established between political language and normative faith that encourages a strategic attitude as the proper political frame of mind as well as an ironic distance to politics by the general population. Human rights are erected as a façade for what has become, on the one hand, a technical administration of things and, on the other, a struggle for power and jurisdiction between different organs entrusted with policy-making tasks.[2] So, while rights-rhetoric does form an important and occasionally valuable aspect of political life, it covers only a part of it and, if allowed to colonize the whole, will have a detrimental effect on the concept of politics.

I

Rights are grounded in a profound mistrust of conceptions of the good society. Such conceptions are assumed to bring forth conflicts of subjective value and of political passion that cannot be settled by reason. The liberal Enlightenment aimed at constructing a political order that would no longer be dominated by such passion, conducive as it was to civil war (Hobbes) and tyranny (Locke, Mill). It was assumed that '[t]he health of the political realm is maintained by conscientious objection to the political'.[3]

[2] This is precisely the criticism made against the European Court's development of its fundamental rights doctrine in countermove to the critiques by the German and Italian supreme courts in the influential article by J. Coppell and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669–92.

In the public realm, the mechanism for attaining this was the separation of legislation and administration (adjudication) by reference to the subjective/rational scheme. Where legislation was the proper field of value and power (of subjectivity), those elements needed to be purged from administration. How administration was to be constrained by what is rational and non-subjective has been conceptualized in different ways and has engendered a series of losses of faith.

For early liberals, constraint was initially received from an autonomous '*reason*' (naturalism) that delimited the sphere of individual freedom as against the social order in a universally homogenous way, and provided apolitical principles that constrained those in administrative positions without relying on anybody's political preferences. As faith in the self-evidence of reason started to seem doubtful, constraint was sought from legal rules and *textual form* (positivism). Rules and texts, however, soon seemed unable to take account of life's 'real necessities' and appeared vulnerable to interminable interpretative controversy. Loss of faith in formalism was followed by calls for recourse to the social ends ('utility', effectiveness) that were assumed to lie behind rules, and 'balancing' of the conflicting interests of social groups and classes (realism).

The use of *rights* in the political discourse of liberal societies in the 1960s and 1970s should be seen as a further move in liberalism's efforts to constrain politics, now against the realist emphasis on social utility and interest-balancing that seemed just a camouflage for making (contested) policy-decisions by those in administrative positions. Ronald Dworkin's famous thesis of rights as 'trumps' is directed precisely at limiting administrative discretion by recourse to realist 'policies'.[4] Contrary to 'policy', rights were assumed to be unpolitical in that they were *universal* (i.e. independent of time and place; unamenable to political controversy) and '*factoid*' (i.e. self-evidently 'there'—'fact-like'—with compelling consequences—unlike the consequences of a statement such as 'do good').[5]

Rights arguments detach the interests of individual right-holders or groups of right-holders from political subjectivity and 'restate the interests of the group as characteristics of all people'.[6] In this way, they may seem to avoid partaking of the political subjectivity that 'raw' interests possess.[7] Claims of right can be recast as claims of an objective reason, reflected in the fact that rights 'straddle' between legal positivity and naturalism. To demonstrate their independence from the political passions of the day, rights appear as ahistorical and universal. Yet, to disclose their

[3] M. Wight, 'Western Values in International Relations', in H. Butterfield and M. Wight, *Diplomatic Investigations: Essays in the Theory of International Politics* (1966), 122.

[4] 'Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish': R. Dworkin, *Taking Rights Seriously* (1977) p. xi.

[5] Cf. D. Kennedy, *A Critique of Adjudication (fin de siècle)* (1997), 305–6.

[6] *Ibid.*, at 307.

[7] Because there is no essential conception of a right, it seems difficult to object to the common practice in Western societies whereby beneficiaries of a policy dress their interests in the fulfilment of that policy in terms of their 'human rights'.

concrete (and democratic) content, they are translated into positive constitutions (fundamental rights) and other legal enactments. Hence the extraordinary rhetorical power of rights: on the one hand, they are 'outside' the political community in the sense that the legislator's task is merely to declare their presence in positive law, not to create them. On the other hand, they are also 'inside' the community by being fixed in constitutions and other positive legal enactments and thus amenable to objective confirmation.

Yet this duality creates an ambivalence: the more we insist on the ability of rights to impose an external standard for the community, the more it starts to resemble theology, and the more difficulty we have in aligning it with the ideal of popular sovereignty with which, as Jürgen Habermas has shown, rights have emerged.[8] To fall back on constitutional or other positive law standards, again, questions the universalism with which rights are associated and focuses on the procedural aspects of the constant struggle about where to draw the line between community interests and individual rights.

II

Social morality cannot, however, be translated exhaustively into rights language. Such language is based on an ideal of individual autonomy that perceives social conflict in terms of interpersonal relationship: for every right, there is a correlative duty; and for every duty, there exists a correlative right.[9] However, in existing societies, many people are confronted with normative demands that cannot be reduced into right-duty relationships. Religions, for instance, typically impose duties on people without the assumption that somebody is in possession of a correlative right. Nor can aspirations for virtue or personal excellence plausibly be translated into rights-language.[10] If a morality seeks to regulate a person's private behaviour, a right-duty relationship can only be constructed by the tenuous fiction of envisaging the holder of the right and the duty to reside in the same person.[11] The priority of the right over the good leaves little room for political value: citizenship is reduced to private reliance on right. Civic virtue, public-mindedness and political participation become a profession that seems indissociable from the advancement of private interests, an object of contempt and a source of popular cynicism.[12]

[8] J. Habermas, 'Human Rights and Popular Sovereignty. The Liberal and Republican Versions' (1994) 7 *Ratio Juris* 2–6.

[9] On individual autonomy as the social ideal informing rights, cf. C. Nino, 'Introduction', in C. Nino (ed.), *Rights* (The International Library of Essays in Law & Legal Theory: Schools; 8 1992), pp. xxvi–xxvii. The correlativity of rights and duties (or powers/liabilities, immunities/disabilities, claims/no-rights, etc.) is a familiar theme of analytic jurisprudence. Although one may, from a conceptual point of view, question the necessity of such correlativity, the point is that rights seem socially effective (and, as such, 'real') often only inasmuch as they are reflected in somebody's (legally enforcible) duties.

[10] Cf. J. Raz, *The Morality of Freedom* (1986), 196–7.

[11] The argument may of course be made that there is no reason for the law to regulate private behaviour. This, however, is not a value-neutral view, but one that builds upon the kind of individualistic premises that characterize one distinct type of liberal theory, and the question remains as to the criteria whereby what is 'private' is delimited.

More generally, the notion of some things as intrinsically praiseworthy cannot find a place in rights-language. And yet, there are a number of contexts in which the very identity of a community depends on a conception of non-instrumental, intrinsic value. Nationalism provides one example. Typical claims of justice embedded in controversy about nationhood envision nations—or a particular nation—as an uninstrumental good, worthy of more than the human lives that inhabit it. Because they are not reducible to claims of rights by individuals, liberal theory tends to think of religion or nationalism as fundamentally irrational.[13] Hence, as Nathaniel Berman has argued, international efforts to find a compromise in nationalist conflicts, such as those involving Jerusalem, have failed. The passions of the parties, of the Arabs and the Israelis, cannot find their way into any of the proposed 'rational' schemes for the city's administration. The antagonists do not see themselves as rational right-claimants in the way liberal theory assumes in order to work.[14] Or think about indigenous societies that construct their sense of identity by a special relationship to land. Members of such societies may have duties to the land that has traditionally belonged to the community; yet no one thinks of himself or herself as an individual right-holder. A legal system that can conceptualize a lien with land only in terms of property and contract (and thus through a basic relationship between the right of the property-owner and the duties of others) cannot articulate the normative reality of such a community. Or think about the solidarity of friendship: there may be a duty between friends to compensate the loss of something even if nobody has committed a wrong. Such duty is independent of the existence of any right in anyone; yet, in terms of friendship, it makes perfect sense to say that the loss ought to be compensated by a person who was involved in bringing it about and has the resources to do so.

In a similar way, and famously, the relationship between the employer and the wage-labourer, or the sexual relations between man and woman, can only with a loss of meaning be described in rights language, for which the focus is on the terms of the contract concluded between two fully rational and autonomous individuals, assumed to trade their rights from a decontextualized negotiating position. The quality of the overall relationship, the purposes for which the work or the sexual act was carried out, or the contract's effects on third parties (e.g. within the family) cannot find articulation. Of course, late modern law includes a plethora of informal considerations that are taken account of in the assessment of such relationships. But these considerations reflect substantive ideals about the labour market and the quality of family life that override and delimit what can justifiably be concluded by reference to rights. Only through them does it becomes possible to assess whether or not the literal terms of the contract should be honoured. The deformalization of contract law by notions of reasonableness, good faith, and public order presumes the presence of

[12] Cf. C. Mouffe, *The Return of the Political* (1993), 82–8.

[13] In the manner of, e.g., E. Kedourie, *Nationalism* (1960).

[14] N. Berman, 'Legalizing Jerusalem or, of Law, Fantasy and Faith' (1996) 45 *The Catholic University of America Law Review* 823–35.

a perspective of the good society from which the rights established by the contract may be evaluated.[15]

The power and the weakness of rights is that they focus on the need to protect the individual against oppression and injustice by the community or the State, as explained usefully in Klaus Günther's contribution to this volume. Although 'rights-talk' has of course spread beyond individual rights to characterize various kinds of economic, social, and cultural objectives as well as different collective goods (right to peace, right to the environment), the latter differ from the former in the all-important sense in which they are understood to be ('merely') programmatory; setting guidelines to legislators and policy objectives to governments instead of creating legally enforceable claims (or powers, immunities) for any person or group of persons.[16] To the extent that such rights may be thought to create legally enforceable claims, they too portray social conflict as *ultimately* having to do with the rights of individuals.[17] In such a case, the relevant social goods worthy of protection are reduced to private interests: I have a right inasmuch as somebody else has a duty not to violate my (legally protected) interest (i.e. right). Since Marx, such a view has been criticized as a formalist, 'alienating' vehicle for the perpetuation of the liberal-capitalist society. The projection of society as merely so many individuals behaving and forming their conceptions of justice from behind a 'veil of ignorance' of their particular character, abilities, desires, and histories is, as later communitarians have insisted, an ideological fiction, examining social normativity 'not by investigation of human beings as we find them in the world, with their diverse histories and communities, but by an abstract concept of the person that has been voided of any definite cultural identity or specific historical inheritance'.[18]

For our purposes, the relevance of this critique lies in the fact that an abstract personhood and the conception of individual rights that goes with it cannot address the sense of injustice that arises, for example, from structural (economic/social) causation or from the sense of belonging to an oppressed minority. But also in many other contexts, posing the normative issue in terms of individual rights fails to grasp its social meaning. To take an example from Joseph Raz: I may own a painting by Van Gogh. Nonetheless, I may have a duty not to destroy it even if nobody has a correlative right. The value of art, in this case, cannot be expressed in rights language—just as little as, for instance, the value of a clean environment in a conflict concerning the carrying out of a contract for a large industrial project.[19]

[15] For the (Weberian) argument about the destructive effects to liberal legalism of such deformalization cf. R. M. Unger, *Law in Modern Society. Towards a Criticism of Social Theory* (1977), 192–200.

[16] It may be conjectured that economic and social rights entered political language as a (left) countermove to invest (left) social objectives with the same kind of dignity or *prima facie* absoluteness that 'bourgeois' objectives in the field of civil and political rights had managed to attain by recourse to rights rhetoric.

[17] This is implied in scholarly discussion about the enforceability of such rights. Cf. M. Scheinin, 'Economic and Social Rights as Legal Rights', in A. Eide, C. Krause, and A. Rosas, *Economic, Social and Cultural Rights* (1995), 41–62. Likewise, Bercusson, 'Fundamental Social and Economic Rights in the European Community', in A. Cassese, A. Clapham, and J. Weiler, *Human Rights and the European Community: Methods of Protection* (1991), 200–1.

[18] J. Gray, *Enlightenment's Wake. Politics and Culture at the Close of the Modern Age* (1995), 2.

[19] Raz, note 10 above, at 212–13.

III

Yet rights are not foundational but depend on collective goods that are evaluated independently from the rights through which we look at them. Freedom of speech is dependent on and intended to support the collective good of the system of political decision-making and public information that prevails in society. The protection of the freedom of contract presumes the existence of, and is constantly limited by, the conditions of the market. Rights protect personal autonomy but 'autonomy is possible only if various collective goods are available'.[20] In a society that offers no choices, autonomy is meaningless. The extent of the availability of such collective goods again is a pure issue of political value; of struggle and compromise between alternative views about what a good society would be like.

That rights refer back to contested notions of the political good is reaffirmed daily in the public decision-processes in which rights-discourse is being waged. A famous example is the *Handyside* case, in which the European Court of Human Rights discussed the margin of appreciation available to national authorities in the field of free speech. The Court affirmed the national authorities' competence to set limits to free speech (in a matter of publications that might offend the sensibilities of the reading public) inasmuch as there did not seem to exist 'a uniform European conception of morals'.[21] The importance of such affirmation is not so much in who the Court saw as the relevant decision-maker, the national or the international judge (though the fact that its focus was on *jurisdiction* is not irrelevant for the argument of this article), but that it expressly spelled out the fact that freedom of speech was a matter of moral assessment, itself independent from the conflicting rights (of free speech and privacy) to which it set a determined boundary.

The insufficiency of rights-rhetoric becomes evident as we try to seek justification or limits to rights. Here a curious paradox emerges. To the extent that rights are assumed as foundational (and this was the argument behind the view of rights as 'trumps') there can exist no perspective from which to justify (or examine/criticize) them. Any justification would relegate the right to a secondary position, as an instrumentality for the reason that justifies it. If the reason is not present, or not valid, then the right is not valid, or applicable, either. Thus, recourse to rights remains an irrationalist strand in liberal theory—or perhaps a bad faith irrationalism ('well, we know we cannot really defend them'). For rights are constantly examined, limited, and criticized from the perspective of alternative notions of the good. This is evident particularly as we examine the problems of field constitution, the relationship between rights and exceptions to them, conflicts between and the indeterminacy of rights.

[20] *Ibid.*, at 247. See J. Finnis, *Natural Law and Natural Rights* (1980), 210–18. Likewise, Mouffe, note 12 above, at 30–2; and M. Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1364–71.

[21] *Handyside* v. *United Kingdom*, ECHR (1976), Series A, No. 24, 22; *Müller and others* v. *Switzerland*, ECHR (1988), Series A, No. 133, 22.

A. Field Constitution

Whether or not a conflict is seen as a rights problem and what rights may seem relevant depends on the language we use to structure the normative field in focus. Examining the question whether the concept of fair trial included the right to legal counsel, Judge Fitzmaurice put his finger on the relevant problem:

> Both parties may, within their own frames of reference, be able to present a self-consistent and valid argument, but since these frames of reference are different, neither argument can, as such, override the other. There is no solution to the problem unless the correct—or rather acceptable—frame of reference can first be determined; but since matters of acceptability depend on approach, feeling, attitude, or even policy, rather than correct legal or logical argument, there is scarcely a solution along these lines either.[22]

In other words, the choice of the relevant language ('frame of reference')—whether the normative field is seen in terms of 'human rights' or, for example, 'economic development' or 'national security'—reflects upon a prior political decision independent of the language finally chosen, often having to do with which authority should have the competence to deal with a matter.

A good example of field constitution is provided by the development of a fundamental rights jurisprudence by the European Court of Justice. As is well known, after a period of reluctance in applying human rights,[23] the Court changed its attitude in response to the challenge by the German and Italian Constitutional Courts and asserted its jurisdiction to examine the compatibility of Community instruments with fundamental rights as inspired by Member States' constitutions (*Stauder*, *Nold*, *Hauer*[24]). Thereafter, such power of review was extended also to (some) Member State legislation in the field of Community law (*Rutili*, *Wachauf*, *Grogan*[25]). As a result of the Court's wish to reassert its jurisdiction as against that of (some) Member States, to borrow a phrase from Ian Ward, '[a]ll sorts of things are bandied around as potential fundamental or human rights',[26] including various political rights (freedom of information), administrative and procedural rights, and rights in the area of social law.[27] The Court has in a particularly striking way also reconstituted the field of economic activity in terms of human rights: '[i]t should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance'.[28]

[22] *Golder* v. *United Kingdom*, ECHR (1975), Series A, No. 18, dissenting opinion of Fitzmaurice, at para. 23.

[23] Cf. Case 1/58, *Stork* v. *High Authority* [1959] ECR 17.

[24] Case 29/69, *Stauder* v. *City of Ulm* [1969] ECR 419; Case 4/73, *Nold KG* v. *Commission* [1974] ECR 491; Case 44/79, *Hauer* v. *Land Rheinland-Pfalz* [1979] ECR 3727.

[25] Case 36/75, *Rutili* v. *Minister for the Interior* [1975] ECR 1219; Case 5/88, *Wachauf* v. *Germany* [1989] ECR 2609; Case 159/90, *Society for the Protection of the Unborn Child* v. *Grogan* [1991] ECR 4685.

[26] I. Ward, *The Margins of European Law* (1996), 142.

[27] Cf. G. de Búrca, 'The Language of Rights and European Integration', in J. Shaw and G. More, *New Legal Dynamics of European Union* (1995), 30–9 and B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in this vol.

[28] Case 240/83, *Procureur de la République* v. *Association de défense des brûleurs d'huiles usagées* [1985] ECR 531, at 548.

While the Court has redescribed entitlement to property and land as well as the confidentiality of business information in fundamental rights language,[29] no such language has been used to describe problems relative to immigration or asylum, racial discrimination, minorities or environmental protection. Such selectivity is of course not dictated by any 'essential' nature of those problems. It is a matter of (political) preference: which interests, which visions of the good merit being characterized as 'rights' and thus afforded the corresponding level of protection, and which do not? What moves are needed to ensure jurisdiction and control?[30]

In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice reconstituted that field in the language of human rights, protection of the environment, humanitarian law, and national self-defence. The decisive concerns, it seems, came for the field of national security that led to the Court's unprecedented *non liquet*.[31] One is left wondering whether that would have been the result had the Court restricted itself to characterizing the use of nuclear weapons in human rights terms (particularly by reference to Article 6 of the 1966 UN Covenant on Civil and Political Rights[32]). The point here is that the choice of the relevant legal field—human rights/environmental law/humanitarian law/self-defence—was crucial for the outcome of the decision, but that this choice, unarticulated though it seemed, could only follow from an external preference about which kinds of concerns are most significant in relation to nuclear weapons.[33]

B. Rights are Conflictual

In every important social conflict, it is possible to describe the claims of both sides as claims for (the honouring of) rights. One typical generic form of rights-conflict is that between right-as-freedom and right-to-security. If, for example, the State's authority to intervene for the prohibition of rape in marriage is conceptualized in terms of a 'right to privacy', then the husband's right to (sexual) freedom is privileged against the wife's right to security. Such a conflict cannot be resolved by mere rights-talk. The boundaries of freedom and security cannot be drawn from any intrinsic or essential meaning of the relevant 'rights'. On the contrary, the debate over where such boundaries should lie reflects back on culturally conditioned ways of thinking about family relationships and the function of the State.

Justification for the imposition of constraint in a morally agnostic society may often seem to lie in the need to limit freedom by the freedoms of others. If your use of your freedom creates harm for me, such use is prohibited. But the formal principle of

[29] Cf. Case 44/79, *Hauer* v. *Land Rheinland-Pfalz* [1979] ECR 3744–50. Cf. also Case 168/91, *Konstantinidis* v. *Stadt Altensteig, Standesamt and Landesamt Calw, Ordnungsamt* [1993] ECR I–1191 in which the general principles of Community law were restricted to apply only in the economic field.

[30] As Weiler puts it, the Court's language is that of human rights while the deep-structure is that of supremacy, in 'Methods of Protection: Towards Second and Third Generation of Protection', in Cassese, Clapham, and Weiler, note 17 above, at 580–1.

[31] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion of 8 July 1996)* (1996) 35 ILM 809.

[32] International Covenant on Civil and Political Rights, adopted by GA Res. 2200 A (XXI) (1966), in United Nations, *A Compilation of International Instruments* (1994), i, part 1, 20.

[33] Cf. M. Koskenniemi, 'Faith, Identity and the Killing of the Innocent. International Lawyers and Nuclear Weapons' (1997) 10 *Leiden Journal of International Law* 137–62.

preventing 'harm to others' merely shifts focus to the concept of 'harm' and fails to indicate which of the competing conceptions of 'harm' should be preferred.[34] Think of the problem of public intervention in rape in marriage again. Here 'harm' for the woman is constituted by the husband's physical aggression, while the 'harm' the husband will suffer follows from the outside intervention on his sexual liberty that he had purchased in the act of marriage. The politically and culturally conditioned character of the notion of 'harm' is perhaps easiest to see in the classic debates about matters of sexual morality. For while most liberals would today feel that homosexual acts between consenting adults should not be taken to 'harm' society,[35] the practice of prostitution or pornography might seem degrading and, as such, harmful for women at large.

But this is just one aspect of the right to freedom/right to security conflict. Embedded in the former in most cases is the ideology of *laissez-faire*, while embedded in the latter is a communal ethic of responsibility, and the dilemma is that 'any effort to keep the state out of our personal lives will leave us subject to private domination'.[36]

It does not follow, however, that rights conflicts could be solved simply once we have decided whether to prefer individualism or altruism; neither is an unmitigated good. Individualism is the Dr Jekyll for the egoism of Mr Hyde. Communal ethic grounds also suffocating, totalitarian practices. But 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.

European human rights organs repeatedly deal with conflicts involving an individual's right to privacy and the right of other individuals to security that the State has been tasked to guarantee. Are prison authorities, for instance, authorized to censor prisoners' letters? Again, the matter turns on policy, or 'striking a balance between the legitimate interests of public order and security and that of the rehabilitation of prisoners'.[37]

But, obviously, there are no technical means of calculating the relative weights of the two kinds of interests. Any 'balancing' will involve broad cultural and political assumptions about whether the good society should prefer the values of public order or those of rehabilitation. It is hard to think of a more openly politico-cultural divide than that. In the *Grogan* case involving the prohibition of dissemination of information on abortion in Ireland, the Advocate-General of the European Court perceived a conflict that required 'balancing two fundamental rights, on the one hand the right

[34] This is of course John Stuart Mill's famous doctrine: '[t]he only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others': J.S. Mill, *On Liberty* (1859/1974), 68. For the point that 'harm' cannot be defined in a morally neutral way, cf. N. MacCormick, 'Against Moral Disestablishment', in N. MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (1982), 28–30.

[35] On the classic debate between Hart and Lord Devlin on the Wolfenden Report on abolishing the criminality of homosexual practices, cf. H.L.A. Hart, *Law, Liberty and Morality* (1963) and P. Devlin, *The Enforcement of Morals* (1959).

[36] F. Olsen, 'Liberal Rights and Critical Legal Theory', in C. Joerges and D.M. Trubek, *Critical Legal Thought: An American–German Debate* (1989), 251.

[37] *Silver and others* v. *United Kingdom*, ECHR (1987) Series B No. 51, 75–6, (1983) Series A, No. 61.

to life as defined and declared to be applicable to unborn life by a Member State, and on the other the freedom of expression'. This was to be dealt with by reference to the Strasbourg Court's criteria of whether any restriction had a legitimate aim and was necessary in a democratic society, criteria which were 'analogous to the principle of proportionality used in Community Law'.[38] Summarizing the task, he concluded: 'the correct justification under general principles of Community law is public policy and/or public morality, because the rule at issue here is justified by an ethical value-judgement which is regarded in the Member State concerned as forming part of the bases of the legal system'.[39]

Alternatively, think of environmental policies. The rights of the upstream industrial user of a common watercourse may conflict with the right of the downstream user to clean water. Neither right enjoys an absolute preference. Any balancing will have to invoke the values of either economic prosperity or clean environment without any expectation that the attained outcome would manifest some sort of an inherent or non-political equilibrium between them.

Another rights conflict is that between formal equality and substantive equality; or equality of opportunity and equality of result. For the women's movement, it has sometimes seemed important to argue from the right to equality (equality of voting rights, for instance), while in other cases the fact that formal neutrality may advance male interests has seemed to compel arguing in favour of (reverse) discrimination. From the perspective of a universalizing rights-rhetoric, this appears as incoherence; while from the perspective of political struggles, incoherence translates into a political necessity.

The resolution of rights-conflicts (and every social conflict is amenable to a description as such) presumes a place 'beyond' rights, a place that allows the limitation of the scope of the claimed rights and their subordination to 'some pattern, or range of patterns, of human character, conduct and interaction in community, and the need to choose such specification of rights as tends to favour that pattern, or range of patterns. In other words, we need some conception of human good, of individual flourishing, in a form (or range of forms) of common life that fosters rather than hinders such flourishing.'[40]

What this pattern might be in Community law was famously stated by the European Court in *Wachauf* as follows:

> The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of these rights, in particular in the context of a common organization of the market, provided that these restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights.[41]

[38] Case 159/90, *Society for the Protection of the Unborn Child* v. *Grogan* [1991] ECR I–4685. Opinion of the AG at para. 34.

[39] *Ibid.*, at para. 35.

[40] J. Finnis, *Natural Law and Natural Rights* (1980), 219–20.

[41] Case 5/88, *Wauchauf* [1989] ECR 2639. Likewise in Case 44/94, *The Queen* v. *Ministry of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations and Others, Federation of*

The point here is not, of course, that the Court's statement should be seen as a mistaken or cynical position about rights but that recourse to the language of 'functions', 'objectives', 'general interest' and 'proportionality' which seems so far removed from our intuitive association of rights with an absoluteness, or 'trumping character', against social policies, is simply unavoidable. A right is, often, a policy and must be weighed as such against other policies. Here there is no question of Klaus Günther's memories of pain and injustice that would seek articulation. The European Court's judicial everyday is the banal exercise of coping with conflicts of (most commonly economic) interests, and allocating scarce resources. The fact that those interests are dressed in rights language does not change this pattern, but it does obscure the political nature of the task.

C. Rights Always Come with Exceptions and it is a Matter of Policy to which One Resort is Made

One example concerns the historical vicissitudes of the right of free speech in the United States, in which that right is always conditioned by the balancing test of the First Amendment and the 'clear and present danger' standard. One of the limitations has been to allow free speech only in places that are 'public forums', excluding for instance leafleting in shopping-centres and prohibiting the posting of signs on city-owned buildings in a way that reflects deeply ingrained political assumptions of American culture.[42]

Within the European system, the relations between rights and the power to derogate from them is in principle conditioned by the criterion of what may be 'necessary in a democratic society'. As Susan Marks has recently shown, this is a criterion that is heavily contextualized in the political self-understanding of post-war Western societies.[43] There is nothing a-historical (or unpolitical) in the conclusion, for instance, that if a person loses his opportunity to work because of the disclosure by public authorities of secret information on him, it still remains the case that 'having regard to the area of discretion which must be left to the State in respect of the defence of the national security . . . [the interference was] . . . "necessary in a democratic society in the interests of national security" '.[44]

The neat scheme of right/derogation that is embedded in the European Convention on Human Rights is constantly undermined by the experience that there is no unpolitical rule or standard that would set out when to apply the right and when the derogation. Why would letter-opening and wire-tapping, with limited judicial control, be 'necessary in a democratic society'? To answer such questions the Commission and the Court have developed a balancing practice that uses abstract notions such as 'reasonable', 'proportionate', 'public order', and 'morals' to justify reference either to the right or to the exception.[45] In this way, the scope of rights becomes conditioned by policy choices that seem justifiable only by reference to alternative conceptions of the good society.

The European Court of Justice has been quite express in this respect. Already its early human rights jurisprudence was based on the assumption that a fundamental right was subject to restrictions inasmuch as 'the restrictions . . . correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights'.[46] It is now 'settled case-law that fundamental rights . . . are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community'.[47] Such restrictions may even follow from 'proportionality'—a utilitarian test, if there ever was one.[48] It matters little if the Court holds the valid test to be that of 'disproportionate' or 'intolerable' effect. The point is that all such language indicates that the characterization of social objectives in terms of the 'rights' of their beneficiaries adds little to the administrative pattern of dealing with them. This involves a political give-and-take and *ad hoc* decision-making in which no memory of pain or injustice is being articulated.

D. Rights are Formulated in Indeterminate Language

It is a truism that the linguistic openness of rights discourse leads to policy being determinative of particular interpretive outcomes. Discussing the concept of 'degrading' treatment, the European Court of Human Rights came to a conclusion that seems practically self-evident, namely that '[t]he assessment is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution'.[49]

But indeterminacy exists far beyond such simple semantic openness. It is hard to imagine a standard that would seem more straight-forward than the right to life under Article 2 of the European Convention on Human Rights (ECHR). Yet even its application is revealed as a weighing standard. Does the right to life also include abortion? The European Commission's practice has been summarized as follows: 'even if one assumes that Article 2 protects the unborn life, the rights and interests involved have been weighed against each other in a reasonable way'.[50]

Highlands and Islands Fishermen and Others, [1995] ECR 3115; Case 22/94, *Irish Farmers Association and Others* v. *Minister for Agriculture, Food and Forestry, Ireland, and the Attorney General* [1997] ECR 1809. As the Court stated in *Nold*: 'if rights of ownership are protected by the constitutional laws of all Member States . . . the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder': Case 4/73, *Nold* [1974] ECR 491.

[42] Cf. D. Kairys, 'Freedom of Speech', in D. Kairys (ed.), *The Politics of Law. A Progressive Critique* (Revised ed., 1990), 262–3.

[43] Cf. S. Marks, 'The European Convention of Human Rights and its "Democratic Society" ', (1995) LXVI *BYIL* 209–38. For an extension of the same point to recent international legal debate see S. Marks, 'The End of History? Reflections on Some International Legal Theses' (1997) 8 *EJIL* 449–77.

[44] *Leander* case, ECHR (1987), Series A, No. 116, 18, 26–7.

[45] For one discussion and critique, cf. P. Van Dijk and G.V. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (1990), 604.

[46] Case 44/79, *Hauer* [1979] ECR 3747.

[47] Case 84/95, *Bosphorus* [1996] ECR 3953.

[48] In *Internationale Handelsgesellschaft*, for instance, the Court concluded that the system of deposits imposed on cornflour exporters did not violate fundamental human rights because '[t]he costs involved in the deposit do not constitute an amount disproportionate to the total value of the goods in question'. Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1136.

[49] *Tyrer* case, ECHR (1978), Series A, No. 26, 15.

[50] Van Dijk and Van Hoof, note 45 above, at 220.

The same concerns the ending of life: 'the value of the life to be protected can and must be weighed against other rights of the person in question'.[51]

The normative limit of the right to life is established through an act of balancing with a view, supposedly, of attaining an aggregate good. It may seem hard to think of a context in which utilitarian approaches seem more out of place than this. None the less, it seems equally clear that the right to life cannot be taken as an absolute standard but involves a prohibition against the arbitrary taking of lives, while what is 'arbitrary' depends on the context.[52]

Again, such assessment involves precisely the kind of discretion that the concept of rights (as 'trumps') was intended to do away with, including balancing between requirements of State security and individual interests.[53] The Strasbourg Court's much-criticized doctrine of the margin of appreciation, 'at the heart of virtually all major cases that come before the Court',[54] is from this perspective nothing more than a healthy admission that there is always interpretative indeterminacy in the construction of particular rights-claims and that often it is local courts, and not Strasbourg organs, that are most competent to police the matter. The main point is that rights not only determine and limit policies, but that policies are needed to give meaning, applicability, and limits to rights.

In a recent piece, Philip Alston has reviewed similar arguments I have made elsewhere as a 'standard post-modernist critique', noting that it is 'unduly focused on conceptions of rights as "trumps" '.[55] What he suggests is that human rights 'can provide a meaningful basis for social order without being rigid, absolute or forever enduring', and that they are:

> capable of partly transcending the institutions that gave birth to them, and those very same institutions (or their successors) which seek to exercise responsibility for their elaboration and interpretation.[56]

For Alston, the above critique works with a straw-man conception of human rights, a conception that is impossibly rigid, and as such does not really exist anywhere. Of course rights are flexible and dependent on evaluation and process, but they are also partly reflective (and creative) of a political consensus without having to assume that they involve a banalization of rights that would do away with 'their capacity to mobilize, to inspire and to exhort'.[57]

I am uncertain about the force of these arguments. I agree that in practice rights are downgraded from their status as 'trumps' to the level of soft policies in favour of

[51] Van Dijk and Van Hoof, note 45 above, at 220–1. On the proportionality standard in this context see *ibid.*, at 222–3.

[52] Cf. the discussion of the International Court of Justice of the right to life in Art. 6 of the International Covenant on Civil and Political Rights and of genocide in the *Legality of the Threat or Use of Nuclear Weapons*, note 31 above, at paras. 24–26: 'after having taken due account of the circumstances of the specific case', at para. 26.

[53] Van Dijk and Van Hoof, note 45 above, at 232.

[54] R. St J. Macdonald, 'The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights', in *International Law at the Time of Its Codification: Studies in Honour of Roberto Ago* (1987), 208.

[55] P. Alston, 'Introduction', in P. Alston (ed.), *Human Rights Law* (The International Library of Essays in Law and Legal Theory, Areas 27, 1996), pp. xvi–xvii.

[56] *Ibid.*

[57] *Ibid.*, at p. xv.

this or that social objective. Like any other policies, they may or may not reflect a consensus of opinion within some part of the population, and being acknowledged as such may also help to mobilize political forces. Indeed, that they are often a policy is the gist of the argument of this chapter.

However, the point I want to make is that although this is true of a large number of those social goods that we tend today to call 'rights', none of us would wish that to be true of a certain limited number of 'core rights', namely those that we most commonly associate with the adjectives 'inalienable' or 'fundamental', and that are capable of articulating Klaus Günther's memories of fear and injustice. But in order to uphold *that* distinction we must, I think, fall back on a naturalist (or 'mythical') conception of basic rights whose special character depends on their not being subject to the kinds of legal-technical arguments and proof that justify—and make vulnerable—'ordinary' rights as policies. The right of property, for instance, is as strong or weak as the economic or social justification that its exercise has in a particular case. It may be assessed and, if necessary, overridden by alternative political preferences. The right to be free from torture operates differently. Its validity is not relative to the force of any justification that we can provide for it, but is intrinsic in a manner that cannot be articulated through the forms of legal-technical argument.

We seem to have good reason to distinguish between two types of rights: those that are an effect of politics and those that constrain it. But upholding the distinction creates two difficulties. First, it seems difficult to defend special rights (memories of fear and injustice) on the basis of their intrinsic value, irrespectively of any arguments we can produce to support them—which means that they must be accepted outside rational convention; as part of our self-definition, as part of our identity as members of our communities; perhaps as taboo. Secondly, identifying the distinction compels an acceptance that *other* rights are no different from policies, in the sense that whether and to what extent they are applicable must be determined by reference to the kinds of 'balancing', 'proportionality', and other kinds of utilitarian considerations that are a commonplace of bureaucratic practice. The problem is that the rights of the former group seem too strong to be defensible within a democratic order, while the rights of the latter group seem too weak to constitute an effective constraint on policy. Indeed, they are indistinguishable from policy.

IV

Rights discourse sometimes appears as an offshoot of inflexible (and, as such, Utopian) legalism: '[t]o make a political issue that is deeply morally contested a matter of basic rights is to make it non-negotiable, since rights . . . are unconditional entitlements, not susceptible to moderation. Because they are peremptory in this way, rights do not allow divisive issues to be settled by legislative [or adjudicative] compromise: they permit only unconditional victory or surrender.'[58]

[58] Gray, note 18 above, at 22.

The absoluteness of rights discourse is not, however, an accidental property in it, but follows from its justification within liberal theory, its purpose to create a set of unpolitical normative demands intended to 'trump' legislative policies or administrative discretion. The very point of rights as a special type of normative entitlement lies in their absoluteness, their uncontextual validity, and immediate applicability. Understood in such a way, rights discourse has three broad cultural effects on politics.

One is the entrenchment of the idea of politics as already constrained by a nonpolitical vision of the good society, understood as the sum total of individual rights that exist in a co-terminous relationship to each other. This is the core sense of liberal naturalism, the view that rights 'exist' outside political society and are then brought inside through legislation. Politics are thereby reduced to the declaration of truths already established elsewhere and the realization of a society already in virtual existence. As politics lose their creative, 'imaginative' character, they are transformed from their core sense as human *vita activa* into an exercise of technical competence by experts.[59] Exit from the tragedy of incompatible and contested goods is bought at the expense of the bureaucratization of politics into balancing or the search of aggregate utility—paradoxically precisely the outcome that rights discourse originally sought to combat.

But inasmuch as rights are not naturally given, but, as I have argued above, the result of the application of policies, then an offshoot is that politics become the politics of procedure, a struggle for the power to define, for jurisdiction: the question is not so much whether a weighing of interests has to take place, but rather which authority in the final analysis is empowered to do the weighing.

This aspect highlights the priority of process to substance in rights discourse. And for those immersed in that discourse the natural cultural preference is that 'only the Strasbourg organs are competent to conduct the weighing of interests involved in the Convention'.[60]

Secondly, rights are inescapably individualist. For even as they necessitate reference to social values and communal goods, rights always occupy the perspective of the single individual, slightly removed from those values and interests herself. For rights discourse, the individual is a separable, unitary entity that has values or interests, and thus rights, only as external attributes to itself but whose identity is not formed by them.[61] Yet it is not clear if a distinction can be made between the self and the values and interests it carries. But the rhetoric of rights fails to articulate the reality where our individual selves are (also) products of the contexts in which we live, of the values and interests of our communities. Besides, often our selves are torn between competing values and interests, and no unitary standpoint beyond them can be found. Thinking of politics in terms of rights is unable to reach the process in which the interests of individuals (and their 'individuality') are formed, omitting the question whether having such interests is good in the first place, and failing to discriminate between interests that conflict but which we feel equally strongly about.

[59] For this argument at greater length, cf. M. Koskenniemi, 'The Wonderful Artificiality of States' (1994) *ASIL Proceedings* 22–9.
[60] Van Dijk and Van Hoof, note 45 above, at 601.
[61] Cf. generally M. Sandel, *Liberalism and the Limits of Justice* (1983).

Moreover, rights individualism loses a creative conception of the political, reducing citizenship to passive reliance on rights and political decision-making to an oscillation between (individual) ethics and economics. No idea of civic virtue or political participation can be sustained through insistence on the priority of the right over the good, and, inasmuch as such ideas occasionally emerge, they find no resonance in a right-based political culture.[62]

A third general consequence of the proliferation of rights-rhetoric everywhere in administration is the inauguration of what could be called a *political culture of bad faith*. For liberal agnosticism, a conception of natural rights, situated outside political society, remains ultimately an unjustifiable, even mythical, assumption that cannot be brought within the conventions of liberal political debate as they would thereby lose their fundamental character. For seeking to justify rights makes those rights vulnerable to the objections that can be directed against the justifying reasons: should people have a right to free speech because that produces the largest aggregate utility, is in accordance with human nature, or corresponds to popular will? Each explanation condenses a contested theory about the political good. As providing such explanations will infect rights with the weaknesses that attach to those theories, they can no longer be used to overrule conflicts over them and their point is lost. Hence, paradoxically, rights seem effective only if they can be accepted by unquestioning faith—a faith the absence of which provided the very reason for having recourse to them. If the critique of rights (as 'political') is correct, then the beneficiality of rights would seem to presuppose that the critique is not known![63]

But no such unthinking faith in rights can be taken for granted. Everyone knows that politics are not 'really' about translating natural rights into positive law; that at issue are struggle and compromise, power and ideology, and not derivations from transparent and automatically knowable normative demands. Nor can the critiques of formalism and realism be undone. Everyone knows that administration and adjudication have to do with discretion, and that, however much such discretion is dressed in the technical language of rights and 'balancing', the outcomes reflect broad cultural and political preferences that have nothing inalienable about them.

So, how does one deal with loss of faith? One response is simply to give up rights. But this would be an unwarranted conclusion inasmuch as there does not exist any other language either, in which political conflict would already have been solved. Another, and the more common response is to continue rights talk without actually believing in the a-political or foundational nature of rights: '[d]o not mind that you cannot really defend your rights. If they effectively produce the political outcomes you wished to produce, just continue. Remember, no one else is in possession of a stronger or more convincing political language and if your justifications cannot withstand internal criticisms that are familiar from 200 years of liberal rhetoric, neither can theirs.' To succeed, however, such a strategy may require not disclosing your own loss of faith. For this might 'jeopardize the idea that human rights are fundamental and universally applicable which is a fiction Europe at least should try to adhere to'.[64]

[62] Cf. Mouffe, note 12 above, at 32–8 and 139–41.
[63] Tushnet, note 20 above, at 1386.
[64] E. Steyger, *Europe and Its Members. A Constitutional Approach* (1995), 49.

In this way, you may be compelled—in order to advance the cultural politics of a 'Europe'—to choose a purely strategic attitude towards rights. Even as you know that rights defer to policy, you cannot disclose this, as you would then seem to undermine what others (mistakenly) believe one of your most beneficial gifts to humanity (a non-political and universal rights rhetoric). It is hard to think of such an attitude as a beneficial basis from which to engage other cultures or to inaugurate a transcultural sphere of politics.

The question would then not be so much which rights we have, or should have, but what it takes to develop politics in which deviating conceptions of the good—whether or not expressed in rights language—can be debated and realized without having to assume that they are taken seriously only if they can lay claim to an a-political absoluteness that is connoted by rights as trumps.

4

The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture

KLAUS GÜNTHER

I. EUROPEAN HUMAN RIGHTS AND THE POLITICAL CULTURE OF A COLLECTIVE MEMORY OF INJUSTICE AND FEAR

To ask for a European approach to human rights is ambivalent. If the question is whether the genesis, nature, and scope of human rights are essentially European, one runs immediately into the endless debate about universalism versus particularism of human rights. Obviously, the question does not aim at a European approach to human rights as the expression of a particular historical culture which should be extended to all different cultures of the world. Instead of this, the question seems to aim at a specific European contribution to human rights which are already considered to be valid for all human beings, as is declared in the Universal Declaration of Human Rights.[1]

To ask the question in this way of course does not mean that one could avoid the problem of cultural relativism. Every European approach and every European contribution to human rights has to keep in mind that the idea of universal human rights is in itself a particular European idea and that it has a long history of misreading, selective interpretation, and wrong application. The idea of universal human rights, as well as the history of its selective realization, is therefore deeply rooted in European history and culture. To say that *all* human beings are created equal and that *every* human being is provided by nature with inalienable rights presupposes something that is common to all human beings as human beings. It is still the language of the Christian religion. The idea that all human beings are equal was interpreted by the Christians on the basis of a belief in a God who is the creator of human beings, and who has created them according to his own image. This reading of universality already included particularity, because it referred primarily to those human beings who believed in the Christian God, and it excluded all those who did not. After

[1] Universal Declaration of Human Rights, adopted by GA Res. 217 A (III) 1948. In United Nations, *A Compilation of International Instruments* (1994) i, part 1, 1.