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# **THE NECESSITY AND POSSIBILITY OF THE USE OF THE PRINCIPLE OF GENERIC CONSISTENCY BY THE UK COURTS TO ANSWER THE FUNDAMENTAL QUESTIONS OF CONVENTION RIGHTS INTERPRETATION**

**BENEDICT DOUGLAS**

This thesis seeks to engage with and give answers to the fundamental question of rights interpretation confronting the British judiciary under the Human Rights Act 1998 (HRA). As a premise, it recognises that the textual openness and consequential semantic uncertainty of the requirements of the Convention rights necessitates their interpretation. In determining the approach the courts should apply, this thesis takes as its structural foundation an analysis of the current approach of the domestic courts and the European Court of Human Rights (ECtHR) to the five pivotal questions of interpretation: who has rights, the substantive nature of those rights, how rights are to be weighted and balanced in cases of conflict, whether they are rights under a will or an interest conception, and against whom the rights are held?

From this basis, the thesis builds upon the existing knowledge to apply Alan Gewirth's Principle of Generic Consistency (PGC) to the current judicial position, to critique its compatibility with this principle's requirements. Through analysis of core settled characteristics of the Convention rights, the substance of the courts' judgements and the ECtHR's jurisprudence, and supported by both dialectically necessary and contingent arguments, it is ultimately argued that it is, theoretically and practically, both necessary and possible for the domestic courts to be guided by the PGC in their interpretive approach.

Finally, an improved understanding of the principle of human dignity will be advocated as a means through which the domestic courts can apply the PGC's requirements. By this means, this thesis ultimately proposes an interpretive approach to the Convention rights which gives compelling guidance in answering the fundamental questions of rights interpretation and, by encouraging direct principled engagement with these questions, increases the public understanding of the fundamental nature of rights and the acceptability of the HRA and judgments under it.

**THE NECESSITY AND POSSIBILITY OF THE USE OF THE  
PRINCIPLE OF GENERIC CONSISTENCY BY THE UK COURTS TO  
ANSWER THE FUNDAMENTAL QUESTIONS OF CONVENTION  
RIGHTS INTERPRETATION**

**In One Volume**

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**Submitted for the degree of Doctor of Philosophy**

**The Law School**

**St. John's College**

**Durham University**

**2012**

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## TABLE OF CONTENTS

DEDICATION .....	i
ACKNOWLEDGEMENTS .....	ii
CHAPTER I: INTRODUCTION.....	1
CHAPTER II: THE UNCERTAINTY OF HUMAN RIGHTS.....	17
<i>Introduction</i> .....	17
<i>The Presence of Uncertainty</i> .....	17
<i>Unavoidable Uncertainty in Human Rights</i> .....	19
<i>The Inherent Uncertainty of Language</i> .....	19
<i>The Uncertainty of Law</i> .....	22
<i>The Semantic Uncertainty of Human Rights</i> .....	23
<i>The Deliberate Uncertainty of Human Rights</i> .....	24
<i>The Need for Agreement</i> .....	25
<i>Substantive Constraints on Content</i> .....	27
<i>The Avoidance of Legal Obligations</i> .....	29
<i>The Consequences of Uncertainty</i> .....	31
<i>Desirable Consequences</i> .....	31
<i>Potentially Problematic Consequences</i> .....	33
<i>The Need for Interpretation</i> .....	35
<i>Conclusion</i> .....	37
CHAPTER III: THE PURPOSES UNDERLYING THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND HOW THESE AND THEIR USE IN THE INTERPRETATION OF THE CONVENTION RIGHTS, CONTRIBUTE TO THE INDETERMINACY OF MEANING OF THE CONVENTION RIGHTS.....	38
<i>Introduction</i> .....	38
<i>The General Purposes behind the Convention’s Creation</i> .....	38
<i>Principled Purposes</i> .....	40
<i>From Purposes to Principles</i> .....	40
<i>The Convention Text</i> .....	41
<i>The Court’s Jurisprudence</i> .....	43
<i>Uncertainty Surrounding the Interpretation of these Principles</i> .....	44
<i>Dignity</i> .....	44
<i>Autonomy</i> .....	48

<i>Equality</i> .....	50
<b><i>The Practical Implications of the Uncertainty of the Underlying Principles for the Interpretation of the Convention Rights</i></b> .....	52
<i>Who Has Rights</i> .....	52
<i>The Substantive Nature of the Convention Rights: Positive and Negative Obligations</i> .....	54
<i>The Weighing and Balancing of Convention Rights</i> .....	56
<i>The Interest and the Will Conceptions of Rights</i> .....	57
<i>Horizontal and Vertical Application</i> .....	59
<b><i>Conclusion</i></b> .....	60
<b>CHAPTER IV: THE APPROACH OF THE ORGANS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO THE PIVOTAL QUESTIONS OF THE INTERPRETATION OF THE CONVENTION RIGHTS</b> .....	61
<b><i>Introduction</i></b> .....	61
<b><i>Who Can Possess Convention Rights</i></b> .....	61
<i>The Convention Text</i> .....	62
<i>The Judicial Organs of the Convention</i> .....	66
<b><i>The Substantive Nature of Rights as Imposing Positive and Negative Obligations</i></b> .....	69
<i>The Legal Source of the Obligations</i> .....	70
<i>The Particular Nature of the Obligations</i> .....	74
<i>Limits of Positive Obligations</i> .....	77
<b><i>The Balancing of Rights</i></b> .....	78
<i>The Need to Balance</i> .....	78
<i>The Approach of the Convention's Adjudicative Bodies</i> .....	81
<i>Proportionality</i> .....	81
<i>The Margin of Appreciation</i> .....	83
<i>Walking the Rope</i> .....	85
<i>Rights against Rights</i> .....	87
<b><i>Will and Interest Conceptions of Rights</i></b> .....	91
<i>The Will Conception</i> .....	91
<i>The Interest Conception</i> .....	94
<i>The Convention and ECtHR's Approach to Waiving Rights</i> .....	97
The Convention Text .....	97
The Approach of the Convention Organs .....	98
<b><i>Horizontal and Vertical Rights</i></b> .....	103

<i>The Application of Rights</i> .....	104
<i>The Effect of Rights Against Individuals</i> .....	106
<b>Conclusion</b> .....	110
<b>CHAPTER V: THE APPROACH OF THE COURTS OF THE UNITED KINGDOM TO THE PIVOTAL QUESTIONS OF INTERPRETATION RAISED BY THE CONVENTION RIGHTS</b> .....	112
<b>Introduction</b> .....	112
<b>Who Can Possess Convention Rights</b> .....	112
<i>Who is a Human Being for the Purposes of Convention rights?</i> .....	112
<b>The Substantive Nature of Rights as Imposing Positive and Negative Obligations</b> .....	116
<i>The Reception of Positive and Negative Obligations</i> .....	116
<i>The Foundations of the Existence of Positive Obligations</i> .....	118
<i>Determining the Extent of Positive Obligations</i> .....	122
<b>The Balancing of Rights</b> .....	124
<i>Areas of Balancing</i> .....	125
<i>Proportionality</i> .....	126
<i>Practical Proportionality</i> .....	132
<i>Balancing Rights Against Rights</i> .....	133
<i>Balancing Rights Against General Interests</i> .....	137
<b>The Will and Interest Conceptions of Rights</b> .....	143
<i>The United Kingdom Courts Approach to Waiving Rights</i> .....	143
<b>Horizontal and Vertical Effect of Convention Rights</b> .....	148
<i>Vertical Effect</i> .....	149
<i>Horizontal Effect</i> .....	153
The Interpretive Obligation.....	154
The Courts as Public Authorities .....	156
<b>Conclusion</b> .....	160
<b>CHAPTER VI: METHODOLOGY: FINDING ANSWERS TO THE OPEN TEXTURE OF RIGHTS IN MORAL PHILOSOPHY</b> .....	161
<b>Introduction</b> .....	161
<b>The Question of the Interpretation of Convention Rights</b> .....	161
<b>The Need to Find a Rational way of Resolving Disputes about the Interpretation the Convention Rights</b> .....	162
<b>Consistency with the Fundamental Features of the Convention’s Human Rights Protection</b> .....	164

<i>Universality</i> .....	164
<i>The Inherent and Inalienability Nature of Rights</i> .....	168
<i>The Emphasis on Rights</i> .....	170
<b><i>The Principle of Generic Consistency as a Guide to the Interpretation of the Convention Rights</i></b> .....	175
<i>Moral Answers to Legal Questions</i> .....	175
Alternate Arguments to the PGC .....	192
<i>Compatibility with the Convention</i> .....	201
Universality of Rights .....	202
Inherently and Inalienably Deontological.....	203
Rights Rather than Duties .....	210
<b><i>The Mirror Principle and the Practical Application of the PGC</i></b> .....	218
<i>The Content and Consequences of the Mirror Principle</i> .....	218
Exceptions to the Mirror Principle.....	221
<i>Reflecting the PGC</i> .....	223
Justification.....	224
<b><i>Conclusion</i></b> .....	234
<b>CHAPTER VII: GEWIRTHIAN CONVENTION RIGHTS</b> .....	235
<b><i>Introduction</i></b> .....	235
<b><i>Who Has Human Rights</i></b> .....	235
<i>Introduction</i> .....	235
<i>Agency in Action</i> .....	235
<i>Rights in Agency</i> .....	236
Generic Rights in Agency .....	236
Generic Rights to Human Rights .....	237
<i>Convention Rights through Generic Rights</i> .....	245
<i>Conclusion</i> .....	259
<b><i>The Substantive Nature of Convention Rights</i></b> .....	260
<i>Foundations of Interpretation</i> .....	260
<i>Convention Rights in the Light of Generic Rights</i> .....	260
Negative Obligations .....	261
Positive Obligations .....	268
The Limits of Positive Obligations .....	274
<i>Conclusion</i> .....	281

<b><i>The Balancing and Weighing of the Convention Rights</i></b> .....	281
<i>Conflicts Between Rights</i> .....	281
<i>Weight and Balance</i> .....	283
Gewirthian Weight .....	284
The Generic Weighting of Convention Rights .....	290
<i>Conclusion</i> .....	299
<b><i>Will Conception of Generic Rights</i></b> .....	300
<i>The Nature of Gewirth's Rights</i> .....	300
<i>The Necessary Nature of the Generic Rights</i> .....	302
<i>Will Conception Convention Rights</i> .....	305
<i>Conclusion</i> .....	311
<b><i>Horizontal and Vertical Gewirthian Rights</i></b> .....	311
<i>Vertically Challenged</i> .....	312
<i>Horizontally Challenging</i> .....	314
<i>Conclusion</i> .....	321
<b>CHAPTER VIII: THE PRINCIPLE OF DIGNITY AS A MEANS FOR THE JUDICIARY TO HAVE REGARD TO GEWIRTHIAN IDEAS IN INTERPRETING THE CONVENTION RIGHTS</b> .....	322
<b><i>Introduction</i></b> .....	322
<b><i>The Role of Dignity in Context of Human Rights</i></b> .....	322
<b><i>Dignity as a Means of Regard to Morality</i></b> .....	327
<i>Gewirthian Dignity</i> .....	329
<b><i>The Susceptibility of British Law to a Dignity Basis for Rights Interpretation</i></b> .....	331
<b><i>Extra-national Support for the Increased Domestic Regard to Dignity</i></b> .....	339
<i>Dignity in other States</i> .....	339
<i>Dignity above the National Level</i> .....	341
<b><i>The Practicality of Dignity</i></b> .....	346
<i>Potential Problems with the use of Dignity</i> .....	352
<b><i>From the Acceptance of Dignity to the Acceptance of Rights</i></b> .....	355
<b><i>Conclusion</i></b> .....	357
<b>CHAPTER IX: CONCLUSION</b> .....	358
<b>BIBLIOGRAPHY</b> .....	368



**DEDICATION**

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## CHAPTER I: INTRODUCTION

A direct engagement by the British judiciary with the key fundamental questions of the interpretation of the Convention rights incorporated by the Human Rights Act 1998 (HRA), in the form of coherent principled approach to them, is both absent and necessary. In this thesis it will be argued that such a principled approach to the five fundamental questions of rights interpretation, which are at the root of all substantive judgements on the interpretation of the Convention's scope and practical application, is both possible and desirable.

A substantive moral principle which will be argued to be capable of giving this interpretive guidance is Alan Gewirth's Principle of Generic Consistency (PGC) which requires moral agents to act in accordance with their own and other's generic rights.<sup>1</sup> This will be shown to be an internally coherent principle of action, with its acceptance both dialectically necessary by those who can be described as moral agents, and contingently necessary by all who accept as valid the requirements of the Universal Declaration of Human Rights (UDHR) or rights documents based upon it. Its use as principle of interpretation will be argued to be a valid approach to their construction due to its consistency with the foundational principles whose protection has been stated to be the purpose of the Convention. Ultimately, it will be claimed that the interpretive use of the PGC is within the practical and constitutional abilities of the domestic courts, as consistent with Strasbourg's jurisprudence, and with the means of implementation already present within the domestic case law.

In chapter two it is shown, as a premise for the interpretative argument to follow, that the rights of the Convention are stated in textually open manner which facilitates semantic uncertainty as to their substantive requirements. Although to some extent an unavoidable

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<sup>1</sup> A. Gewirth, *Reason and Morality* (University of Chicago Press 1978), 135

characteristic of language and feature of laws, and particularly of the nature of rights, the openness of the provisions of the Convention to differing interpretations is also the product of a deliberate exploitation of this latent uncertainty. Phrased in this manner, to pragmatically facilitate the agreement of states with different ideas of rights protection to a single document, to be practically effective they require authoritative interpretation. More specifically, it will be argued that the open textured language and the deliberate avoidance of semantic specificity as to the nature of rights within the Convention, gives scope for a principle such as the PGC to be used in their interpretation to direct their application.

The third chapter will acknowledge that three general principles are in fact apparent within the Convention itself and in the jurisprudence of the European Court of Human Rights (ECtHR), existing as the motivating foundations underpinning the practical purposes of the Convention and the substantive rights. It will however be argued that these principles of dignity, autonomy and equality also lack clearly defined content and are the subject of differing interpretations and thus share in and, when applied as interpretive tools, contribute to the semantic uncertainty of the Convention generally.

From this disputed nature of the underlying principles and the uncertainty of the requirements of the substantive Convention rights, it will be argued that five questions of interpretation emerge and must be engaged with to fully determine the rights' scope and application. These questions ask: who has rights, what is the nature of the obligations they impose, how should the weighting and balancing of conflicting rights be conducted, whether they are rights under a will or interest conception and against whom are the rights held? These questions and the examination of judicial attempts to answer them, provide the analytical skeleton of the

argument presented in this thesis as how the PGC can be used to answer these questions, and thereby provide a coherent practical interpretive tool for the domestic judiciary.

Chapters four and five respond to the uncertainty of the Convention's requirements and the necessity of engaging with the five fundamental questions by identifying, through analysis of the Convention itself and case law, the current positions taken by the documents and judicial organs of the Council of Europe and the domestic courts in recognising and engaging with these pivotal questions. It is necessary to have regard to the ECtHR's approach because of the hierarchical relationship between the domestic courts and Strasbourg,<sup>2</sup> and the ancestral relationship between the HRA and the ECHR. This analysis will ultimately facilitate the construction of a compelling argument to be made in chapter seven, that it is in practice possible for the domestic courts, within this relationship, to adopt an interpretative approach to the Convention rights determined by the application of the PGC.

On the question of who has rights, it will be submitted that Convention and its judicial bodies have deliberately taken pains to avoid ruling on the question of what characteristic entitles a human being to the protection of the Convention. The decision on this question has been left to each member state in their application of the ECHR, in recognition that there is scope for differences of opinion amongst them. The British courts will be argued to have exercised this discretion by applying in Convention context, their pre-HRA position on the nature of personhood for the purposes of the possession of legal rights generally.

Almost all the Convention rights are expressed in terms of negative obligations prohibiting actions. The ECtHR has been prepared to rely on the more general Articles 1, 13 and 14, as

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<sup>2</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [20]

well as a general principle of effectiveness, to interpret negatively phrased rights as also having a positive dimension, giving rise to a duty to act. However, no clear general theory on the recognition of positive obligations has been stated by the ECtHR, which advances on a case by case basis, leaving open the question of what obligations the Court will recognise. It will be shown that the HRA had a significant impact on the position of positive obligations generally within British law which previously gave little recognition to them. The development of the recognition of positive obligations will be argued to have relied heavily on Strasbourg jurisprudence in the absence of relevant domestic precedent. Consequently, the domestic courts have similarly not developed and applied a general theory of positive obligations. Instead, they have largely mirrored the ECtHR's case law to ground the recognition positive obligations, tempering its implementation with a concern to act in accordance with the separation of powers.

John Locke recognised that if all members of a community are deemed to have the same rights then those rights will come into conflict.<sup>3</sup> The consequence of this is that the balancing of competing rights and interests is at the heart of the application of the Convention. It will be submitted that at a fundamental level both cases which explicitly raise questions of balancing the rights of one party against another, as well as those which substantively involve balancing rights against general interests, should be approached in the same way, as involving conflicting rights claims. The balancing tool of proportionality, and the Court's margin of appreciation, will be shown to be sufficiently open in their application, to allow an approach to the balancing of the Convention rights at the domestic level which both reflects the reinterpretation of the conflict between rights and interests that will be argued for, and allows for the use of the PGC to resolve rights conflicts generally. The domestic courts will be

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<sup>3</sup> J. Locke, *Two Treatises of Government* (J.M. Dent and Sons 1924), 118-120

shown to currently apply an approach to the weighting and balancing of rights and of competing interests, within a framework of proportionality and deference, which is capable of being guided by the PGC.

The question of the position of the Convention rights within the dichotomy between will and interest conceptions of rights, is determined by whether and the grounds on which the benefits of the rights can be waived by their holders. This debate will be deliberately characterised in terms of whether the benefits of rights can be waived, rather than whether the rights themselves can be waived, in order to take account of the inalienability of rights which will be argued to be a fundamental feature of the Convention rights and international human rights norms generally.<sup>4</sup> Although the text of the ECtHR is silent on this matter, the ECtHR has in some cases held that a Convention right's benefit can be waived. However, it will be shown that the court has not set out a clear principled answer to this question, and thus it is not clear in those cases where the waiving of the benefit of a right has been explicitly permitted or rejected whether the decision was reached based on a will or interest conception of the rights. The domestic courts, similarly, have not adopted a settled approach to this question of rights interpretation. The case law which preceded and followed the enactment of the HRA contains judgements which can be interpreted as favouring each approach, or which are as ambiguous as to which they are applying. Thus, as in Strasbourg there is no authoritative statement as to which conception is to be applied in British law, creating a need for principled direction to be given to the law's development.

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<sup>4</sup> Below p.57-58 & 168

Although created with the intention of having the legal effect of protecting individuals from the actions of the state,<sup>5</sup> it will be argued that the Convention's rights protection should also be seen to be necessarily applicable to interactions between individuals. By virtue of this, the indirect legal effect given to them by Strasbourg's jurisprudence, to require the protection of individuals from other actions, will be argued to be justified and required under the Convention even though direct enforcement between individuals is not legally possible at the supra-national level of the ECtHR. Compared to the other key questions of rights interpretation, as a result of the attempts of litigants to gain their protection in private law disputes, the domestic courts have engaged most directly with the question of against whom the incorporated rights can be enforced, recognising the question of the fundamental nature of rights it raises. In common with the Convention, there was a deliberate intention in the enactment of the HRA not to allow the rights to be directly horizontally enforceable between individuals.<sup>6</sup> However, the arguments of fundamental horizontal applicability apply at the domestic level, and the domestic courts will be shown to have recognised this in giving effect to the Convention rights between individuals in an indirect manner, as foreseen in Parliament during the enactment of the Act. It will ultimately be argued that this ready recognition of horizontality is strengthened by a principled approach based in the PGC.

From this premise of the open textured statements of the Convention rights, and the recognition of their semantic nature, together with approaches of the domestic and Strasbourg judiciary of either leaving the fundamental questions of rights interpretation either unanswered or without a clearly answer, no rationally coherent approach to interpreting the Convention rights is apparent. The pivotal importance of the five questions to the interpretation of the Convention rights, however, makes such an approach necessary. Chapter

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<sup>5</sup> Council of Europe, *Collected Edition of the "Travaux Préparatoires"* (Council of Europe 1964), vol.1, 67

<sup>6</sup> HL Deb 5 February 1998, vol.585, col.840



six will put forward the PGC as the basis of such an approach, capable of providing coherent principled guidance to the interpretation and application of the Convention rights.

As Ronald Dworkin recognised, to be a valid interpretation of a collection of fundamental norms, rather than a rewriting of it, a principle such as the PGC must fit their common settled core characteristics.<sup>7</sup> In the context of the Convention rights these features will be identified as their universality, their inalienable and inherent possession, and the primary focus of the ECHR on rights rather than duties.

The rights will be shown to be fundamentally universal in nature through their possession being envisaged as both uninfluenced by subjective individual characteristics and their requirements as not relativistic in nature. That they are inalienably possessed is stated clearly in the Universal Declaration of Human Rights 1948 (UDHR) which preceded and influenced the Convention.<sup>8</sup> Constant with their universality, they will be argued to inalienably attach to a shared inherent characteristic semantically labelled as dignity. At a substantive level, the Convention repeatedly speaks in terms of rights which will be argued to have the characteristics of ‘claim rights’ under Wesley Hohfeld’s refinement of the term, giving rise to consequential duties requiring action by others.<sup>9</sup> Additionally and more fundamentally, under Dworkin’s deontological dichotomy of rights or duties theories,<sup>10</sup> it will be submitted that the text of the Convention can most persuasively be read as presupposing an underlying justification characterised by rights rather than duties.

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<sup>7</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth 1997), 105-106 and R. Dworkin, *Law’s Empire* (Hart 1998), 66

<sup>8</sup> UDHR, Preamble, [1]

<sup>9</sup> W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (D. Campbell and P. Thomas eds, Ashgate 2001), 11-12

<sup>10</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth 1997), 172

Within this methodological framework of the three fundamental characteristics of the ECHR, the PGC will be put forward as a justifiable moral theory guiding action and thus capable of answering the five fundamental questions of rights interpretation in a principled manner. As a moral theory it gives answers to fundamental questions of moral philosophy: the authoritative question of why regard should be had to the interests of others, the distributive question of to whose interests regard should be had and the substantive question of the nature of those interests. The PGC's answers to these questions will in turn be argued to provide rationally compelling guidance to the resolution of the five questions of rights interpretation with which the application of the HRA requires judicial engagement.

At the foundation of Gewirth's argument, and forming the answer to the distributive question, is the possession of purposive agency, the capacity of an agent for action, the ability to voluntarily act for the attainment of a chosen purpose.<sup>11</sup> This voluntariness and purposiveness thus constitute generic features of agency, possessed by all who are ultimately bound in their actions by the PGC. From this premise, both dialectically necessary and dialectically contingent arguments can be put forward to demonstrate rationally why agents must act in accordance with the PGC in their treatment of others, respecting the possession of purposive agency. The dialectical approach has its roots in the Socratic dialogues 'that begins from assumptions, opinions, statements, or claims made by protagonists or interlocutors and then proceeds to examine what these logically imply.'<sup>12</sup> Throughout this thesis, for literary convenience, and due the failure of the English language to steal or develop a satisfactory gender neutral alternative, the pronoun 'he' is used in describing an agent's dialectical reasoning process. As will be readily apparent, an agent can be a being of either gender or no

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<sup>11</sup> Gewirth (n.1), 22, 26-27, 37 & 44-46

<sup>12</sup> Ibid, 43

gender, what is essential is the possession of the generic characteristics of voluntariness and purposiveness.

The dialectically necessary argument that Gewirth puts forward, as ultimately justifying and requiring the acceptance of the PGC, is necessary in the sense that the premise from which it begins, and from which all subsequent statements deductively follow, is one which must rationally be accepted by all agents: their possession of the generic features of that agency, their purposiveness and voluntariness.<sup>13</sup> In this first part of this dialectical argument it is claimed that such an agent must, in having purposes, necessarily recognise those purposes as at least instrumentally good in the sense that he desires to attain them for some reason.<sup>14</sup> He must also, in thinking of his purposes as good, necessarily also think of the generic features of the actions necessary to achieve his purposes as instrumentally good.<sup>15</sup> These generic features are ‘freedom’ and ‘well-being’,<sup>16</sup> they are necessary for any action and – as action characterises agency – can be described as the ‘generic goods’ of agency.<sup>17</sup>

In the second stage of the dialectically necessary argument to the PGC, it is shown that an agent must recognise that they have rights to these generic goods. Although an agent is not dialectically required to view their agency as good, if they wish to exercise their agency they must necessarily think that their freedom and well-being is instrumentally good to the purposiveness and voluntariness that characterises their action and agency.<sup>18</sup> From this it follows that they must therefore dialectically necessarily think that others should not interfere

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<sup>13</sup> Ibid, 43-44

<sup>14</sup> Ibid, 48-52

<sup>15</sup> Ibid, 52 and D. Beyleveld, *The Dialectical Necessity of Morality* (Chicago University Press 1991), 23-24

<sup>16</sup> Gewirth (n.1), 62-63

<sup>17</sup> Ibid, 52

<sup>18</sup> Beyleveld (n.15), 23-24

with their generic goods.<sup>19</sup> This claim by an agent is the functional equivalent to a claim to have rights to the generic goods which should not be infringed by others.<sup>20</sup> These rights to freedom and well-being form the PGC's answer to the substantive question of morality, the nature of the interests of which account should be taken.

However, if the PGC is to be shown to be a moral principle it must establish why account should be had to the interests of others, an agent's claim to the generic rights is not in itself sufficient to show why he or other agents should have regard to another's interests and respect their generic rights. Thus in the third stage of Gewirth's dialectically necessary argument he addresses the authoritative question of morality.

The moral status of the generic rights under the PGC is established by demonstrating that an agent must claim, accepting that it would be self-contradictory to hold otherwise, that he has the generic rights only because of his status as a purposive agent.<sup>21</sup> From this argument for the sufficiency of agency, Gewirth argues the application of the formal principle of universalisability logically follows. This principle states that if a person claims to have rights only because they possess a particular characteristic then they logically must accept that any other being possessing that characteristic must also possess those rights.<sup>22</sup> The ultimate consequence of these arguments, Gewirth argues, is that all agents must recognise that all other agents have the generic rights to freedom and well-being and they have an obligation to act in accordance with those rights, this he expresses in the form of the moral Principle of

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<sup>19</sup> Gewirth (n.1), 77

<sup>20</sup> Ibid, 64 & 77

<sup>21</sup> Ibid, 109-110

<sup>22</sup> Ibid, 105 & 112

Generic Consistency requiring agents ‘act in accord with the generic rights of your recipients as well as of yourself.’<sup>23</sup>

When justified through the dialectically necessary method the PGC must be accepted by all agents, for to deny it would be to contradict their own agency or what it necessarily entails. The PGC will also be shown to be capable of justification by dialectically contingent means, ‘from singular or general statements or judgements that reflect the variable beliefs, interests, or ideals of some person or group’,<sup>24</sup> but which are not necessarily attributable to all agents by virtue of their agency.

Thus it will be shown that if the moral point of view – that the interests of others ought to be taken account of by a person when acting<sup>25</sup> – is assumed, as opposed to being dialectically necessarily proved in the third stage of Gewirth’s argument of the PGC, the application of this to the generic features of agency entails the acceptance of the PGC. Similarly, it will be argued that if the specific moral point of view of the ‘golden rule’ of impartiality – requiring that we ‘treat others only as we consent to being treated in the same situation’<sup>26</sup> – is contingently applied to the dialectically necessary conception of agency argued for in stage one of Gewirth’s argument, the consequence is again that such agent’s must accept the PGC as governing their actions.<sup>27</sup>

In order to practically strengthen the argument this thesis will make for the practical use of PGC as an interpretative basis for the Convention rights, it will further be shown that the

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<sup>23</sup> Ibid, 134-135

<sup>24</sup> Ibid, 43

<sup>25</sup> K. Baier, *The Moral Point of View: A Rational Basis of Ethics* (Cornell University Press 1958), 118-190

<sup>26</sup> H. Gensler, *Ethics: A Contemporary Introduction* (Routledge 1998), 104

<sup>27</sup> D. Beyleveld, ‘The Principle of Generic Consistency as the Supreme Principle of Human Rights’ (2012) 13 *Human Rts.Rev.* 1, 6

contingent acceptance of the principle of impartiality can be seen to be implicit within the foundational statements of the post-WWII human rights era in the UDHR. From this it will be argued that it is consequentially possible to derive the acceptance of the PGC, by combining the commitment to impartiality within tangible international human rights law and the dialectically necessary acceptance of the definition of purposive agency.<sup>28</sup>

Based upon these arguments for the PGC as coherent moral principle capable of guiding action, it is claimed that both necessary and contingent dialectical reason requires that the courts resolve cases in accordance with the requirements of the PGC. In the remainder of chapter six, and in the two subsequent chapters of the thesis, it will be argued this is a practically and legally possible basis for judicial interpretation of the Convention rights.

To this end it will initially be demonstrated that the interpretive use of the PGC in relation to the ECHR is valid under Dworkin's characterisation of an interpretive enterprise, showing that the PGC's substantive content fits with the three fundamental features of the Convention rights. The basic contention that the generic rights are held by all agents gives them a universality that accords with the Convention, their deontological nature makes possession of the generic rights consistent with the inherent and inalienable characteristics of the Convention rights, and basis of the generic rights in the characteristics of purposive agency entails that PGC's requirements are best characterised those of a theory of rights rather than one of duties.

In addition to proving the interpretive legitimacy of the application of the PGC to the Convention rights, because of the current relationship between the domestic courts and the

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<sup>28</sup> Ibid, 6-8

ECtHR is characterised at the domestic level by the application of the ‘mirror principle’,<sup>29</sup> the application of the PGC must not conflict with Strasbourg’s jurisprudence in order to be legally acceptable. It will be later argued that the ECtHR’s substantive jurisprudence does not require the domestic courts to act other than in accordance with the PGC. However, it will also be submitted in chapter six that, whilst as the supreme principle of morality the PGC is dialectically binding upon the courts and must logically be complied with by both Strasbourg and the domestic courts, at a more legalistic level the no more than<sup>30</sup> element of the mirror principle is an unjustified restriction on the courts interpretive powers and should be abandoned.

From this basis, that the interpretive application of the PGC by the British courts is practically necessary, theoretically justified and required, in chapter seven the compatibility with the requirements of the PGC of courts’ current approach to the five fundamental questions of rights interpretation will be critiqued. In light of the open textured nature of the Convention rights and the reluctance of the domestic courts and Strasbourg to generally engage either clearly or directly with most of the five questions described in chapters four and five, it will be submitted that to the extent that the British courts do not already comply with the PGC there is the potential for them to do so, and for the PGC to give additional clarity to the interpretation of the Convention rights.

In relation to the necessarily foremost question of who has the Convention rights, the conception of agency underlying the PGC from which the generic rights derive will be carefully defined and its consequences explained, to demonstrate how it can inform the judiciary’s answer to this question generally and the specific key case law manifestations of

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<sup>29</sup> J. Lewis, ‘The European Ceiling on Human Rights’ [2007] *P.L.* 720, 720

<sup>30</sup> *Ullah* (n.2), [20]

it. It will be submitted that the domestic courts' current conception of who can possess the Convention rights generally, can and must be changed to be consistent with the PGC. However, more generally, the courts' approach to recognising the possession of specific rights by particular persons appears consistent with the PGC.

On the subsequent question of the substantive nature of the Convention rights, it will be argued that a regard to the fundamental underlying rights to freedom and well-being can and, because of their dialectical nature and practical utility, should be used by the courts to give substantive content to the open textured rights. The negative and positive obligations under the PGC to which the generic rights and interests give rise will be explained in detail. The relationship between these generic rights the Convention rights will then be critically illuminated, and the possibility of their practical application by the judiciary under the HRA argued for. Although it will be concluded that there is compatibility between the current approaches to the Convention and the approach the application of the PGC would entail, it will be argued that the application of the latter can give principled coherence to the former.

In relation to the inherent necessity of human rights adjudication, that conflicting rights be weighted and balanced against each other, it will be submitted that the PGC can give principled guidance to the courts in their assessment of the factors they consider in applying the proportionality test, which will itself be shown to be susceptible to influence by the PGC. It will be argued that regard to the generic rights and interests under the PGC, their generic weight and the moral status of their holders, can give guidance and transparency to judgements which improves upon the opaque reasoning of courts on this question. Although a PGC based approach to the balancing of rights will not resolve conflicts in a precise, mathematical manner, it will enable more clearly reasoned judgments to be given.



The dialectical reasoning by which the existence of the generic rights is claimed necessarily entails that they should be recognised to be rights under the will conception. It will be argued that the unspecific wording of the Convention, and the undecided nature of the current case law allows, such a will conception to be applied by the domestic courts in their interpretations. The current domestic judicial approach will be characterised as open to being clarified by the application of an understanding of the nature of rights on this question entailed by PGC.

Although by the nature of its dialectical derivation, primarily concerned with interactions between individuals, the PGC will be shown to also have application to the actions of the state which effect individuals. This indirect application of the PGC is facilitated by the HRA's intention of allowing individuals to directly enforce the Convention rights against the state. However, the HRA does not proscribe for such direct effect of the rights horizontally between individuals. It will be submitted that the direct applicability of the generic rights between individuals supports interpretations of the Convention as recognising this horizontally, and together they provide a fundamental justification mandating and supporting the domestic courts in giving as much horizontal effect as possible under the Act.

In the final chapter of this thesis it will be argued that the dialectically justified PGC, shown to be capable of guiding the domestic courts' answers to the five fundamental questions of rights interpretation, can be looked to directly by the courts as giving content to the principle of dignity. Explicitly forming the basis of many human rights documents of the 20<sup>th</sup>

Century,<sup>31</sup> dignity encapsulates the factor which gives individuals the value justifying their protection by human rights norms.<sup>32</sup> However, beyond agreement on the role dignity plays in rights documents there is scope for differing views as to its substantive content. It will thus be submitted that purposive agency can give content to dignity and that thereby the domestic courts can give effect to the PGC, by using dignity characterised in this way to interpret the Convention rights. It will be argued that such interpretive regard to dignity and underlying moral principles more generally is not alien to domestic law, and is additionally supported by the jurisprudence of the ECtHR, the Canadian and German courts, as well as its presence in international human rights documents. This interpretative attribution of dialectical content to dignity, through the lens of the PGC giving dialectical content to it, addresses some of the criticism that metamorphic nature of the meaning of dignity.

It will thus be concluded that the PGC should and can be used by the British courts in answering the five fundamental questions of human rights interpretation. Its recognition will be shown to be both a dialectically necessary consequence of purposive agency and a contingent consequence of the acceptance of modern human rights obligations. Its use is consistent with domestic and European case law, and the application of the PGC to give content to principle of dignity makes its use by the judiciary in interpretation a realistic practical possibility.

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<sup>31</sup> C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *E.J.I.L.* 655, 664-667

<sup>32</sup> *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2005] 1 CMLR 5, [AG75]

## CHAPTER II: THE UNCERTAINTY OF HUMAN RIGHTS

### *Introduction*

This thesis argues from the premise that human rights are uncertain norms and that this uncertainty renders their meaning susceptible to various and divergent interpretations. It will be claimed that this is principally a result of the deliberate utilisation of language's latent potential for uncertainty by the drafters, to achieve pragmatic and political purposes.

This textual openness to different conceptions of human rights will be argued to have both positive and negative consequences. It will then be argued that judicial interpretation of rights can, in spite of being itself susceptible to the linguistic problems that accompany definitions in that judgements themselves require interpretation, ameliorate the negative consequences of the uncertain drafting of rights by virtue of their authoritativeness.

### *The Presence of Uncertainty*

The many different international human rights instruments share a common characteristic in setting out the rights they contain in uncertain terms.<sup>1</sup> This feature of rights treaties generally is also shared by the document the HRA incorporates, the European Convention on Human Rights (ECHR), which 'speaks in abstract terms, and subjects many of the rights it declares to equally abstract exceptions.'<sup>2</sup>

There are two distinct, but related, types of uncertainty present in human rights. The first is the textual uncertainty of the ambiguous words used to set out the rights in the rights

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<sup>1</sup> C. Wellman, *Real Rights* (OUP 1995), 179

<sup>2</sup> R. Dworkin, *Freedom's Law* (OUP 1996), 358

documents.<sup>3</sup> Before they are interpreted and their meaning is agreed, the definition of words generally is intrinsically uncertain.<sup>4</sup> The other form of uncertainty is the more specific uncertainty of the semantic conceptions embodied in the rights themselves. This is the uncertainty as to the requirements and scope of application of the rights which renders them open to different interpretations.<sup>5</sup>

Both of these types of uncertainty are connected, in that the textual openness of language used to state the rights facilitates the semantic openness of the requirements and scope of those rights to different interpretations.<sup>6</sup> A corollary of this is that a more linguistically detailed definition of a right can reduce the uncertainty of the semantic concept embodied in the right.<sup>7</sup>

The semantically uncertain nature of the rights is demonstrated in the many questions of interpretation the wording leaves open.<sup>8</sup> In the ECHR context, this uncertainty is clearly apparent in relation to Articles 2 and 8 ECHR, the text of both being open to several interpretations.<sup>9</sup> Article 2 immediately raises the question of when should life be deemed to begin and end for the purposes of the protection of the Convention,<sup>10</sup> with Article 8 a key semantic question is where is the boundary between private and public life.<sup>11</sup> That the level of textual uncertainty varies between and within human rights documents is also obvious. For

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<sup>3</sup> Wellman (n.1), 178

<sup>4</sup> Below p.19-20

<sup>5</sup> C. Douzinas, *The End of Human Rights* (Hart 2000), 375 and R. Clayton, 'Developing Principles for Human Rights' [2002] *E.H.R.L.R.* 175, 194

<sup>6</sup> Below p.23

<sup>7</sup> UN General Assembly 'Annotations on the Text of the Draft International Covenants on Human Rights' (1955) 10<sup>th</sup> Session, Doc A/2929, 8, see also A. Robertson, 'The European Convention for the Protection of Human Rights' (1950) 27 *B.Y.B.I.L.* 145, 152 and below p.24

<sup>8</sup> L. Sumner, *The Moral Foundations of Rights* (Carendon 1986), 5

<sup>9</sup> Wellman (n.1), 178 and A. Heringa and L. Zwaak, 'Right to Respect for Privacy' in P. Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006), 664

<sup>10</sup> An issue recognised in the pre-HRA case of *Airedale NHS Trust v Bland* [1993] AC 789, 878-879 and discussed in detail below p.66-69 & 112-116

<sup>11</sup> Eg. *Campbell v MGN* [2004] UKHL 22, [67]-[68] & [92]

instance, the right to life in the ECHR is defined in greater detail than in the Universal Declaration of Human Rights (UDHR).<sup>12</sup> Similarly, Article 6 ECHR sets out detailed requirements for a fair trial whereas Article 8 gives little detail on what the protection of private and family life requires, thus textual uncertainty increases semantic uncertainty.

### ***Unavoidable Uncertainty in Human Rights***

Uncertainty is not a characteristic unique to human rights norms or to laws generally. In part, some uncertainty in the linguistic meaning of words is often inevitable. Herbert Hart noted it is a feature of all laws, with the language of a norm at some point having an open texture where there is uncertainty as to what the law requires in a particular case.<sup>13</sup> However, to a significant extent, the semantic uncertainty of the norms found in rights treaties, and therefore also under the HRA, is particular to them and present as a result of deliberate decisions by the drafters.

### ***The Inherent Uncertainty of Language***

Words are representations of ideas or concepts.<sup>14</sup> They themselves thus have no inherent meaning, and must be assigned or associated with an idea or concept which forms their meaning.<sup>15</sup> A person must decide on the idea or concept, the meaning, that is attached to a word;<sup>16</sup> this is as true of the lexicographers who compile dictionaries as anyone else. However, the way in which words are assigned their meaning by people can give rise to uncertainty as to the meaning of the word.

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<sup>12</sup> Article 2 ECHR and Article 3 UDHR, see generally H. Golsong, 'Implementation of International Protection of Human Rights' (1963) 110(3) *R.C.A.D.I.* 1, 59

<sup>13</sup> H. Hart, *The Concept of Law* (2nd edn., OUP 1994), 127-128

<sup>14</sup> D. Wright, 'Do Words Have Inherent Meaning?' (2008) 65(2) *ETC: A Review of General Semantics* 177, 178

<sup>15</sup> *Ibid.*, 178 and J. Raz, 'Why Interpret?' (1996) 9 *Ratio Juris* 349, 356

<sup>16</sup> Raz (n.15), 356

Under the rules of ‘general semantics: the meaning of a text depends on its being read in context.’<sup>17</sup> People assign meanings to words based on the context within which they observe them being used.<sup>18</sup> The internal context of a work encompasses the statements within which the word is found,<sup>19</sup> thus the word ‘bear’ can mean to carry a load or refer to an animal of the family *Ursidae*, depending on the content of the sentence within which it is used. The external context comprises of the circumstances of the utterance and the relevant knowledge possessed by the speaker and the listener;<sup>20</sup> with a document such as the UDHR this would include the historical context which led to its creation. This, however, creates the possibility that, because people observe words being used in different contexts, they may assign a different meaning to the word.<sup>21</sup> Similarly, Richard Robinson also noted that words can also be ambiguous in a ‘sliding’ sense, in that the word may be seen as covering a collection of ideas that are in some way connected,<sup>22</sup> indeed the concept of ‘rights’ will be argued below to be such a term.<sup>23</sup>

It should, however, be noted that it follows from the way in which words obtain their meaning that not all words are linguistically or semantically uncertain. On some words there is absolute agreement as to the semantic conceptions they convey.<sup>24</sup> For example, in the context of mathematics there is general agreement on the definition of the number ‘two.’ Such agreement is due to the artificially constructed nature of numbers which makes their numerical value their only feature.<sup>25</sup>

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<sup>17</sup> Z. Bankiwski et al., ‘On Method and Methodology’ in D. MacCormick and R. Summers (eds), *Interpreting Statutes* (Dartmouth 1991), 26 and see also Law Commission, *The Interpretation of Statutes* (Law Com No 21, 1969), 25

<sup>18</sup> Wright (n.14), 180-181 and R. Robinson, ‘Ambiguity’ (1941) 50 *Mind* 140, 143

<sup>19</sup> Law Commission (n.17), 25-26

<sup>20</sup> *Ibid*, 25 & 27-28 and Robinson (n.18), 143

<sup>21</sup> Wright (n.14), 180 and Robinson (n.18), 142

<sup>22</sup> Robinson (n.18), 142

<sup>23</sup> Below p.170-171

<sup>24</sup> Hart (n.13), 126

<sup>25</sup> D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn., OUP 2002), 133

Thus, when interpreting the meaning of a word in a statement of a human right, the word can be linguistically ambiguous in its meaning because interpreters may assign different meanings to that word by having regard to different contexts. Even where the right is interpreted afresh and an attempt is made to give it a new meaning within its own context, it is still possible for its requirements to be semantically uncertain because different interpreters may apply different relevant knowledge to the interpretation of the words and see words as imposing different requirements. The importance of regard to context in interpretation has been explicitly recognised in relation to international laws, of which human rights treaties form an important part,<sup>26</sup> by the Vienna Convention on the Law of Treaties<sup>27</sup> which gives an open ended definition of ‘context’ as an interpretive tool.<sup>28</sup> The problems of interpretation through regard to different contexts is, in practice, reduced slightly in relation to judicial interpretation of the wording of rights because, as American legal realists have argued, judges will share similar training and other characteristics,<sup>29</sup> which may lead them to assign similar meanings shaped by regard to similar contexts. This does not, however, guarantee that their interpretation will be the ‘best’ interpretation if judged against an objective standard.<sup>30</sup>

Attempts to interpret a right afresh face a further inherent problem. A new idea cannot be communicated without using old words which are themselves necessarily linguistically uncertain.<sup>31</sup> It is this ambiguity resulting from their linguistic uncertainty which enables them

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<sup>26</sup> *Golder v United Kingdom* (1979-80) 1 EHRR 524, [29] where the ECtHR held that interpretation of the ECHR should be guided by the Vienna Convention, see also C. Ovey and R. White, *Jacobs and White: The European Convention on Human Rights*, (4<sup>th</sup> edn., OUP 2006), 44

<sup>27</sup> Article 31(1) Vienna Convention on the Law of Treaties 1969

<sup>28</sup> Article 31(1) and 32 (2) Vienna Convention on the Law of Treaties 1969, Article 32(2) allows regard to be had to ‘supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion,...[in order to help interpret a treaty under Article 31]’ (my emphasis).

<sup>29</sup> K. Llewellyn, in Julius Rosenthal Foundation for General Law, *My Philosophy of Law: Credos of Sixteen American Scholars* (Rothman 1987), 196

<sup>30</sup> Below p.162-163

<sup>31</sup> Robinson (n.18), 149

to be used to define a new idea.<sup>32</sup> Laws generally, and human rights specifically, are attempts to put ideas into a verbal form,<sup>33</sup> and thus the potential for semantic uncertainty when enumerating a right is inherent in language.

### *The Uncertainty of Law*

Given the potential linguistic uncertainty of words it is unsurprising that laws generally are textually open,<sup>34</sup> with consequent uncertainty as to their semantic meaning. As far back as the Elizabethan era Francis Bacon noted the semantic uncertainty produced by the use of linguistically uncertain language in British laws and in laws generally.<sup>35</sup> More recently Karl Llewellyn argued that the linguistic uncertainty of many laws<sup>36</sup> means that the search for laws that are 'plain to every plain man are a will-o'-the-wisp.'<sup>37</sup> Hart similarly argued that, although there may be a central core of a law where it will be readily apparent what it requires in particular cases, there will always be a 'penumbra of uncertainty' where in some cases the open textured nature of the language makes it uncertain what the phrasing of a law requires.<sup>38</sup>

This uncertainty is clearly shown by the cases coming to court disputing the interpretation of statutes; if their meaning were always clear, there would be no need for such cases to be brought.<sup>39</sup> The fact that judges can disagree over the interpretation of laws also demonstrates the uncertainty of semantic meaning the linguistic uncertainty of a law can generate,<sup>40</sup> and

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<sup>32</sup> Ibid

<sup>33</sup> Llewellyn (n.29), 188

<sup>34</sup> Hart (n.13), 128

<sup>35</sup> F. Bacon, A Proposition Touching the Compiling and Amendment of the Laws of England, in *The Works of Francis Bacon* (first published 1616, London 1826), Vol. IV, 366, see also J. Frank, *Law and the Modern Mind*, (English edn., Stevens and Sons 1949), 10

<sup>36</sup> Llewellyn (n.29), 190

<sup>37</sup> Ibid, 195

<sup>38</sup> Hart (n.13), 12 & 123

<sup>39</sup> Frank (n.35), 8

<sup>40</sup> R. Dworkin, *Law's Empire* (Hart 1998), 3 and ibid, 156



shows the availability of different reasons, purposes and values judges can rely upon to reach an interpretation.<sup>41</sup> As laws generally are incapable of being reduced to ‘clear exact and certain [rules]’<sup>42</sup> and are thus surrounded by uncertainty,<sup>43</sup> it is foreseeable that human rights in national and international human rights law should share in this linguistic and semantic uncertainty.

### *The Semantic Uncertainty of Human Rights*

In so far as words are an attempt to convey ideas and concepts, the particular nature of human rights exacerbates the linguistic uncertainty and consequent room for disagreement that applies to an attempt to define the meaning of words and laws generally. In addition to the uncertainty of the words used in statements of rights, the practical requirements of those rights themselves are also inherently uncertain in scope. The human rights declared in legal documents have no immediate definite tangible content,<sup>44</sup> unlike quantifiable facts,<sup>45</sup> they are ‘symbolic constructs... [that] do not refer to things or other material entities’.<sup>46</sup> Although all ordinary statutes are to some extent textually open, the ‘magniloquent phrases’<sup>47</sup> of human rights documents have a greater propensity to uncertainty, with a much larger penumbra of uncertainty.<sup>48</sup> Thus, Douzinas claims that ‘[n]o person, thing or relation is in principle closed to the logic of rights...[anything] can become the subject or object of rights [and] any right can be extended to new areas and persons or conveniently withdrawn from existing ones.’<sup>49</sup>

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<sup>41</sup> Below p.40-41 & 44-51

<sup>42</sup> Frank (n.35), 5

<sup>43</sup> Ibid

<sup>44</sup> Douzinas (n.5) , 254

<sup>45</sup> Eg. the nature of the species *Meles meles* (the European Badger) defined in the Protection of Badgers Act 1992

<sup>46</sup> Douzinas (n.5) , 254

<sup>47</sup> Hart (n.13), 13

<sup>48</sup> Ibid

<sup>49</sup> Douzinas (n.5) , 254, see also, 255

This description of the semantic uncertainty of the scope of rights statements has its historical roots as an important part of Burke's criticism of the French Declaration of the Rights of Man and the Citizen. He argued that the rights it contained were 'inventions' and 'speculative',<sup>50</sup> concluding that because of their nature '[t]he rights of men are...incapable of definition'.<sup>51</sup> Burke considered that the requirements of rights could only be discerned through practice and history<sup>52</sup> and their lack of connection with substance and practice made bold statements of rights semantically uncertain.<sup>53</sup>

The use of more detailed language in stating rights provisions will not entirely eradicate the semantic uncertainty from human rights provisions. Whatever language is used, it will still attempt to describe an abstract concept about which there is disagreement.<sup>54</sup> Additionally, a more detailed definition will also in turn give rise to further questions about the meaning of the detail and its implications for the scope and requirements of rights.<sup>55</sup> Thus, although more detailed statements of rights may give more insight into the relevant context which should be used to interpret the rights,<sup>56</sup> trying to create an exhaustive textual definition of a right is 'impractical if not impossible.'<sup>57</sup>

### ***The Deliberate Uncertainty of Human Rights***

Although it is clear that some element of the semantic uncertainty found in statements of human rights is an inevitable result of the nature of language and of rights, deliberate pragmatic decisions by the drafters which exploit the potential uncertainty of language

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<sup>50</sup> E. Burke, *Reflection on the Revolution in France* (Penguin 2004), 121

<sup>51</sup> *Ibid*, 153

<sup>52</sup> *Ibid*, 118 & 148

<sup>53</sup> *Ibid*, 151

<sup>54</sup> Below p.25-27

<sup>55</sup> H. Lauterpacht, *International Law and Human Rights* (Archon Books 1950), 329-330

<sup>56</sup> Above p.20-21

<sup>57</sup> Lauterpacht (n.55), 331

constitute the main cause of this semantic uncertainty. These decisions, concerning the level of linguistic uncertainty and the specificity of the wording of the rights contained within the ECHR, can best be discovered by looking at the drafting process by which they were formulated, which indicates the intentions of the contracting parties.<sup>58</sup>

Regard to the drafting process behind other international rights documents is also instructive in ascertaining the particular practical reasons for the semantic uncertainty of the Convention rights. This is so because at a theoretical level the UDHR can be seen as the founding document upon which subsequent rights treaties are based,<sup>59</sup> creating an interconnection between them.<sup>60</sup> The drafters of subsequent treaties have had regard to pre-existing treaties in shaping the rights they drafted.<sup>61</sup> The preamble of the ECHR itself states that its aim is to give enforceable effect to the UDHR<sup>62</sup> and the Consultative Assembly, the body charged with looking into the creation of a human rights treaty by the Council of Europe, had explicit regard to the provisions of the Declaration,<sup>63</sup> and the Committee of Experts was instructed to consider the UDHR in drafting the ECHR.<sup>64</sup>

### *The Need for Agreement*

For international rights treaties to come into being a sufficient number of states must be prepared to agree to the articles they contain. Thus, Lauterpacht argues that to draft a rights treaty with very detailed provisions would limit the number of states prepared to agree to it

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<sup>58</sup> Ovey and White (n.26), 40

<sup>59</sup> H. Steiner and others, *International Human Rights in Context: Law, Politics, Morals* (3<sup>rd</sup> edn., OUP 2008), 133 & 137

<sup>60</sup> The interconnection between the ECHR and the UDHR is made explicit in the Preamble of the ECHR, see L. Zwaak, 'General Survey of the European Convention' in P. Van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 2006), 4

<sup>61</sup> Lauterpacht (n.55), 435 and Robertson (n.7), 145

<sup>62</sup> Zwaak (n.60), 4 and Golsong (n.12), 54

<sup>63</sup> Council of Europe, *Collected Edition of the "Travaux Préparatoires"* (Council of Europe 1964), vol.1, 50, 102 & 114 and Robertson (n.7), 146

<sup>64</sup> Robertson (n.7), 148

because, the greater the detail it contained, the more likely it would be that they would find a provision they objected to.<sup>65</sup> Thus, linguistic uncertainty in the wording of rights treaties produces textually open rights, amenable to a number of semantic conceptions, which facilitates their acceptance by states with different political systems and traditions.<sup>66</sup>

The Council of Ministers, in considering the draft ECHR, noted that it intentionally did ‘not attempt to define with legal precision the human rights it seeks to guarantee.’<sup>67</sup> It was felt that the pre-existing rights protection of the various signatories would make agreement on detailed human rights very difficult to achieve.<sup>68</sup> The rights that were agreed were thus a compromise between those states that wanted very specific rights<sup>69</sup> and those that favoured very general rights identical to those in the UDHR with each signatory state left to define their meaning for themselves subsequently.<sup>70</sup> The final text, although influenced by both approaches, more closely favoured a more detailed enumeration of the rights.<sup>71</sup> French foreign minister Robert Schuman, on signing the ECHR, noted that this compromise was arrived at because both sides recognised the importance of ensuring the creation of protection for human rights.<sup>72</sup> The uncertainty that was allowed in phrasing of the rights can be seen to have been aided in its aim of ensuring the agreement of states to the Convention as a whole by the doctrine of the margin of appreciation propounded by the European Court of Human

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<sup>65</sup> Lauterpacht (n.55), 329

<sup>66</sup> Sumner (n.18), 6, Ibid, 329-331 and Douzinas (n.5) , 117

<sup>67</sup> Council of Europe, ‘Preparatory Work on Article 1 of the European Convention on Human Rights’ Cour 77(9) (31 March 1977), 2, citing: European Movement, ‘European Convention on Human Rights, Report Submitted by the European Movement to the Committee of Ministers of the Council of Europe, *Doc. INF/5/E/R*, <[http://www.echr.coe.int/Library/DIGDOC/Travaux/ECHRTravaux-ART1-COUR\(77\)9-EN1290551.PDF](http://www.echr.coe.int/Library/DIGDOC/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF)> accessed 9<sup>th</sup> September 2012

<sup>68</sup> Ibid

<sup>69</sup> Robertson (n.7), 150, see also Zwaak (n.60), 5

<sup>70</sup> Robertson (n.7), 149

<sup>71</sup> Ibid, 150

<sup>72</sup> Ibid, 163

Rights (ECtHR) in order to allow for some difference in views amongst states as to the interrelation of some Convention rights' requirements.<sup>73</sup>

That the Convention rights, although open to a number of semantic interpretations, are more linguistically specific than those found in the UDHR<sup>74</sup> is possible for practical reasons. One reason for this is that, although there was disagreement about the rights to be included in the Convention, there were fewer states that had to agree to the content of the rights.<sup>75</sup> Additionally the regional nature of the ECHR reduced the potential number of political and cultural differences that had to be accommodated within the wording of the rights,<sup>76</sup> compared to the UDHR or the UN Covenants.<sup>77</sup> This meant that the ECHR's wording had to encompass fewer semantic conceptions of rights and thus could be more specific.

#### *Substantive Constraints on Content*

In addition to political reasons for the textual openness of rights, more practical considerations have contributed to the linguistic uncertainty of the provisions of rights treaties. The drafters of both the ECHR and the UN Covenants on Civil and Political Rights (ICCPR) and Economic Social and Cultural Rights (ICESCR), claimed that they were prevented from defining rights in more detail because of the constraints inherent in their drafting processes. The Council of Europe noted that a complete definition of the rights would require a much more complex and lengthy document.<sup>78</sup> The drafters of the ICCPR and ICESCR argued that it was impossible to create an exhaustive list of all the obligations

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<sup>73</sup> Below p.83-84

<sup>74</sup> Above p.18-19

<sup>75</sup> Golsong (n.12), 54

<sup>76</sup> Ibid, 141 and Council of Europe (n.63), 88

<sup>77</sup> UN General Assembly (n.7) , 8

<sup>78</sup> Council of Europe (n.67)

imposed on states by rights,<sup>79</sup> because it was not possible to foresee all the acts a state might commit which could impinge upon rights.<sup>80</sup> This recognition contributed to the open textured wording of the rights included in the conventions.<sup>81</sup>

The Consultative Assembly of the Council of Europe acknowledged that ‘years of [study and experiments would be necessary]...to attempt with any hope of success, to formulate a complete and general definition of all the freedoms and all the rights’.<sup>82</sup> Thus, the Assembly felt that the time constraints prevented the agreement upon a more precise definition of rights to be included in the ECHR.

The open textured nature of the Convention can also be seen to be consistent with a recognition of Jürgen Habermas’s subsequent assertion that the truth of a proposition can only be known through rational discourse.<sup>83</sup> This position is based upon the argument that what is true can never be said to be conclusively determined,<sup>84</sup> something the UN has recognised in the context of the application of human rights<sup>85</sup> and the ECtHR has acknowledged in practice.<sup>86</sup> This open-endedness is a consequence of the limits of the capacity of humans to possess complete knowledge, given its continually increasing nature and diversity analogous to the different contexts which can be available to use in interpretation described above,<sup>87</sup> and the limitations of human discourse and of language.<sup>88</sup>

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<sup>79</sup> UN General Assembly (n.7) , 8

<sup>80</sup> Ibid, 9

<sup>81</sup> Ibid

<sup>82</sup> Council of Europe (n.63), 44

<sup>83</sup> J. Habermas, *On the Pragmatics of Communication* (M. Cooke ed., Polity Press 1999), 357-358, 364, 367 & 369, see also J. Bohman, W. Rehg and Edward N. Zalta (ed.) "Jürgen Habermas" (*The Stanford Encyclopaedia of Philosophy Winter 2011 Edition*) <<http://plato.stanford.edu/archives/win2011/entries/habermas/>> assessed 28<sup>th</sup> December 2011

<sup>84</sup> Habermas (n.83), 366

<sup>85</sup> UN General Assembly (n.7), 9

<sup>86</sup> Below p.32

<sup>87</sup> Above p.20-21

<sup>88</sup> Habermas (n.83), 365-366 & 368

The open wording and consequent uncertain requirements of the Convention can thus be seen to be a necessary and inevitable consequence of the ongoing nature of debate about the correct answers to the questions of interpretation of the Convention rights.<sup>89</sup>

Intertwined with the drafters' debates concerning the level of detail in which to draft the Convention rights, from the perspective of achieving agreement and time constraints, was a dispute as to the style in which the Convention as a whole should be drafted.<sup>90</sup> The dispute centred on whether to use the civil style of legislation, which favours the statement of broad principles which are given detail by subsequent interpretation, or the common law style which utilises more precise legislative provisions.<sup>91</sup> It is submitted that the uncertainty of the rights and fact that the drafters' intention was that the rights to be given detailed application by the member states and their courts<sup>92</sup> together with the ECtHR, suggests that the civil approach may in part be responsible for the linguistically uncertain definitions of the rights.

#### *The Avoidance of Legal Obligations*

Unlike the earlier UDHR,<sup>93</sup> both the UN Covenants of 1966 and the ECHR were intended to be legally binding. Additionally, the ECHR provided for the practical enforcement of the Convention rights against member states by a supra-national court. This legally binding quality also influenced the more detailed drafting of the rights found in these instruments compared to those found in the UDHR.<sup>94</sup> As Heribert Golsong argues, 'it was necessary to

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<sup>89</sup> Ibid, 366-368

<sup>90</sup> Robertson (n.7), 151

<sup>91</sup> Ibid

<sup>92</sup> Lauterpacht (n.55), 443

<sup>93</sup> Robertson (n.7), 145

<sup>94</sup> Council of Europe, 'Explanatory Report to Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms' (ETS No.117), [3]

define the rights enumerated [in the ECHR]...with sufficient precision to enable a judge to control their application.<sup>95</sup>

However, the legally binding nature and the potential for the enforcement of the Convention rights by individuals may also have led states to argue for more linguistically uncertain definitions of the rights to be included. This would enable them to avoid legal obligations by arguing for an interpretation of the semantic conception of the right which favoured allowing an impugned state action. This possibility finds support in Dworkin's observation that the textual openness of rights leaves scope for disagreement amongst reasonable people as to their proper interpretation and application.<sup>96</sup>

In spite of its non-binding nature, the states still sought to ensure that the UDHR was drafted to be semantically uncertain using open textured language to avoid the imposition of restrictions upon their actions.<sup>97</sup> If this was an intention behind the drafting of a non-legally binding rights document, it is submitted it is all the more likely that it may have influenced the drafters of the ECHR. Even if it was not a deliberate intention behind the drafting of the Convention, it is apparent that, in practice, the member states seek to use the open textured wording of the rights to protect their actions.<sup>98</sup> This potential of semantically uncertain rights to be used to 'suppress' liberty was recognised by the UN Secretary General when he argued that '[i]n the name of "public order" many a saintly character has been crucified'.<sup>99</sup>

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<sup>95</sup> Golsong (n.12), 59

<sup>96</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth 1997), 133

<sup>97</sup> H. Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 *B.Y.B.I.L.* 354, 373

<sup>98</sup> For example, *R v A (No. 2)* [2001] UKHL 25; [2002] 1 AC 45 on what a fair trial requires, see in particular the submissions by David Pannick QC and Johannah Cutts for the Secretary of State.

<sup>99</sup> UN General Assembly (n.7), 9



### *The Consequences of Uncertainty*

It is apparent from the causes of textual openness discussed above that, in relation to human rights norms, some uncertainty is attributable to the nature of language, whilst the main cause is deliberate choices by the drafters, exploiting the potential of language to be open textured. A number of the consequences of the way in which the rights are drafted have already been noted. Although some of this semantic uncertainty is undesirable, it is submitted that a certain amount is indeed necessary to ensure the success of a rights treaty.

### *Desirable Consequences*

As noted previously, the drafting of rights in manner which left the Convention rights semantically uncertain facilitated the agreement of a wide number of different states to a single rights document. The nature of the language enabled the various states to interpret the provisions of a particular rights document in a way which reflected their own domestic context and thus agree to it.<sup>100</sup> Without such textually open language it is conceivable that disagreement amongst the states as to the specific content may have prevented the creation of human rights treaties.

A clear example of this flexibility can be seen in relation to freedom of speech. The extent of protection of the protection for speech differs noticeably between the United States, which gives very strong protection to freedom of speech, and Germany, which prohibits holocaust denial because of its particular historical context.<sup>101</sup> Yet both have agreed to the freedom of expression provision contained in the ICCPR.<sup>102</sup>

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<sup>100</sup> Dworkin (n.96), 135

<sup>101</sup> E. Barendt, *Freedom of Speech* (OUP 2005), 180-181 & 183 and *Auschwitz Lie Case* BVerfGE 90, 241 (1994)

<sup>102</sup> Article 19 ICCPR

As well as allowing for variations in the requirements of human rights within states, the textual openness of human rights allows for the interpretation of rights to change over time. This flexibility is important because societal recognition of what is protected by human rights changes with time.<sup>103</sup> Recognition of the shifting content of liberty led Burke to argue that an attempt to settle the scope of liberty once and for all was ‘foolish.’<sup>104</sup> Such a change is readily apparent in the ECtHR’s jurisprudence on the rights of transsexuals. Here the court changed its interpretation of Articles 8 and 12 to find greater protection for their interests.<sup>105</sup> In this context the ECtHR explicitly recognised the need for a ‘dynamic and evolutive’ approach to the interpretation of rights which reflected the ‘changing conditions’ in member states.<sup>106</sup> Thus, Jerome Frank argues ‘[m]uch of the uncertainty of law is not an unfortunate accident: it is of immense social value’,<sup>107</sup> with its fluidity being able to cope with the constantly changing nature of society.<sup>108</sup>

It is not humanly possible to foresee all the situations and complications which a law may have to contend with.<sup>109</sup> However, just as the textual openness of rights can be used to take account of changes in societal recognition of rights, it also enables rights to give protection in situations that were not, or could not, have been foreseen by the drafters at the time they created the rights document.<sup>110</sup> This is because, just as the linguistic uncertainty of words

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<sup>103</sup> Dworkin (n.96), 134

<sup>104</sup> Burke (n.50), 151

<sup>105</sup> *Sheffield and Horsham v United Kingdom* (1999) 27 EHRR 163 and *Goodwin v United Kingdom* (2002) 35 EHRR 447, see generally S. Gilmore ‘Case Commentary *Bellinger v Bellinger* -- Not Quite Between The Ears And Between The Legs -- Transsexualism And Marriage In The Lords’ (2003) 15(3) *C.F.L.Q.* 295, 302

<sup>106</sup> *Goodwin v United Kingdom* (2002) 35 EHRR 447, [74]

<sup>107</sup> Frank (n.35), 7

<sup>108</sup> *Ibid.*, 6

<sup>109</sup> Bacon (n.35), Vol. IV, 366

<sup>110</sup> Dworkin (n.96), 134 and Hart (n.13), 128-129

which allows them to be used to define new ideas,<sup>111</sup> it also allows rights to be interpreted to meet new and unforeseen situations.<sup>112</sup>

If rights were not defined in a textually open manner it is also possible that, when faced with a set of facts not explicitly considered by a detailed right, the court may interpret this as a deliberate exclusion from the scope of the right by the drafters.<sup>113</sup> Given the difficulty in predicting the future application of rights described above, such an interpretation may well be incorrect. Drafting a right in a textually open manner can avoid this problem by leaving the potential semantic scope of a right open.

#### *Potentially Problematic Consequences*

Although the textually open wording of rights, which allows for the expression of the semantic uncertainty of rights, has been shown to be necessary for the existence and application of human rights treaties, it also gives rise to various theoretical and practical problems. In several instances these problems are themselves side effects of the very advantages that have been described above.

At a general level the textual openness of rights means that the wording of the rights alone gives little guidance as to their semantic scope.<sup>114</sup> Consequently, a literal or linguistic interpretation, which interprets words without regard to their context of their use other than their linguistic setting, is of no use in relation to the wording of a rights provision.<sup>115</sup> Thus, on

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<sup>111</sup> Above p.21-22

<sup>112</sup> Hart (n.13), 130-131 and Robinson (n.18), 149

<sup>113</sup> Robertson (n.7), 152

<sup>114</sup> Sumner (n.18), 5

<sup>115</sup> Sumner (n.18), 5, Z. Bankowski and N. MacCormick, 'Statutory Interpretation in the United Kingdom' N. MacCormick and R. Summers, *Interpreting Statutes* (Dartmouth 1991), 364, R. Elliot, 'The Supreme Court's Rethinking of the Charter's Fundamental Questions (or Why the Charter Keeps Getting more Interesting)' in P. Bryden and others (eds.) *Protecting Rights and Freedoms* (University of Toronto Press 1994), 131 and R. Cross and others, *Cross: Statutory Interpretation* (3<sup>rd</sup> edn, Butterworths 1995), 66 & 383

their face rights have an indeterminate scope,<sup>116</sup> a problem with which the Convention rights are not alone.<sup>117</sup> As noted above,<sup>118</sup> this uncertainty has the advantage of enabling rights documents to cope with unforeseen applications and to evolve over time. However, this can be argued to be problematic in that it means that ‘the boundaries are always contested’<sup>119</sup> and that their connection with social discourse entails that their meaning is ‘essentially unlimited.’<sup>120</sup>

This indeterminacy of scope also raises a more theoretical difficulty, one perceived as so serious that it has the potential to undermine the whole international human rights project. Costas Douzinas argues that, as a result of the drafting of human rights in terms intended to ensure that as many different states will feel able to agree to them, any state can sign up to them and ‘claim to be a human rights state.’<sup>121</sup> Combined with a lack of binding legal status and the protection given to national sovereignty by many rights treaties,<sup>122</sup> Douzinas claims that there is a danger of rights being used by states as a mere tool to give themselves legitimacy.<sup>123</sup> The fact that, of the 193 members of the UN, 167 are party to the ICCPR, some of which have been accused of serious rights violations,<sup>124</sup> adds support to this argument. The deliberately uncertain statement of the semantic conceptions that the rights embody to avoid legal obligations, noted above, makes this problem almost inevitable.<sup>125</sup>

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<sup>116</sup> Dworkin (n.96), 133

<sup>117</sup> Clayton (n.5), 194

<sup>118</sup> Above at p.15-16

<sup>119</sup> Douzinas (n.5), 375

<sup>120</sup> Ibid, 371 & 375

<sup>121</sup> Ibid, 117

<sup>122</sup> Ibid, 118

<sup>123</sup> Ibid, 117

<sup>124</sup> For example, North Korea: Amnesty International, ‘North Korea Human Rights’ <<http://www.amnestyusa.org/our-work/countries/asia-and-the-pacific/north-korea>> accessed 14 July 2012

<sup>125</sup> Above p.29-30

In addition to the danger of rights becoming a mere rubber stamp of international legitimacy, their open textured nature also creates the risk that rights will be devalued at the national level. Their openness to differing interpretations enables many diverse groups to use rights as a ‘form of political argumentation’,<sup>126</sup> claiming their protection for their activities, some of which may be worse, or no better, than those they claim are infringing their rights.<sup>127</sup> If this leads to a general perception that rights can be used to support any argument, the public may begin to respond to claims of rights with scepticism and cynicism, viewing them as providing neither guidance nor constraint.<sup>128</sup>

### ***The Need for Interpretation***

The forgoing description of the linguistic and semantic uncertainty inherent and implanted in human rights, and the positive and negative consequences of this consequent textual openness, demonstrates that, as they are written, human rights are poor guides to action. As with all laws whose scope is textually open,<sup>129</sup> to be practically useful human rights must be interpreted to find their meaning.<sup>130</sup> Under the HRA the interpretation of the Convention rights falls to the judiciary.<sup>131</sup>

The drafters intended that the textually open terms of the Convention rights be given detailed application by member states and their courts as well as the ECtHR.<sup>132</sup> This approach is in line with the civil style of drafting which influenced the drafters.<sup>133</sup> It is also in accordance

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<sup>126</sup> J. Matlár, *When Might Becomes Human Right: Essays on Democracy and the Crisis in Rationality* (Gracewing 2007), 53

<sup>127</sup> Douzinas (n.5) , 117 & 254-255

<sup>128</sup> Sumner (n.18), 8-9

<sup>129</sup> Llewellyn (n.29), 194 and Hart (n.13), 128

<sup>130</sup> Wellman (n.1), 178

<sup>131</sup> s.2 HRA

<sup>132</sup> Lauterpacht (n.55), 443

<sup>133</sup> Above p.29

with the correct separation of powers within states which seek to protect liberty.<sup>134</sup> As Montesquieu argued, the power to judge must be separated from the legislature and executive powers, this power includes the interpretation of laws necessary to resolve disputes over what the law requires.<sup>135</sup> The independence and impartiality of judges from the parties and the state makes them fit to fulfil this role.<sup>136</sup>

Judicial interpretation, however, can never completely eradicate linguistic uncertainty from a human rights provision. The judiciary must use language to define rights and these definitions, as noted above,<sup>137</sup> can in turn be ambiguous. Their interpretations of rights will themselves have to be interpreted to determine what the courts think the rights mean and the judges' semantic conceptions of the rights may not always be linguistically clear.<sup>138</sup> Further uncertainty of meaning can result from the fact that there are a number of interpretive approaches which can be taken by judges to find the meaning of the open textured rights, and thus it may be uncertain as to which judges will take.<sup>139</sup>

In spite of these problems with judicial interpretation of human rights, it does carry with it an advantage which counteracts some of the negative consequences of open textured nature of rights described above.<sup>140</sup> The authoritativeness of judicial interpretation of the Convention rights at the national and supra-national level mitigates against the indeterminacy of rights.<sup>141</sup> Without it human rights are in greater danger of becoming nothing more than the political footballs and rubber stamps Douzinas describes. Leonard Sumner argues that if cynicism and

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<sup>134</sup> C. Montesquieu, *The Spirit of Laws* (first published 1748, Prometheus Books 2002), 150-152

<sup>135</sup> *Ibid.*, 151-152

<sup>136</sup> Lord Steyn, 'Dynamic Interpretation Amidst an Orgy of Statutes' [2004] *E.H.R.L.R.* 245, 247

<sup>137</sup> Above p.21

<sup>138</sup> Robinson (n.18), 150-151

<sup>139</sup> Llewellyn (n.29), 189

<sup>140</sup> Above p.33-35

<sup>141</sup> Sumner (n.18), 5

nihilism in relation to rights is to be avoided a standard must be found against which to verify rights claims.<sup>142</sup> Judicial interpretations provide such a standard.

Although it is thus clear that the judicial interpretation of rights is essential to ensure their effectiveness, the question remains as to which interpretive approach should be taken. Many different approaches are available. The aim of this thesis will be to argue for one particular principle to guide interpretation. It was observed above that words generally take their meaning from their context,<sup>143</sup> and so this thesis will argue for a particular context which should be used by the British courts to interpret the Convention rights and seek an approach to interpretation that is compatible with it.

### *Conclusion*

It has been shown that various causes have created and facilitated the linguistic and semantic uncertainty in the meaning of human rights norms. This uncertainty and the connected open textured nature has both negative and positive attributes. The uncertainty and its consequences, however, make the interpretation of the human rights, including those incorporated by the ECHR, essential if the rights and rights movement generally is to have meaning. The next chapter will identify in detail disputes of interpretation as to the semantic content of the Convention rights that arise as a result of the open textured nature described in this chapter.

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<sup>142</sup> Ibid, 10

<sup>143</sup> Above p.20-21

### **CHAPTER III: THE PURPOSES UNDERLYING THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND HOW THESE AND THEIR USE IN THE INTERPRETATION OF THE CONVENTION RIGHTS, CONTRIBUTE TO THE INDETERMINACY OF MEANING OF THE CONVENTION RIGHTS**

#### ***Introduction***

This chapter will demonstrate how the nature of the principles that underlie the ECHR, whose furtherance has been claimed by the courts and the drafters to be the purpose of the rights, add to the open textured nature of the Convention to increase the uncertainty as to how the rights they underpin should be interpreted and applied. It will be shown that a lack of agreement as to the interpretation of these principles creates scope for disagreement upon the requirements that the substantive rights based upon them should be interpreted as imposing. This underlying lack of agreement, together with the open textured nature of the Convention's language, will be shown to have a practical impact in creating uncertainty as to the judgements that the ECtHR and national courts should reach on five central questions of interpretation, that underlie disputes over the meaning of the Convention rights, and around which the uncertainty of the meaning of the rights coalesces.

#### ***The General Purposes behind the Convention's Creation***

The broad practical reasons which underlie the creation of the ECHR are both reactive and prospective. They share much in common with the rationale behind the creation of the other international human rights documents following World War II (WWII).

Although similar normative protection for human rights can be traced back to the United States' Declaration of Independence 1776 and the French Declaration of the Rights of Man



and the Citizen 1789,<sup>1</sup> the movement which led to the creation of our modern international human rights protections developed during WWII as a response to the Nazi atrocities and with a view to the type of society that should be created upon an Allied victory.<sup>2</sup> In the American President Roosevelt's 'Four Freedoms' state of the union address<sup>3</sup> and at the meeting of the allied powers at Dumbarton Oaks in 1944 an intention to respond to the atrocities of the war by ensuring the protection of human rights was clearly stated.<sup>4</sup>

The ECHR was a product of this widespread movement in favour of the protection of human rights.<sup>5</sup> It 'was a direct response to a global war which had included the horrors of the holocaust',<sup>6</sup> with the Consultative Assembly that drafted the Convention explicitly stating the need to protect against the injustices and tyrannies of the Nazi regime.<sup>7</sup> Whereas traditionally relations between a state and its citizens were seen as 'part of the individual state's sovereignty and [therefore] governed by national law',<sup>8</sup> in light of the war it was felt necessary for there to be international regulation of States' treatment of their citizens.<sup>9</sup> In Europe the ECHR was the synthesis of this feeling<sup>10</sup> which has since put an end to the national sovereignty objection to the protection of human rights.<sup>11</sup>

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<sup>1</sup> C. Ovey and R. White, *Jacobs and White: The European Convention on Human Rights* (4th edn., OUP 2006), 1

<sup>2</sup> L. Henkin, 'Human Rights: Ideology and Aspiration, Reality and Prospect' in S. Power and G. Allison (eds), *Realizing Human Rights: Moving from Inspiration to Impact* (Palgrave Macmillan 2006), 8 & 10

<sup>3</sup> F. Roosevelt, *State of the Union Address to the Congress 6 January 1941*, in M. Ishay, *The Human Rights Reader* (2<sup>nd</sup> edn., Routledge 2007), 479-481

<sup>4</sup> Henkin (n.2), 3-4 & 9

<sup>5</sup> S. Williams, 'Human Rights in Europe' in S. Power and G. Allison (eds), *Realizing Human Rights: Moving from Inspiration to Impact* (Palgrave Macmillan 2006), 80-81

<sup>6</sup> Ovey and White (n.1), 1

<sup>7</sup> Council of Europe, *Collected Edition of the "Travaux Préparatoires"* (Council of Europe 1964), Vol.1, 48-50 and M. Janis and others, *European Human Rights Law: Text and Materials* (2nd edn., OUP 2000), 17

<sup>8</sup> M. Nowak, *Introduction to the International Rights Regime* (Martinus Nijhoff 2002), 16

<sup>9</sup> *Ibid* & see also 22, Henkin (n.2), 17 and M. Janis and others, *European Human Rights Law: Text and Materials* (2nd edn., OUP 2000), 7

<sup>10</sup> A. Simpson, *Human Rights and the End of Empire* (OUP 2001), 157

<sup>11</sup> Nowak (n.8), 24 and UN World Conference on Human Rights 'Vienna Declaration and Program of Action' (Vienna 14-25 June 1993) A/CONF.157/23, Article 5

In addition to this reactive purpose, the ECHR was also drafted with the aim of creating post-war societies of a particular nature. There was a desire to create a new world order that protected human rights against oppressive government.<sup>12</sup> Within Europe it was felt necessary to ‘encourage Germany to develop democratic institutions and the rule of law within a more integrated Europe’<sup>13</sup> in order to prevent the spread of communism.<sup>14</sup> This led to an emphasis within the ECHR on protecting the values and principles which were thought necessary for the creation and maintenance of democratic societies.<sup>15</sup> This is particularly clear in the grounds for determining whether a state’s infringement of a right is justifiable which make reference to this aim.<sup>16</sup>

### ***Principled Purposes***

#### *From Purposes to Principles*

These societal consequences that the ECHR was intended to effect are practical manifestations of underlying principles which form theoretical bases for the Convention. These principles of dignity, autonomy and equality<sup>17</sup> are statements of the valued characteristics of human beings and what is necessary for the existence of a good society.<sup>18</sup> Applying any of the definitions of the three underlying principles which will be discussed below<sup>19</sup> it becomes clear that the Nazi policies and actions were abuses of these principles. This link was recognised in the preamble of the UDHR which closely and clearly tied the principles of dignity and equality to the need to protect against a repetition of the barbarous

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<sup>12</sup> Simpson (n.10), 219

<sup>13</sup> Williams (n.5), 81

<sup>14</sup> A. Robertson and J. Merrills, *Human Rights in the World* (4th edn., Manchester University Press 1996), 120, Ovey and White (n.1), 2 and ibid

<sup>15</sup> Ovey and White (n.1), 2

<sup>16</sup> Article 8(2), 9(2), 10(2) and 11(2) ECHR

<sup>17</sup> Ovey and White (n.1), 1, Nowak (n.8), 1 and D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn., OUP 2002), 112

<sup>18</sup> Feldman (n.17), 6

<sup>19</sup> Below p.44-51

acts of WWII that violated them.<sup>20</sup> The bias of the ECHR in these principles is apparent from their connection to the practical purposes for which the Convention was created described above, the text of the Convention itself, especially the reference to the UDHR in the preamble, and the jurisprudence of the ECtHR.

### *The Convention Text*

The Convention itself makes no explicit statement that the three principles underlie the rights it contains.<sup>21</sup> However, the preamble of the ECHR does make repeated reference to the UDHR, and states an intention to give effect to it.<sup>22</sup> This is significant because the preamble of the UDHR recognises respect for both dignity and equality as an important part of the general aim of the Declaration of achieving respect for human rights. Louis Henkin argues that in this way the UDHR, through its invocation of dignity ‘provided the idea of human rights with a universally acceptable foundation.’<sup>23</sup> Given that the ECHR was intended to give further effect to the UDHR it follows logically that it was also intended to give effect to the principles underlying it.<sup>24</sup> This deduction is strengthened by the invocation of dignity as a justification for the protection of rights in the preambles of both the International Covenants on Civil and Political Rights and that on Economic, Social and Cultural Rights.<sup>25</sup> This wider use supports the recognition of dignity as a basis of the similar rights contained in the ECHR and its more general acceptance as a basis of human rights.<sup>26</sup>

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<sup>20</sup> The protection of dignity and equality were similarly depicted as a response to WWII in the preamble to the *Charter of the United Nations*.

<sup>21</sup> In relation to dignity see D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001), 12

<sup>22</sup> UDHR Preamble, [5]

<sup>23</sup> Henkin (n.2), 11

<sup>24</sup> D. Feldman, 'Human Dignity as a Legal Value: Part I' [1999] *P.L.* 682, 689, see also Beyleveld and Brownsword (n.21), 12

<sup>25</sup> Feldman (n.24), 688 and Beyleveld and Brownsword (n.21), 12-13

<sup>26</sup> See also Feldman (n.17), 130 and Feldman (n.24), 682

The reasoning that supports dignity as an underlying principle can also be applied in relation to equality, due to its similar status within the UDHR preamble. Additionally, by stating rights to universal suffrage, representative democracy and equal protection of the law and against violation of rights,<sup>27</sup> the Declaration recognised “equality” and non-discrimination [as] a most insistent theme.<sup>28</sup> Although the Convention rights do not duplicate verbatim the rights found in the UDHR, they take inspiration from them,<sup>29</sup> something that can be seen in Convention’s similar requirement of free elections and the prohibition of discrimination in relation to the enjoyment of the Convention rights.<sup>30</sup> This substantive overlap gives further support to the acceptance of equality as a principle also underling the Convention rights.

No explicit mention of the principle of autonomy is made in any of the rights treaties referred to above. However, the concept of ‘freedom’ of action dapples the Convention. Isaiah Berlin, in describing his concept of ‘positive liberty’,<sup>31</sup> which he depicts as protecting the ‘autonomous self’,<sup>32</sup> uses the words ‘liberty’ and ‘freedom’ synonymously.<sup>33</sup> Thus, it is here submitted that the references to freedom in the title and body of the ECHR can be seen as encompassing and furthering the protection of the principle of autonomy, establishing it as underpinning the Convention.<sup>34</sup>

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<sup>27</sup> Article 2, 7 & 21 UDHR

<sup>28</sup> Henkin (n.2), 12

<sup>29</sup> Ovey and White (n.1), 2

<sup>30</sup> Article 14 and Protocol 1, Article 3 ECHR

<sup>31</sup> I. Berlin, *Liberty: Incorporating Four Essays on Liberty* (OUP 2002), 178, See also J. Marshall, ‘A right to personal autonomy at the European Court of Human Rights’ [2008] *E.H.R.L.R.* 337, 340

<sup>32</sup> Berlin (n.31), 179, see also G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988), 13

<sup>33</sup> Berlin (n.31), 169

<sup>34</sup> See in agreement, J. Laws, ‘The Constitution: Morals and Rights’ [1996] *P.L.* 622, 623-624 & 626-627

### *The Court's Jurisprudence*

Under the ECHR the ECtHR is given the authority to rule on the interpretation of the Convention rights.<sup>35</sup> In fulfilling this function it has both explicitly stated, and implicitly though use in interpretation<sup>36</sup> recognised, the principles mentioned above as underlying the rights.

The Court has clearly stated dignity as an underlying principle upon which the Convention rights are based,<sup>37</sup> going so far as to hold that '[t]he very essence of the Convention is respect for human dignity'.<sup>38</sup> Just as the cases cited below demonstrate that autonomy is often used as an underlying principle in cases concerning Article 8,<sup>39</sup> the case law shows that dignity is very frequently invoked in relation to Article 3.<sup>40</sup> In addition to the recognition of the underlying position of dignity, in *Pretty v United Kingdom*, the ECtHR also explicitly held that 'the notion of personal autonomy is an important principle underlying the interpretation [of Article 8]'.<sup>41</sup> This was similarly openly recognised in *Goodwin v United Kingdom*<sup>42</sup> and implicitly underpinned the ECtHR's decision in *Von Hannover*.<sup>43</sup>

Although there is a relative paucity of explicit statements of equality as an underlying principle, a finding of unequal treatment has been relied upon as the basis for holding that a Convention right has been violated. Thus, in the *East African Asians v United Kingdom* the

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<sup>35</sup> Article 32(1) ECHR

<sup>36</sup> S. Fredman, 'From deference to democracy: the role of equality under the Human Rights Act 1998' (2006) 122 *L.Q.R.* 53, 53

<sup>37</sup> Feldman (n.17), 128

<sup>38</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, [65]

<sup>39</sup> Below p.49 & 146-148

<sup>40</sup> Feldman (n.24), 687 & 691-692, C. Gearty, *Principles of Human Rights Adjudication* (OUP 2004), 94, eg. *Tyrer v United Kingdom* (1979-80) 2 EHRR 1 and *Price v United Kingdom* (2002) 34 EHRR 53

<sup>41</sup> *Pretty* (n.38), [61], see also A. Mowbray, *Cases and Materials on the European Convention on Human Rights* (4th edn., OUP 2007), 510 and Marshall (n.31), 344

<sup>42</sup> *Goodwin v United Kingdom* (2002) 35 EHRR 18, [70], see also *Evans v United Kingdom* (2008) 46 EHRR 34, [71]

<sup>43</sup> Marshall (n.31), 345 and *Von Hannover v Germany* (2006) 43 EHRR 7, [50]

Commission held that Article 3 had been violated because treating people differently rendered them second class citizens.<sup>44</sup> Additionally it has been argued that a notion of equality underlies the ECtHR's interpretation of the 'necessary in a democratic society requirement'<sup>45</sup> provision of the qualified rights where the ECtHR has refused to simply give precedence to the view of the majority over the minority on matters of freedom of speech;<sup>46</sup> for if the majority could tyrannise the minority they would not be treated as equals.<sup>47</sup>

### *Uncertainty Surrounding the Interpretation of these Principles*

Although there appears to be good support for perceiving these principles to underlie the Convention rights, the nature of the principles creates scope for disagreement as to their theoretical contents. Though the different interpretations of the principles are each capable of being used to interpret the Convention rights, the diverging views as to their contents creates scope for differing claims as to how the rights they underpin should be interpreted, adding to the uncertainty as to how the substantive open textured Convention rights will be interpreted by the ECtHR.

### *Dignity*

As a principle of moral philosophy, dignity attaches to the inherent characteristic of humans which gives them their value<sup>48</sup> as a moral agent and entitlement to respect from other agents.<sup>49</sup> Thus, the central question that different theories of dignity seek to address is the nature of this characteristic, defining what it is about the human condition that should be

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<sup>44</sup> *East African Asians v United Kingdom* (1981) 3 EHRR 76, [180], [196], [199] & [205]

<sup>45</sup> Article 8(2), 9(2), 10(2) and 11(2) ECHR

<sup>46</sup> R. Singh, 'Interpreting a Bill of Rights' (2008) 29(2) *Stat.Law.Rev.* 82, 191 and J. Jowell, 'Is Equality a Constitutional Principle?' (1994) 47(2) *C.L.P.* 1, 2, see for example *Handyside v United Kingdom* (1979-80) 1 EHRR 737, [49]

<sup>47</sup> Singh (n.46), 184

<sup>48</sup> O. Schochter, 'Human Dignity as a Normative Concept' (1983) 77 *A.J.I.L.* 848, 849

<sup>49</sup> K. Dicke, 'The Founding Function of Human Dignity in the Universal Declaration of Human Rights' in D. Kretzmer and E. Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002), 117

deemed to possess value.<sup>50</sup> The answer to this question is key, if dignity is to act as a justification for deeming individuals to have rights by which states are bound, for it will be this characteristic to which the rights attach and thus shapes, the interpretation of those rights.<sup>51</sup>

The 'neo-classical' conception of dignity,<sup>52</sup> so named because of its roots in the idea of classical thought that dignity was attached to the rank of an individual,<sup>53</sup> takes the view that humans have dignity, and therefore rights which should be respected,<sup>54</sup> merely by virtue of the fact that they are human,<sup>55</sup> by ranking as humans. This conception of the uniqueness of the human being can be speciesist,<sup>56</sup> whereby it is the mere fact that humans are humans that gives them special value.<sup>57</sup> Alternately and historically from a religious perspective, the value can derive from the belief that humans are made in a God's image.<sup>58</sup>

On this view, the content of this definition of dignity, the meaning it gives to the rights based upon it, is concerned with protecting the inherent worth of *being human* and how people see themselves as humans (their sense of self worth).<sup>59</sup> Moon and Allen summarise this definition of dignity as requiring the 'esteem and respect of other people' and that a person not be

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<sup>50</sup> Beyleveld and Brownsword (n.21), 15

<sup>51</sup> Ibid, 10-11 & 15 and Feldman (n.24), 689-690

<sup>52</sup> Or what Feldman calls the 'objective' conception of dignity, Feldman (n.24), 685-686

<sup>53</sup> C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *E.J.I.L.* 655, 657, C. Starck, The Religious and Philosophical Background of Human Dignity and its Place in Modern Constitutions, *The Concept of Human Dignity in Human Rights Discourse* (n.49), 181, J. Eckert, 'The Legal Roots of Human Dignity in German Law,' in *The Concept of Human Dignity in Human Rights Discourse* (n.49), 43 and D. Shultziner, 'Human Dignity - Functions and Meanings' (2003) 3 *Global Jurist Topics* Article 3, 10

<sup>54</sup> Nowak (n.8), 2

<sup>55</sup> Feldman (n.24), 684

<sup>56</sup> Richard Ryder coined the phrase 'speciesism' in 1970: R. Ryder, 'Speciesism' (Richard Ryder's personal website) <<http://www.richardryder.co.uk/speciesism.html>> accessed 5<sup>th</sup> January 2012 and P. Singer, *Animal Liberation: Towards an end to Man's Inhumanity to Animals* (Granada Publishing 1977), 42 (note 4)

<sup>57</sup> Feldman (n.24), 684, Singer (n.56), 26 & 28 and Ryder (n.56)

<sup>58</sup> Beyleveld and Brownsword (n.21), 10 & 51, Singer (n.56), 37. John Locke argued that we have rights because we are all created by God, those rights being necessary for 'a life fit for the dignity of man'. (J. Locke, *Two Treatises of Government* (J.M. Dent and Sons 1924), 120 & 124)

<sup>59</sup> Feldman (n.24), 685-686, Feldman (n.17), 129 and G. Moon and R. Allen, 'Dignity Discourse in Discrimination Law: A Better Route to Equality', (2006) 6 *E.H.R.L.R.* 610, 645

‘humiliated or treated without respect for his value as a person.’<sup>60</sup> In this way this conception of dignity links to the classical conception of dignity as a person’s social rank and focused upon a person’s self-presentation, character and conduct.<sup>61</sup> Under the neo-classical conception, degrading treatment is that which reduces the value of being a human, not merely treats them in a manner inferior to that which is due to their social rank.

Uncertainty arises, however, when the neo-classical conception is called upon to interpret rights, for the question must first be asked: what does this value of being a human require? In answering this question the interpreter must apply their own view informed by social factors<sup>62</sup> to decide the question and interpret the right.<sup>63</sup> On this question there is scope for disagreement, leading to uncertainty as to the requirements of a right based upon this definition of dignity. An explicit application of this definition can clearly be seen in *Pretty v United Kingdom* where the ECtHR held that Article 3 would be violated if ‘treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity’.<sup>64</sup>

The core feature of the other main conception of dignity is that it focuses, not on the dignity of a human as a whole, but instead deems a particular characteristic to be of value and therefore giving the agent who possesses it dignity.<sup>65</sup> [T]he best-known articulation of the

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<sup>60</sup> Moon and Allen (n.59), 627

<sup>61</sup> Beyleveld and Brownsword (n.21), 58 and D. Ullrich, ‘Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany’ (2003) 3 *Global Jurist Frontiers* 1, 5

<sup>62</sup> Gearty (n.40), 88

<sup>63</sup> Thus, Ullrich notes that this conception of dignity, which Feldman describes as objective, has an element of subjectivity. (Ulrich (n.61), 5 and Feldman (n.24), 685)

<sup>64</sup> *Pretty* (n.38), [52], see also *East African Asians* (n.44), [189]

<sup>65</sup> Beyleveld and Brownsword (n.21), 22 and R. Elliot, ‘The Supreme Court’s Rethinking of the Charter’s Fundamental Questions (or Why the Charter Keeps Getting more Interesting)’ in P. Bryden and others (eds.) *Protecting Rights and Freedoms* (University of Toronto Press 1994), 46



idea of intrinsic human dignity',<sup>66</sup> which shows a clear break from the classical and neo-classical conceptions, is found in Immanuel Kant's philosophy.<sup>67</sup> For Kant the characteristic which had intrinsic value and thus dignity was the capacity for rational thought.<sup>68</sup>

He noted that rationality was the factor essential for a being to be able to give universal law and recognise that they were bound by a universal law; capable of creating a moral theory and acting in accordance with it.<sup>69</sup> Kant argued that this had intrinsic absolute worth (dignity)<sup>70</sup> because it was pure rationality, not the product of impulses, inclinations or feelings which, unlike rationality,<sup>71</sup> can be subject to comparison and competition and therefore are of relative worth.<sup>72</sup> Based upon this intrinsic value Kant argues that rationality should be treated as an end in itself not the means to another end.<sup>73</sup> A particular interpretation of this conception of dignity was applied in relation to Article 3 ECHR by the French *Conseil d'Etat* who held that the throwing of dwarves for sport was to treat the dwarf as an object and not an end in itself as required by dignity.<sup>74</sup> Gewirth similarly takes the capacity for rationality, specifically when present in purposive and voluntary action,<sup>75</sup> to be the fundamental characteristic of foremost (all be it contingent) value,<sup>76</sup> and which therefore provide an underlying justification for human rights.<sup>77</sup>

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<sup>66</sup> Beyleveld and Brownsword (n.21), 52

<sup>67</sup> Ibid

<sup>68</sup> Ibid, 53, see also Feldman (n.24), 685 and Feldman (n.17), 126

<sup>69</sup> I. Kant, *The Groundwork of the Metaphysics of Morals*, M. Gregor (ed.), C. Korsgaard (intro.) (Cambridge University Press 1997), 41

<sup>70</sup> Ibid, 36-38 & 42

<sup>71</sup> Ibid, 46

<sup>72</sup> Ibid, 42-43

<sup>73</sup> Ibid, 44-46

<sup>74</sup> *Lancer de Nain*, Conseil d'Etat, 27 October 1995 – 265340

<sup>75</sup> A. Gewirth, *Reason and Morality* (Chicago University Press 1978), 22 & 26-27

<sup>76</sup> A. Gewirth, 'Human Dignity as the Basis of Rights' in M. Meyer and W. Parent (eds) *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992), 22-23, see also D. Beyleveld and R. Brownsword 'Human Dignity, Human Rights, and Human Genetics' (1998) 61(5) *M.L.R.* 661, 671 and Beyleveld and Brownsword (n.21), 64

<sup>77</sup> Gewirth (n.75), 46, A. Gewirth, *Human Rights: Essays on Justification and Application* (Chicago University Press 1982), 15 and Beyleveld and Brownsword (n.21), 115 & 124

Peter Singer also rejects a neo-classical conception of dignity in favour of a characteristic which is not by definition restricted to the human person.<sup>78</sup> However, in contrast to Kant and Gewirth, he argues that the capacity for suffering and enjoyment, rather than reason, is the fundamental characteristic making a being worthy of respect and which can give rise to rights binding others.<sup>79</sup>

It is, therefore, clear that in addition to there being different general conceptions of individual dignity, there are also different interpretations of those conceptions. Thus, the use of dignity as an underlying principle to interpret the substantive Convention rights carries with it the scope for disagreement as to the interpretation of the rights. Although different interpretations of the underlying principle may agree on an interpretation of a particular substantive right,<sup>80</sup> the potential for different interpretations to be recommended creates uncertainty as to the scope of the open textured rights. The specific areas of potential dispute in interpretation will be discussed below.

### *Autonomy*

The word autonomy derives from the Greek ‘*autos*’ meaning ‘self’ and ‘*nomos*’ meaning ‘rule’ or ‘law’ and referred to the capacity of a city state to make their own laws as opposed to being under the control of another power.<sup>81</sup> In its application to people, autonomy in a general sense can be interpreted as upholding the choices people make about how they wish to live their lives.<sup>82</sup> This overall aim has, however, been interpreted in different ways.<sup>83</sup>

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<sup>78</sup> Singer (n.56), 27, 243-245

<sup>79</sup> Ibid, 27 & 243

<sup>80</sup> Eg. *Tyrer* (n.40), [33] & [35] where the ECtHR used both a neo-classical and a Kantian conception of dignity to reach the same interpretation of Article 3, see further Feldman (n.24), 685

<sup>81</sup> Dworkin (n.32), 12-13, see also J. Cooper, ‘Stoic Autonomy’ in E. Paul and others (eds.) *Autonomy* (Cambridge University Press 2003), 2

<sup>82</sup> Feldman (n.17), 7 and Kant (n.69), xxiv & 24 and *Pretty* (n.38), [62]

<sup>83</sup> Dworkin (n.32), 6

Autonomy can be interpreted from both positive and negative perspectives.<sup>84</sup> In the positive sense it involves the ‘freedom to make one’s own choices’<sup>85</sup> and set one’s own goals without having these predetermined by some other entity or person over which one has no control.<sup>86</sup> It is to act upon one’s own independently determined reasons for acting.<sup>87</sup> The use of this conception is apparent in the ECtHR’s protection in *Von Hannover v Germany* of a person’s ability to develop their own personality.<sup>88</sup> In the negative conception autonomy requires freedom from interference with ones positively autonomous actions by others.<sup>89</sup>

As with dignity, therefore, there are different conceptions of autonomy as a principle underlying rights. Both of these interpretations, however, give rise to a question that interpretations of dignity do not: unlike dignity, the principle of autonomy in isolation does not answer the question of why autonomy should be respected,<sup>90</sup> and why it is that a person is deemed to have autonomy<sup>91</sup> and, consequently, to what decisions does autonomy attach. The principle of dignity, as shown above, gives answers to these questions and thus it can be seen as not only underlying human rights but also the principle of autonomy.<sup>92</sup> This relation between dignity and autonomy is recognised in the UDHR’s preamble, where dignity is said to be the ‘foundation of freedom,’<sup>93</sup> which was itself argued above to encompass within the Convention the idea of autonomy.<sup>94</sup> However, as has been noted, dignity itself is not without uncertainty. The scope for argument as to the identity and requirements of the appropriate

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<sup>84</sup> Nowak (n.8), 132 & 137

<sup>85</sup> Marshall (n.31), 340

<sup>86</sup> Berlin (n.31), 178-179, see also Dworkin (n.32), 13 & 31

<sup>87</sup> T. Scanlon, ‘A Theory of Freedom of Expression’ (1972) 1(2) *Phil. & Pub.Aff.* 204, 215-216

<sup>88</sup> *Von Hannover* (n.43), [50], see also *Goodwin* (n.42), [90] and Marshall (n.31), 337 & 349

<sup>89</sup> Marshall (n.31), 339, Berlin (n.31), 169 & 175 and *Evans* (n.42), [71]

<sup>90</sup> Beyleveld and Brownsword (n.21), 23 and Berlin (n.31), 173

<sup>91</sup> Dworkin (n.32), 13 and Berlin (n.31), 173

<sup>92</sup> Schochter (n.48), 849-850, Marshall (n.31), 338, Gearty (n.40), 84 and Feldman (n.24), 688

<sup>93</sup> UDHR, preamble, [1]

<sup>94</sup> Above p.42

meta-principle,<sup>95</sup> in addition to the existence of differing conceptions of autonomy itself, again involves uncertainty as to its scope and requirements when used to interpret rights.

### *Equality*

Statements of equality were given a prominent place in the early human rights documents<sup>96</sup> and it has been argued that equality underlies many of the Convention rights.<sup>97</sup> In its basic formulation, dating back to Aristotle, equality can be defined as requiring that like things should be treated alike and dissimilar things be treated dissimilarly.<sup>98</sup> The application of both these aspects is apparent in ECtHR jurisprudence.<sup>99</sup>

However, under this definition it is ‘virtually impossible to conceive of equality in the abstract’,<sup>100</sup> there must be something in relation to which equality is assessed. Thus, the invocation of equality raises the question of what characteristics should be deemed to require that there be equal treatment in relation to them, which itself necessitates answering the more fundamental question of why ought we to act with equality.<sup>101</sup> Thus, without underlying guiding moral standards equality is meaningless and ‘can have nothing to say as to how we should act.’<sup>102</sup> Without such content ‘[e]quality is an empty vessel with no substantive moral content of its own.’<sup>103</sup>

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<sup>95</sup> Above p.44-48, Berlin suggests the philosophies of Kant and Mill as possibilities. (Berlin (n.31), 173)

<sup>96</sup> The second sentence of the United States Declaration of Independence 1776 and Article 1 of the French Declaration of the Rights of Man and the Citizen 1789, see also Feldman (n.17), 133

<sup>97</sup> Singh (n.46), 185

<sup>98</sup> P. Westen, ‘The Empty Idea of Equality’ (1982) 95(3) *Harv.L.Rev.* 537, 54 citing Aristotle, *The Nicomachean Ethics*, D. Ross (trans.), L. Brown (intro. and notes) (OUP 2009), 84-85

<sup>99</sup> *East African Asians* (n.44) showing the former and *Thlimmenos v Greece* (2001) 31 EHRR 15 demonstrating the latter.

<sup>100</sup> Feldman (n.17), 133

<sup>101</sup> Westen (n.98), 543-544, see also *ibid*, 134 and K. Greenawalt, ‘How Empty is the Idea of Equality?’ (1983) 83(5) *Colum.Law.Rev.* 1167, 1169

<sup>102</sup> Westen (n.98), 547 and Fredman (n.36), 71

<sup>103</sup> Westen (n.98), 547

If we are not to rely on an intuitive notion<sup>104</sup> of when equality is appropriate, some other moral principle must guide the application of this principle.<sup>105</sup> Peter Westen argues that this moral content can be provided by looking at the rights people possess.<sup>106</sup> This analysis of the nature of equality is implicit in the key equality provision of the ECHR ensuring equality, the Article 14 prohibition on discrimination,<sup>107</sup> which the ECtHR has held creates no freestanding right but rather ‘relates solely to “rights and freedoms set forth in the Convention”’.<sup>108</sup> This, however, raises the question: what is the justification for the scope of these rights? Thus, like autonomy, analysis of the application of equality leads us into consideration of principles of dignity which, as demonstrated above, provides answers to the questions equality raises.<sup>109</sup> Some recognition of this is apparent in the ECtHR’s reference to the rights and dignity possessed by the claimants in the *East African Asians* case.<sup>110</sup>

In addition to providing a fundamental basis for rights, the use of dignity also avoids the philosophical trap of invalidly deriving a moral ‘ought’ from a non-moral ‘is.’<sup>111</sup> To be logically valid the characteristic which entitles people to be treated equally must be a morally significant characteristic as opposed to a merely physical characteristic.<sup>112</sup> Dignity is such a characteristic. However this does not eliminate the potential for uncertainty in the application of equality because, as has been noted above, dignity itself is open to different interpretations.

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<sup>104</sup> Eg. M. Huemer, *Ethical Intuitionism* (Palgrave Macmillan 2005), 6, 102-103

<sup>105</sup> Greenawalt (n.101), 1172-1173, 1175 & 1178

<sup>106</sup> Westen (n.98), 529, 548, 560 & 592

<sup>107</sup> Cf. Article 1 of Protocol 12 setting out a free standing right to equality has not been signed by a large number of member states (Ovey and White (n.1), 430)

<sup>108</sup> *Belgian Linguistics* (1979-80) 1 EHRR 252, [9], see also *Van Raalte v Netherlands* (1997) 24 EHRR 503, [33]

<sup>109</sup> Beyleveld and Brownsword (n.21), 13 & 21, Schochter (n.48), 851, Feldman (n.24), 684-685 and Fredman (n.36), 71

<sup>110</sup> *East African Asians* (n.44), [205] & [207]-[209] and Feldman (n.24), 692

<sup>111</sup> Westen (n.98), 545

<sup>112</sup> *Ibid*, 544 & 547

### *The Practical Implications of the Uncertainty of the Underlying Principles for the Interpretation of the Convention Rights*

The textual and semantic uncertainty of the Convention rights, combined with the fact that the underlying principles described above are open to different interpretations, has the practical implication that the interpretation of the substantive Convention rights by the ECtHR or national courts is a matter of debate and disagreement. This uncertainty as to the meaning of the rights is thus not merely a practical consequence of the language used to define the rights; it reflects a deeper theoretical debate as to the nature of the principles which underlie the Convention. Within this uncertainty, five fundamental questions of interpretation can be identified with which it is necessary to engage in order to adequately determine the meaning of the Convention rights. The scope and requirements of each Convention right depends on the answers to these questions. The practical importance of these questions can be seen from the fact that they arise in the Convention rights cases of the most controversy which most tax the highest courts. Thus, the nature of the principle(s) deemed to underlie the Convention and used to interpret it, through the answers to the five questions that they entail, is pivotal to the practical meaning and scope of the substantive rights.

### *Who Has Rights*

This question of who can be recognised as capable of possessing human rights is of primary and pivotal importance over all other questions of rights interpretation. Its position derives from the fact that it is essential to know who can claim the protection of rights before determining the protection that a right gives them in a given factual circumstance. Prior, therefore, to issues of whether a particular right is relevant on the facts of a case, is the question of whether the being in question has the characteristics necessary to be said to be capable of holding human rights generally.

Although the universality of rights is regarded as a foundational feature of human rights,<sup>113</sup> carrying with it the idea that human rights are applicable to all humans, when it comes to the practical application of the rights, this broad statement of who can be a beneficiary of rights has the boundaries of its scope questioned in hard cases. These cases have involved the determination of whether prisoners,<sup>114</sup> foetuses,<sup>115</sup> dead humans<sup>116</sup> or the more intelligent of the non-human primates<sup>117</sup> should be deemed to be capable of being possessors of the Convention rights.

Cases such as these pivot on the issue of what the underlying interpretive principles set as the characteristic to which rights attach. Thus, under a Kantian perspective on dignity the capacity to think rationally is pivotal to whether a person can be deemed to have human rights.<sup>118</sup> However, it is also possible to conceive of a principle of dignity which gives rights only to those capable of autonomous action.<sup>119</sup> Conversely, the speciesist approach described above would give rights to those who are genetically human.<sup>120</sup> Thus, disagreement and consequent uncertainty as to the meaning of human rights arise as a product of the different interpretations of the underlying principles that can be applied to interpret the rights. The far-reaching implications of such disagreement are most clearly illustrated by the fact that under the Declaration of Independence and the Declaration of the Rights of Man, women and non-white people were not deemed to have rights they are now recognised as possessing.<sup>121</sup>

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<sup>113</sup> Nowak (n.8), 12 and below p.164-168

<sup>114</sup> *Hirst v United Kingdom (No2)* (2006) 42 EHRR 41, [69]-[70]

<sup>115</sup> *Vo v France* (2005) 40 EHRR 12

<sup>116</sup> *McCann v United Kingdom* (1996) 21 EHRR 97, [193], see also *Mephisto* BVerfGE 30, 173 (1971), 194

<sup>117</sup> A case is currently before the ECtHR which asks this very question: M. Balluch and E. Theuer 'Personhood Trial for Chimpanzee Matthew Pan' (Verein Gegen Tierfabriken Website 2008)

<<http://www.vgt.at/publikationen/texte/artikel/20080118Hiasl.htm>> accessed 2<sup>nd</sup> January 2012

<sup>118</sup> Beyleveld and Brownsword (n.21), 54

<sup>119</sup> *Ibid*, 23

<sup>120</sup> Above p.45

<sup>121</sup> Nowak (n.8), 13

### *The Substantive Nature of the Convention Rights: Positive and Negative Obligations*

After it has been established who can be deemed to possess rights a further question arises as to the substantive nature of the obligations that are imposed on others by the rights.<sup>122</sup> Rights can be formulated as imposing positive obligations whereby the party bound by the right is required 'to undertake specific affirmative tasks'<sup>123</sup> in order to protect what can be called another's 'positive' right from interference or to facilitate and provide for the exercise of another's right.<sup>124</sup> Alternatively, they may be interpreted as additionally or alternately imposing a negative obligation to refrain from interfering with the 'negative' rights of another.<sup>125</sup>

The ECtHR is yet to articulate a general theory in this area<sup>126</sup> and it has been argued that all rights are capable of imposing positive or negative obligations.<sup>127</sup> Guidance as to this element of the nature of the rights can be found through the application of the principles argued to underlie the rights; however, these can lead to divergent views.

Feldman has argued that a concept of dignity which prohibits interference with a person's self-respect and self-worth will generally only give rise to rights imposing a negative obligation.<sup>128</sup> He, however, concedes that a conception of dignity which attributes value to persons who may be incapable of such self-awareness, also coinciding with the neo-classical conception described above, can impose positive duties which must be fulfilled to enable a

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<sup>122</sup> Eg. *X and Y v Netherlands* (1986) 8 EHRR 235, [23], *Evans* (n.42), [75] and *Pretty* (n.38), [67]

<sup>123</sup> A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights* (Hart 2004), 2

<sup>124</sup> S. Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights [2006] *P.L.* 498, 500

<sup>125</sup> *Ibid*, 498

<sup>126</sup> Mowbray (n.123), 221 and G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) *M.L.R.* 878, 883

<sup>127</sup> Mowbray (n.123), 224 and Fredman (n.124), 500

<sup>128</sup> Feldman (n.24), 686 and Feldman (n.17), 128



person to live in a dignified manner.<sup>129</sup> Alternately, conceptions of dignity that take a Kantian approach can be interpreted as requiring not simply non-interference with the exercise of the value-laden characteristic such as rationality,<sup>130</sup> but also as requiring the provision of the circumstances necessary for that dignity to flourish.<sup>131</sup>

As with dignity, so with autonomy. Autonomy can be interpreted as giving rise to not only rights to be free from interference by others, but also rights to the positive support necessary to exercise that autonomy,<sup>132</sup> especially in relation to those such as children may need support because they are not capable of exercising their autonomy.<sup>133</sup> Alternatively, a restrictive, but possible, interpretation would see autonomy as only requiring the recognition of rights imposing negative obligations, ensuring freedom from interference with an individual's actions.<sup>134</sup>

Equality can also be interpreted in both a positive and a negative manner. It can be seen as either requiring that people be equally free in, and treated equally by others in relation to, the exercise of their rights or dignity to which the principle of equality attaches.<sup>135</sup> But also it can require that positive steps be taken to put a person in a similar position to others in relation to, or be assisted so that they are equality able to exercise, the right or value upon which equality operates.<sup>136</sup>

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<sup>129</sup> Feldman (n.24), 685-687 & 690 and Feldman (n.17), 128, what Feldman describes as objective dignity.

<sup>130</sup> Beyleveld and Brownsword (n.21), 16

<sup>131</sup> Ibid, 11, 18 & 64

<sup>132</sup> J. Marshall, A Right to Personal Autonomy at the European Court of Human Rights [2008] *E.H.R.L.R.* 337, 344

<sup>133</sup> Feldman (n.17), 10 & 12-13 and Berlin (n.31), 171

<sup>134</sup> Feldman (n.17), 11

<sup>135</sup> Ibid, 134

<sup>136</sup> Ibid, 12 & 134

### *The Weighing and Balancing of Convention Rights*

As Locke recognised, if all humans have rights then there is potential for one person's actions to infringe the rights of another.<sup>137</sup> Thus, there must be a means by which disputes as to conflicts between rights are resolved.<sup>138</sup> The inevitability of conflict is recognised in the substantive provisions of the Convention described below, however, at the conceptual level such conflicts have been seen to be between the competing parties' interests under the underlying principles<sup>139</sup> behind the substantive rights. Such a conflict was, for example, apparent in *Pretty* where the autonomy of Mrs Pretty was felt to conflict with the autonomy interest of vulnerable persons to be free from coercion.<sup>140</sup> Additionally a conception of autonomy or dignity which requires non-interference may well conflict with state actions felt necessary in the pursuit of a public interest, such as those listed in the explicitly qualified Convention rights such as Article 8(2),<sup>141</sup> although the extent to which these two types of conflict are distinct will be discussed further below.<sup>142</sup>

The way in which such disputes are resolved, between rights and claims that they should be limited in favour of specific interests, will be directed by the conception of the underlying principle that is adopted. If a teleological underlying principle is applied then the decision that 'would produce the *greatest amount*'<sup>143</sup> of the value protected by that principle is the correct one. If a deontological approach is taken then the conflict must be resolved in accordance with the relative weight given to the parties' claims by the extent to which they

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<sup>137</sup> Locke (n.58), 118-120

<sup>138</sup> *Ibid*, 159

<sup>139</sup> H. Fenwick, 'Judicial Reasoning in Clashing Rights Cases' in H. Fenwick and others (eds) *Judicial Reasoning Under the Human Rights Act* (Cambridge University Press 2007), 260-261

<sup>140</sup> *Pretty* (n.38), [67] & [76], see also *Evans* (n.42)

<sup>141</sup> *Marshall* (n.31), 343-344

<sup>142</sup> Below p.80-81 & 126

<sup>143</sup> M. Timmons, *Moral Theory: An Introduction* (Rowman and Littlefield 2002), 104

further the intrinsic value protected by the deontological principle.<sup>144</sup> Under this approach the *quantitative* consequences are generally irrelevant; it is the nature of parties' rights that will determine the correct balance.<sup>145</sup> The quantitative consequences of an action are only relevant to the extent that they relate to the calculation of the likelihood of interference with the protected rights.<sup>146</sup> While there is uncertainty as to which approach to balancing the courts will and should adopt there will be uncertainty as to the decision they will reach in cases where rights conflict.

### *The Interest and the Will Conceptions of Rights*

In addition to the questions of who has rights, what those rights require of others and their precedence over others' rights, is the question of whether the bearer has the capacity to waive the protection that his rights gives him. Waiving the benefit of a right is to suspend the claim made by it so as to permit an action prohibited by the right or decline to seek its vindication where an action in breach of the duty it imposes has occurred.<sup>147</sup> The 'benefit' of the right is referred to deliberately in order to distinguish the idea that the actual possession of a right can be surrendered or waived. Under a conception of rights which sees their possession as inalienable, in that they are possessed by virtue of some characteristic rather than gifted by the external power of the state, the idea that a person might cease to possess a right, on a ground other than that they no longer poses the characteristic to which it attaches, is fundamentally inconsistent. Thus, the idea that a person could waive their claim to hold a right, as opposed to waiving the benefit of their right, is inconsistent with the idea of

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<sup>144</sup> D. Beyleveld, *The Dialectical Necessity of Morality* (University of Chicago Press 1991), 48, see generally Fenwick (n.139), 256-257 and Berlin (n.31), 173

<sup>145</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth 1997), ix, xi & 96 and J. Thompson, 'The Trolley Problem' (1985) 94 *Yale L.J.* 1395, 1404 & 1408

<sup>146</sup> Thus, if the interest protected by the rights of a group of people are all equally threatened, such as a runaway trolley, the justified course of action would be consistent with the demands of the one which spared the interests of the greatest number of people. (Thompson (n.145), 1408 & 1412)

<sup>147</sup> M. Kramer, *Rights Without Trimmings* in M. Kramer and others (eds), *A Debate Over Rights* (Clarendon Press 1998), 62-63

inalienable rights.<sup>148</sup> It will be argued below that the UDHR and ECHR must be understood to state inalienable rights in this sense<sup>149</sup> and thus, if waiving is possible in relation to these rights, it is only the benefit of the rights can be waived. Academic and judicial consideration of the exercise of a waiver in relation to the Convention rights will thus be interpreted accordingly, unless there is evidence of a clear intention to argue for the waiver of the rights rather than their benefit.

On the question of whether the benefit of a right can be waived, there are two competing approaches. Under an interpretation of rights which follows the ‘will conception’ it is open in principle to an agent to waive the protection of any right,<sup>150</sup> allowing an act which would otherwise infringe upon his right. Under the contrasting ‘interest conception,’ such waiving is not necessarily possible.<sup>151</sup> The two conceptions give different conclusions on the waiving of the benefits rights because they have different conceptions of characteristics of a right generally.<sup>152</sup> If principles underlying the Convention rights are used in the interpretation of those rights, then whether a will or interest conception of those rights is required by the principle can dictate the outcome of a case.<sup>153</sup>

The impact of this question of interpretation is apparent from the Convention right case law. In the *Dwarf Tossing*<sup>154</sup> decision mentioned above,<sup>155</sup> the *Conseil d’Etat*’s adopted an interest based approach holding that the dwarf’s consent to being hurled did not prevent the sport

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<sup>148</sup> S. Pattinson, *Medical Law and Ethics* (Sweet & Maxwell 2011), 8 (fn 16)

<sup>149</sup> Below p.169-170

<sup>150</sup> L. Sumner, *The Moral Foundations of Rights* (Clarendon 1986), 36 & 47 and C. Wellman, *Real Rights* (OUP 1995), 123

<sup>151</sup> Sumner (n.150), 47 and Wellman (n.150), 152

<sup>152</sup> N. MacCormick, ‘Rights in Legislation’ in P. Hacker and J. Raz (eds), *Law, Morality and Society* (Clarendon 1977), 192

<sup>153</sup> Sumner (n.150), 49

<sup>154</sup> Although not an ECtHR the *Conseil d’Etat* did have regard to Article 3 in reaching its decision under France’s monist constitution.

<sup>155</sup> Above p.47

being an impermissible infringement of his dignity.<sup>156</sup> The court held that the dwarf could not act in a way which denied his own dignity.<sup>157</sup> This decision is consistent with Kant's interest conception of dignity which entailed that rational beings owed an unavoidable duty to themselves to respect their own rationality, their dignity, as well as that of others.<sup>158</sup> This demonstrates the potential for conflicting conclusions to be reached under the two approaches: had a will conception been applied by the *Conseil d'Etat*, it could have been possible for M. Wackenheim to permit himself to be tossed. Without certainty as to which the courts should and do apply there will be uncertainty as to how the substantive Convention rights should be interpreted.

#### *Horizontal and Vertical Application*

A logical corollary of considering the nature of the rights and their consequent obligations is the question of upon whom the rights impose obligations, upon only the state (vertically) or also upon private individuals and non-state bodies (horizontally)? At a principled level the question is one of whether rights are *applicable* against not only the state but also against private individuals and entities.<sup>159</sup>

Whose rights should be interpreted as being *legally effective* against, directly or indirectly,<sup>160</sup> has been argued to be contingent on,<sup>161</sup> or at least to gain weight from,<sup>162</sup> the answer to the question of who the rights are applicable to in principled or moral terms.<sup>163</sup> This in turn can be seen to depend on the nature of the principles deemed to underlie the Convention rights.

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<sup>156</sup> *Lancer de Nain* (n.74), see Human Rights Committee 'Wackenheim v France' Comm. No. 854/1999: France, (26 February 2002) UN Doc. CCPR/C/75/D/854/1999, [2.5] for an English description of the case.

<sup>157</sup> Beyleveld and Brownsword (n.21), 26-28

<sup>158</sup> Kant (n.69), 38, see also *ibid*, 55 & 65

<sup>159</sup> D. Beyleveld and S. Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) 118 *L.Q.R.* 623, 626

<sup>160</sup> G. Phillipson, 'The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?' (1999) 62(6) *M.L.R.* 824, 826

<sup>161</sup> Beyleveld and Pattinson (n.159), 626

<sup>162</sup> Phillipson (n.160), 830

<sup>163</sup> Beyleveld and Pattinson (n.159), 626

This role of the underlying principles is demonstrated by Scanlon's application of a conception of autonomy that is underpinned by the philosophy of Mill.<sup>164</sup> From this theoretical basis his conception of autonomy dictates that a right to freedom of expression only has application against the state<sup>165</sup> – for it is only concerned with determining whether an individual should consider themselves bound to obey a law,<sup>166</sup> not their actions generally – and he concedes that a different principle could make freedom of speech rights applicable between individuals.<sup>167</sup> Thus, whilst there is uncertainty and disagreement as to the nature of the underlying principles to be applied there will similar uncertainty as to whether the substantive rights should have horizontal or vertical applicability.

### ***Conclusion***

It has thus been shown that the underlying principles that it is the purpose of the Convention to protect are of uncertain definition. They are open to multiple interpretations, the differences in which can have tangible effects on the outcome of the application of the Convention rights by entailing different interpretations of the rights. The existence of the different principles and different definitions of the principles thus creates uncertainty as to how the five pivotal questions of Convention rights interpretation should be answered. There is thus a need for a coherent conception of the principled basis of the rights in order to provide some certainty as to the principles which should be used to interpret the rights and through this, the meaning and application of the Convention rights themselves.

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<sup>164</sup> See generally Scanlon (n.87)

<sup>165</sup> Ibid, 221

<sup>166</sup> Ibid, 217

<sup>167</sup> Ibid, 208 & 221

## **CHAPTER IV: THE APPROACH OF THE ORGANS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO THE PIVOTAL QUESTIONS OF THE INTERPRETATION OF THE CONVENTION RIGHTS**

### *Introduction*

The five key questions of the interpretation of the Convention rights as a whole are pivotal in shaping the ECtHR's decisions in the cases that come before it. These questions of who can possess the rights, the nature of the obligations the rights impose, how should rights be balanced against other rights and other interests where they conflict, whether a rights holder can waive the benefit of their rights and against whom the rights are held, determine the scope and application of all Convention rights to the facts of a particular case. Analysed from the perspective of their importance, the ECtHR can be seen to have developed a jurisprudence which seeks to answer these questions although it is of varying detail and certainty.

This chapter seeks to define those answers to the five questions. To apply a moral principle to determine what the requirements of the Convention rights within British law should be, it is necessary to know the current approach of the judiciary at the level of the Council of Europe to these questions. With such a foundation, the extent to which the interpretative requirements of such a principle are consistent with the United Kingdom's supranational rights protection obligations, and the effect such a principle can have within British law without a change in Strasbourg jurisprudence, can thus be determined.

### *Who Can Possess Convention Rights*

The question of who should be deemed capable of possessing rights is a central aspect of the scope of the Convention and must, as argued above, precede all other questions of the interpretation rights. The Convention cases which have raised this issue directly have

concerned the question of whether a foetus can be said to have Convention rights.<sup>1</sup> However, the question also arises where an attempt is made to argue that a person in a permanent vegetative state<sup>2</sup> or a member of another species<sup>3</sup> should have the Convention's protection.

Although of pivotal status, it is submitted that this question has not been fully and definitively addressed by the organs and documents of the Convention and Council of Europe.<sup>4</sup> In spite of this, it is, however, possible to identify some approaches which have been rejected by them, and from these deduce some indication of the interpretations that may be acceptable under the Convention.

### *The Convention Text*

Aside from the titular statement that the 1950 European Convention contains 'Human Rights', the Convention itself contains no specific description of who can hold the rights it contains. The overwhelming majority of the Convention rights<sup>5</sup> describe those with rights as 'everyone' or else state that 'no one' is to be deemed to be unprotected by a right. Neither is defined within the Convention.<sup>6</sup> The term 'person' is used in other rights to describe those with rights who have been affected by a state action.<sup>7</sup> The ECtHR uses it as a term encompassing those with rights<sup>8</sup> synonymous with the use of 'everyone' and 'no-one' in the Convention text. This term is open to different interpretations<sup>9</sup> which the ECtHR has,

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<sup>1</sup> Eg. *Vo v France* (2005) 40 EHRR 12

<sup>2</sup> *Airedale NHS Trust v Bland* [1993] AC 789, 879

<sup>3</sup> M. Balluch and E. Theuer 'Personhood Trial for Chimpanzee Matthew Pan' (Verein Gegen Tierfabriken Website 2008) <<http://www.vgt.at/publikationen/texte/artikel/20080118Hiasl.htm>> accessed 2<sup>nd</sup> January 2012

<sup>4</sup> D. Harris and others, *Law of the European Convention on Human Rights* (2nd edn., OUP 2009), 53

<sup>5</sup> The exceptions being Articles 12 and 14 ECHR, Article 1 and 2 of the 1<sup>st</sup> Protocol and Article 1, 3 and 5 of the 11<sup>th</sup> Protocol which either use the term "person" or refer to persons in specific stats such as spouses or aliens.

<sup>6</sup> *Paton v United Kingdom* (1981) 3 EHRR 408, [7] and *Vo v France* (2005) 40 EHRR 12, [75]

<sup>7</sup> Eg. Article 5(1)(a)

<sup>8</sup> *Vo* (n.6), [80]

<sup>9</sup> J. Mason and G. Laurie, *Mason and McCall Smith's Law and Medical Ethics* (7th edn., OUP 2006), 121



however, refused to choose between,<sup>10</sup> whilst recognising that ‘personhood’ is necessary to hold rights.<sup>11</sup> The *travaux préparatoires* to the Convention give no definition of ‘everyone’ for the purposes of the ECHR.<sup>12</sup>

However, although giving no positive description of what attributes a being must have in order to possess human rights, it is submitted that by the application of logic to Article 14 it is possible to draw inferences as to what characteristics are irrelevant to determining whether a being is capable of bearing any of the Convention rights. Article 14 is not a free standing right,<sup>13</sup> rather it states the grounds on which a person cannot be denied the protection of the rights and freedoms of the Convention.<sup>14</sup> The Article’s description of characteristics which are irrelevant to the enjoyment of rights can, however, be seen to imply that these characteristics are not ones the possession of which is necessary to be a person to whom substantive Convention rights attach. Although the possession of one of the characteristics listed in Article 14 may make a particular Convention right relevant to the facts of a case, the possession of a political opinion may for example make Article 10 relevant where the expression that opinion is limited by a law,<sup>15</sup> the applicability of the protection of the Convention scheme generally to the being with such an opinion depends on other less contingent characteristics.

The Council of Europe’s subsequent Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine 1997

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<sup>10</sup> *Vo* (n.6), [85]

<sup>11</sup> *Ibid*, [80] & [85]

<sup>12</sup> *Ibid*, (Dissent) [O-IV 17]

<sup>13</sup> C. Ovey and R. White, *Jacobs and White: The European Convention on Human Rights*, (4th edn., OUP 2006), 413 & 415, *Haas v The Netherlands* (2004) 39 EHRR 897 at [41]

<sup>14</sup> ‘[S]ex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

<sup>15</sup> Eg. *Lindon v France* (2008) 46 EHRR 35, [46]

(the Biomedicine Convention) built upon the ECHR, elaborating some of the principles contained within it,<sup>16</sup> with the ECtHR given the power to deliver advisory opinions on its interpretation.<sup>17</sup> The Biomedicine Convention's description of the application of rights declares that the parties to the Convention are to 'guarantee *everyone*...respect for their integrity and other rights and fundamental freedoms'.<sup>18</sup> This reuse of the term 'everyone' is again undefined, the explanatory report accompanying it made it clear that this deliberate decision was the result of a lack of agreement amongst the members of the Council of Europe.<sup>19</sup> It was felt that in light of this it should be left to the states to define 'everyone' when giving effect to the Convention.<sup>20</sup>

Although it gives no explicit definition, it is apparent that Article 1 of the Biomedicine Convention draws an instructive distinction between the guarantee of rights to 'everyone' and a separate injunction upon states to 'protect the dignity and identity of all human beings'.<sup>21</sup> The term 'human being' was used because of its 'general character'<sup>22</sup> which was furthered by leaving it undefined.<sup>23</sup> The decision to use two different terms implies that drafters felt that there was a distinction which could be drawn between them, with everyone having rights but not all human beings falling within the more specific classification of 'everyone.' The intentionally utilised general character of the term 'human being' lends weight to this interpretation. It is also apparent from the provisions which exclusively address and protect

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<sup>16</sup> Council of Europe, 'Explanatory Report to the Convention on Human Rights and Biomedicine' (ETS No. 164), [9] <<http://conventions.coe.int/Treaty/en/Reports/Html/164.htm>> accessed 3<sup>rd</sup> September 2012

<sup>17</sup> Article 29 Biomedicine Convention, and see also *Vo* (n.6), [84]

<sup>18</sup> Article 1 Biomedicine Convention (my emphasis), see also Article 10 Biomedicine Convention

<sup>19</sup> Council of Europe (n.16), [18]

<sup>20</sup> Council of Europe (n.16), [18] and *Vo* (n.6), [84]

<sup>21</sup> An identical distinction is drawn by Article 1 of the Additional Protocol to the Biomedicine Convention concerning Biomedical Research and of the Additional Protocol concerning Genetic Testing for Health Purposes 2008.

<sup>22</sup> Council of Europe (n.16), [9]

<sup>23</sup> *Vo* (n.6), [84] & (Dissent) [O-IV 20]

‘human beings’<sup>24</sup> that the drafters intended to draw a distinction between human beings and humans with rights; these provisions implying that that a being must have attributes additional to being a human being in order to have rights under the Biomedicine Convention and the ECHR. This shows that the wording of the Biomedicine Convention should thus be interpreted as indicating that the drafters of the ECHR did not intend to adopt a speciesist approach to who can be deemed to have Convention rights.

It has been noted in the previous chapter that the principle of dignity is used in rights discourse to describe those characteristics possessed by a being upon which its possession of rights is based. Article 1 of the Biomedicine Convention requires the protection of the dignity of human beings; this is not, however, fatal to the above conclusion that the Biomedicine Convention requires something more than being a human being to possess the Convention rights because, as noted above, there are two main conceptions of dignity that are applied in the context of Human Rights. The speciesist neo-classical conception of dignity takes the view that humans have dignity, and therefore rights which should be respected, only by virtue of the fact that they are human beings and therefore of worth.<sup>25</sup> The other conception of dignity, the ‘Kantian conception’, argues that humans have the value which gives them rights as a result of some other characteristic.<sup>26</sup>

If the Biomedicine Convention is interpreted as using dignity in a more general sense of the neo-classical conception of ranking as having some worth, but not in the sense of a characteristic which gives beings rights, then it is still possible to argue that the Biomedicine Convention and the ECHR require something more than being a human being in order to possess rights. Support for this interpretive approach can be seen in practice in the ECtHR’s

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<sup>24</sup> Article 2 Biomedicine Convention

<sup>25</sup> Above p.45-46

<sup>26</sup> Above p.46-48

judgement *Vo v France* that foetuses deserve some protection ‘in the name of human dignity’ for their development into a person ‘without making it a “person” with the “right to life” for the purposes of Article 2.’<sup>27</sup> This interpretation is also consistent with the ECtHR’s decision in *Pretty* where dignity was used to refer to the quality of life in addition to its foundational sense.<sup>28</sup>

### *The Judicial Organs of the Convention*

Given that the Convention text is unspecific as to who qualifies as coming within the description of ‘everyone’ for the purposes of possessing its rights, the Convention’s judicial organs have been called upon to interpret the text and provide an answer. However, like the drafters of the Convention, the Commission and ECtHR have declined to answer the question.<sup>29</sup> The key cases, in which the opportunity to rule on the nature of the beings that are protected by the Convention rights has arisen, have concerned the question of whether foetuses fall within the scope of ‘everyone’ under Article 2. The judicial organs have, however, argued that it is undesirable and unnecessary for them to give an answer to this question.

The Commission and the ECtHR have held 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 ...within the scope of Article 2’.<sup>30</sup> Both have based this view on the lack of agreement amongst the member states as to the legal status of the foetus.<sup>31</sup> The ECtHR and the Commission have justified their approach by holding that the member states differing views

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<sup>27</sup> *Vo* (n.6), [84]

<sup>28</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, [52] & [65]

<sup>29</sup> J. Mason, ‘Case Commentary: What’s in a Name? : The Vagaries of *Vo v France*’ [2005] *C.F.L.Q.* 97, 104 and Harris (n.4), 53 & 55

<sup>30</sup> *Vo* (n.6), [85]

<sup>31</sup> *Ibid*, [84], Harris (n.4), 54

requires that they be granted a margin of appreciation on this question.<sup>32</sup> It is here submitted that this use of the margin of appreciation to cover decisions as to who is a being for the purposes of the Convention rights is a novel application of the doctrine which departs from its traditional application. Previously it has only been applied to the question of whether an interference with a right is justified and was held not to be relevant to the determination of the scope of a right's application in terms of what constitutes an interference with a right.<sup>33</sup>

Although this new use of the margin appreciation is a substantive departure from its previous area of application, the courts' justification for extending it is clearly shared with the justifications given for the ordinary application of the margin to questions of balancing conflicting rights and interests.<sup>34</sup> The ECtHR in *Vo* recognised that cultural differences make universal agreement difficult to achieve, and held this justified giving member states the capacity to reach different conclusions on the rights status of foetuses. The application of the margin of appreciation to this question is also consistent with deliberately open textured nature of the terms of the Convention including that of 'everyone,' designed to maximise agreement amongst states to participation in the Convention project.<sup>35</sup> This extended application of the margin gives effect to this aim by enabling the continued membership of states with differing approaches to this question<sup>36</sup> to the ECHR.

From a practical and pragmatic standpoint the application of the margin of appreciation to this element of the question of who has rights is thus justified. However, the fundamental nature of the question of who has rights and why, with its implications for the wider

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<sup>32</sup> *Vo* (n.6), [85], *Evans v United Kingdom* (2008) 46 EHRR 34, [56] and *H v Norway* Application No. 17004/90 (Commission Decision, 19 May 1992), [1], see also Harris (n.4), 54-55

<sup>33</sup> *Vo* (n.6), (Dissent) [O-III 3 & 8] and below p.83-85

<sup>34</sup> Below p.84

<sup>35</sup> Above p.25-27

<sup>36</sup> Eg. Article 40(3)(iii) Constitution of Ireland 1937

interpretation of all Convention rights, requires an intellectually coherent principled answer. Although the ECtHR has concluded that this is not possible at the supra-national level, it has left member states and their courts the scope to search for such a basis.

This reluctance to rule upon this question and use of the margin of appreciation is also consistent with the earlier approach to the this question applied by the Commission, that laws governing this area in the member states entail that it is unnecessary for it to rule upon the scope of Article 2 in this context. Thus, in *Paton v United Kingdom* the Commission held that, as the Abortion Act 1967 had implicitly recognised a right to life for the foetus by regulating abortions, a ruling on whether Article 2 applied would be redundant because the member state had acted as if it did.<sup>37</sup> Thus, in two ways the Convention organs have abdicated their task of interpreting the Convention when asked to determine to whom it applies.<sup>38</sup>

Outside of cases directly raising the question as to who has human rights, decisions upholding the application of rights to particular classes of person give some indirect indication of the view of the judicial organs in this area. Thus, the Commission's decision in *Herczegfalvy v Austria*, with which the ECtHR agreed in principle but disagreed on the facts,<sup>39</sup> demonstrates that persons need not have consciousness of the physical effect of an act for them to have the protection of the relevant Convention rights. On the facts of this case the Commission held that a person's Article 3 rights could be infringed by restraining them whilst they were unconscious.<sup>40</sup> Similarly, the Court has made it clear that a person with

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<sup>37</sup> *Paton* (n.6), [23], See also *Boso v Italy* (App. No.50490/99) ECHR 5 Sept 2002, [1] and *Bruggemann and Scheuten v Germany* Application No. 6959/75 (Commission Decision, 12 July 1977), [60] & [62]

<sup>38</sup> *Vo* (n.6), (Dissent) [O-II7]

<sup>39</sup> *Herczegfalvy v Austria* (1993) 15 EHRR 437, [82] and *Ovey and White* (n.13), 99

<sup>40</sup> *Herczegfalvy v Austria* Application No. 10533/83 (Commission Decision, 1 March 1991), [248] & [255], Cf. The earlier decision on *H v Norway* (n.32), [2]

reduced mental capacity still retains the benefit of the Convention rights.<sup>41</sup> The ECtHR has even been prepared to hold that the rights may confer protection on the dead, with Article 2 having been held to impose a duty on states to conduct an ‘effective official investigation’ into deaths as a result of state action.<sup>42</sup> These cases indicate that, outside the indicative question of Convention rights for foetuses, Strasbourg is prepared to take quite a broad approach as to who should be recognised as capable of possessing Convention rights. However, the Court continues to avoid giving a clear principled answer to the central question of who can possess the Convention rights and the characteristic to which they attach.

### ***The Substantive Nature of Rights as Imposing Positive and Negative Obligations***

The answer to the question of the substantive nature of the obligations imposed as corollaries to the possession of the Convention rights contains a certain amount of uncertainty. It is clear from the ECtHR’s case law that the rights can impose positive or negative obligations on states<sup>43</sup> However, just as the language of the Convention rights is open textured, the boundaries between two ‘do not lend themselves to precise definition’<sup>44</sup> and the ECtHR has refused to state a general theory of positive obligations.<sup>45</sup> Negative obligations are found where the Convention rights are interpreted as requiring states ‘to abstain from interference with, and thereby respect, human rights.’<sup>46</sup> Conversely the nature of positive obligations

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<sup>41</sup> *X and Y v Netherland* (1986) 8 EHRR 235, [22]

<sup>42</sup> *McCann v United Kingdom* (1996) 21 EHRR 97, [161], see also *Ovey and White* (n.13), 65

<sup>43</sup> *Harris* (n.4), 19 and *Evans* (n.32), [75]

<sup>44</sup> K. Starmer, *European Human Rights Law* (Legal Action Group 1999), 206 and R. Singh, ‘Using Positive Obligations in Enforcing Convention Rights’ (2008) 13(2) *J.R.* 94, 97-98, eg. *Keenan v United Kingdom* (2001) 33 EHRR 38, [110] and [115]

<sup>45</sup> *Plattform 'Ärzte für das Leben' v Austria* (1991) 13 EHRR 204, [31], A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004), 221 and Starmer (n.44), 199

<sup>46</sup> *Harris* (n.4), 18

whose nature has not been authoritatively defined by the ECtHR, require states to ‘take action’<sup>47</sup> of various sorts to secure to individuals the protection of the Convention rights.<sup>48</sup>

### *The Legal Source of the Obligations*

David Harris *et al* note that civil and political rights generally state negative obligations, the protection of the individual from state inflicted harm in these negatively phrased rights was a key aim of the Convention,<sup>49</sup> and consequently they constitute the majority of the obligations imposed by the ECHR.<sup>50</sup> Many of the Convention rights open by explicitly imposing a negative obligation on states to treat ‘no one’ in a particular manner<sup>51</sup> or in the case of Articles 8-11 seek determine the extent to which the state should be prohibited from interfering with a person’s right recognised freedom.<sup>52</sup>

Articles which explicitly impose positive obligations are the exception.<sup>53</sup> These can be stated in clear terms<sup>54</sup> such as the Article 6(3)(c) requirement of the provision of free legal assistance for defendants to criminal charges or the injunction under Article 3 of Protocol 1 to hold elections. Alternately, it may be apparent from the text that a positive obligation accompanies a negative obligation. This has held to be the case in relation to Article 8, where the injunction to States to ‘respect private life’ has been held not only to compel the state to abstain from arbitrary interference with private and family life, but to inherently impose a positive obligation on the state to provide for it.<sup>55</sup>

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<sup>47</sup> Mowbray (n.45), 2 citing Judge Martens’ dissenting opinion in *Gül v Switzerland* (1996) 22 EHRR 93, [8], see also Starmer (n.44), 194

<sup>48</sup> Mowbray (n.45), 2 and Harris (n.4), 18

<sup>49</sup> A. Simpson, *Human Rights and the End of Empire* (OUP 2001), 157

<sup>50</sup> Harris (n.4), 18

<sup>51</sup> Eg. Article 3

<sup>52</sup> See Articles 8(2)-11(2)

<sup>53</sup> J. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester University Press 1993), 103

<sup>54</sup> Starmer (n.44), 194 and Singh (n.44), 94

<sup>55</sup> *Marckx v Belgium* (1979-80) 2 EHRR 330, [31], see further Singh (n.44), 95



In spite of the lack of an explicit statement of the positive dimension to most of the Convention rights in the text, the ECtHR has found it necessary and possible to imply, from the rights and other articles of the Convention,<sup>56</sup> an additional,<sup>57</sup> wider range of positive obligations by which the states are bound. Although not the sole reason,<sup>58</sup> Starmer correctly identifies this development as to a large extent driven by ‘the recognition that the acts of private individuals can threaten human rights just as much as the acts of state authorities’,<sup>59</sup> with positive obligations being found to arise from rights which are phrased in a negative manner to require state protection of those rights to ensure the freedom of individuals from interference by other individuals.<sup>60</sup> The ECtHR has also been motivated in developing this aspect of its jurisprudence by its own practical needs.<sup>61</sup> In order to spare itself from having to engage in difficult fact finding missions the ECtHR has imposed positive duties on states to conduct investigations into killings, ill-treatment and disappearances.<sup>62</sup> Additionally the ECtHR has required States to give an effective remedy for delays in the criminal process, in part to deal with the huge numbers of such cases under Article 6(1).<sup>63</sup> Thus the positive obligations under the Convention can either require the state to provide something to an individual, protecting and deriving from a positive right to some good, or the state can be placed under a positive obligation to uphold an individual’s negative right to be free from interference, by protecting them from unjustified infringement of their rights by another.

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<sup>56</sup> Mowbray (n.45), 2-3

<sup>57</sup> J-P. Costa, ‘The European Court of Human Rights: Consistency of its Case-Law and Positive Obligations’ (2008) 26(3) *N.Q.H.R.* 449, 452

<sup>58</sup> *Airey v Ireland* (1979-80) 2 EHRR 305, discussed below p.76-77, demonstrates a positive obligation purely concerned with a state’s action and not with the protection of an individual from the actions of another individual.

<sup>59</sup> Starmer (n.44), 194

<sup>60</sup> Starmer (n.44), 194, K. Starmer, Positive Obligations Under the Convention in J. Jowell and J. Cooper (eds), *Understanding Human Rights Principles* (Hart 2001), 145, Harris (n.4), 19 and Merrills (n.53), 104, for case law detail see below p.75

<sup>61</sup> Mowbray (n.45), 221-222

<sup>62</sup> *Ibid*, 222

<sup>63</sup> *Ibid*

Utilising the provisions of the Convention outside the main substantive rights, the ECtHR has held that the obligation Article 1 imposes on states to ‘secure to everyone within their jurisdiction the rights and freedoms’ entails that the states can be deemed to have positive obligations to secure these rights.<sup>64</sup> This provision has been a key justification in the ECtHR’s jurisprudence for its imposition of positive obligations under Article 2, as in the case of *McCann v United Kingdom*,<sup>65</sup> and Article 3, apparent in the case of *A v United Kingdom*.<sup>66</sup>

Similarly, the Article 13 right to an effective remedy has been held to require states to take positive actions to protect the Convention rights of the people within their jurisdiction, not merely to themselves refrain from action which would violate the Convention rights.<sup>67</sup> Thus, in *Aydin v Turkey* it was held to impose a positive obligation on states to investigate a breach of Convention rights, separate from and beyond any such obligation that might be imposed by substantive Convention rights such as Article 2.<sup>68</sup>

The ECtHR has also showed a willingness to find that the States may be subject to positive obligations by individuals’ rights under the Article 14 prohibition on discrimination.<sup>69</sup> In the case of *Thlimmenos v Greece* Strasbourg recognised that this Article not only required that states not treat persons differently without justification in their enjoyment of their Convention

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<sup>64</sup> Singh (n.44), 94-95 and Costa (n.57), 452

<sup>65</sup> *McCann* (n.42), [161] (obligation to investigate a killing committed by state agents)

<sup>66</sup> *A v United Kingdom* (1999) 27 EHRR 611, [22] and Costa (n.57), 452, see also Starmer (n.60), 143

<sup>67</sup> See generally, Starmer (n.44), 204

<sup>68</sup> *Aydin v Turkey* (2006) 42 EHRR 44, [207] & [209] and Starmer (n.44), 204

<sup>69</sup> *Ovey and White* (n.13), 414

rights, but can also require that states take action to treat different persons differently where their distinctive characteristics engage their Convention rights.<sup>70</sup>

As well as finding that Articles 1, 13 and 14 entail the imposition of positive obligations, the ECtHR has also held that positive obligations are necessitated by the substantive rights themselves in order that they may be ‘practical and effective’,<sup>71</sup> ‘not theoretical and illusory.’<sup>72</sup> This is a more general justification<sup>73</sup> because it ‘runs like a thread through Convention jurisprudence’<sup>74</sup> of positive obligations and has been used in the interpretation of a number of different rights. The ECtHR’s logic under this justification is that ‘to secure the rights effectively means to provide that rights holders are able to do or have what the right is a right to’.<sup>75</sup> Thus, in *Airey v Ireland* it was held that, for the right to private and family life to be effectively protected, it was necessary that the state enable people to gain a separation from their partner.<sup>76</sup> Similarly, in the case of *Plattform ‘Ärzte für das Leben’*<sup>77</sup> Article 13 was relied upon by the ECtHR to hold not only that the state has a negative duty to permit people to exercise their Article 11 rights by holding a peaceful demonstration, but also that it must provide for the prohibition and prevention of violent counter demonstrations which would inhibit ‘effective [exercise of] freedom of peaceful assembly.’<sup>78</sup> This justification for the imposition is supported by the text of the preamble which states that an aim of the

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<sup>70</sup> *Thlimmenos v Greece* (2001) 31 EHRR 15, [44] & [46]

<sup>71</sup> *Soering v United Kingdom* (1989) 11 EHRR 439, [87]

<sup>72</sup> *Costa* (n.57), 453, and *Singh* (n.44), 100

<sup>73</sup> *Mowbray* (n.45), 221

<sup>74</sup> *Starmer* (n.60), 146

<sup>75</sup> D. Beyleveld and S. Pattinson, ‘Horizontal Applicability and Horizontal Effect’ (2002) 118 *L.Q.R.* 623, 631, see also *Starmer* (n.44), 201 and *Merrills* (n.53), 103-104 citing Judge Matscher’s opinion in *Marckx* (n.55), [2]-[3] which dissented on another point.

<sup>76</sup> *Airey* (n.58), [33]

<sup>77</sup> *Plattform Ärzte* (n.45)

<sup>78</sup> *Ibid*, [25], [32] & [39]

Convention is to further that sought by the UDHR: ‘securing the universal and effective recognition and observance of the rights’.<sup>79</sup>

The statement and application of positive obligations not found explicitly within the text of the Convention shows a recognition by Strasbourg that the Convention is primarily an instrument designed to protect individuals and their human rights, not merely a code which restricts members of the Council of Europe from committing certain unacceptable acts. This can be clearly seen in the justifications relied upon in the development of its jurisprudence of positive obligations. The reliance on Article 1’s injunction to secure individuals’ rights, the desire to ensure that the rights possessed by individuals are given effective protection applying Article 13 and the Convention’s preamble, and the development of positive obligations to ensure that individuals are protected from the actions of other individuals in addition to those of the state.

### *The Particular Nature of the Obligations*

Different substantive positive obligations can be found from these justifications, some of which may be combined to support a particular judgement.<sup>80</sup> The general nature of the above justifications,<sup>81</sup> together with the lack of a statement of a ‘general theory’ of positive obligations by the ECtHR,<sup>82</sup> entails uncertainty as to the specific positive obligations that the scope of the Convention rights require for ‘[t]here is no *a priori* limit to the contexts in which a positive obligation may be found’.<sup>83</sup> This uncertainty is magnified by the potential for judicial disagreements as to what positive obligations are necessary to protect a right.<sup>84</sup>

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<sup>79</sup> Beyleveld and Pattinson (n.75), 630-631 and *Soering* (n.71), [87]

<sup>80</sup> Eg. *Osman v United Kingdom* (2000) 29 EHRR 245, [116]

<sup>81</sup> *Costa* (n.57), 453

<sup>82</sup> *Ibid* and *Plattform Ärzte* (n.45), [31]

<sup>83</sup> *Costa* (n.57), 453 and *Singh* (n.44), 94

<sup>84</sup> *Merrills* (n.53), 104

Within this uncertainty it is, however, possible to discern two broad categories of positive obligations which the ECtHR has imposed.<sup>85</sup>

Positive obligations can be seen to be either regulative or facilitative in nature.<sup>86</sup> The regulative obligations require States to create a legal framework which ensures effective protection of the Convention rights of those within their jurisdiction.<sup>87</sup> Thus, Strasbourg has held that States are under an obligation to ensure that they enact laws which enable their people to complain and obtain redress for violations of their Convention rights.<sup>88</sup> This category of positive obligation has been particularly important in the context of the infringement the interests protected by individual's negative Convention rights by other private individuals.<sup>89</sup> It is one of the most prevalent,<sup>90</sup> and has been held to require States to enact laws which deter people from infringing the rights of others<sup>91</sup> and ensure that their rights are protected by law from infringement by others.<sup>92</sup> In addition to the enactment of laws, states can also be obliged to act to take practical action to prevent one individual from infringing another's rights.<sup>93</sup>

States have also been held to be required to take positive actions to regulate the actions of their emanations to ensure the effective protection of rights.<sup>94</sup> Thus, especially in the context of Articles 2 and 3<sup>95</sup> because of their fundamental nature within the Convention,<sup>96</sup> the ECtHR

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<sup>85</sup> Mowbray (n.45), 225

<sup>86</sup> Singh (n.44), 95

<sup>87</sup> Starmer (n.44), 196 & 198 and *Young and others v United Kingdom* (1983) 5 EHRR 201, [49]

<sup>88</sup> *Plattform Ärzte* (n.45), [25]

<sup>89</sup> Mowbray (n.45), 225

<sup>90</sup> *Ibid*

<sup>91</sup> *A v United Kingdom* (n.66), [22] and Starmer (n.44), 199

<sup>92</sup> *X and Y* (n.41), [30] and *A v United Kingdom* (n.66), [22], see also Singh (n.44), 95

<sup>93</sup> Starmer (n.44), 199 & 202, Singh (n.44), 97, Mowbray (n.45), 255, *Osman* (n.80), [115] and *Plattform Ärzte* (n.45), esp. [32]

<sup>94</sup> *McCann* (n.42), [161]

<sup>95</sup> But not exclusively, Mowbray (n.45), 71-72 & 227 citing the imposition of such obligations under Article 5 in *Akdeniz v Turkey* Application No. 23954/94 (ECtHR 31 May 2001), [107]-[108]

has held that states are under a positive obligation to conduct effective investigations into alleged violations of right by state agents.<sup>97</sup> Such investigations have the aim of determining whether a violation has in fact occurred, and ‘the identification and punishment of those responsible’<sup>98</sup> for a breach of the Convention rights. In order to prevent such violations by state agents<sup>99</sup> the ECtHR has also held that states have obligations to those detained under its criminal justice system to provide conditions of detention which do not violate Article 3<sup>100</sup> and to take positive steps to protect their health.<sup>101</sup>

The various facilitative positive obligations require States ensure that people can exercise and enjoy the rights recognised in the Convention.<sup>102</sup> Such obligations include a requirement that the state enact legal frameworks which give recognition to people’s rights within the law.<sup>103</sup> Thus in *Marckx v Belgium* Article 8 was held to require that the state recognise at law the familial relationship between mother and illegitimate child from the moment of birth, rather than via a bureaucratic procedure, to give effect to the rights to a family life.<sup>104</sup>

Even where such a legal framework for the exercise of rights exists, the ECtHR has been prepared to impose a further obligation on states. The Court has held that states can owe an obligation to ‘provide resources to individuals to prevent breaches of their Convention rights.’<sup>105</sup> Thus, in *Airey* discussed above<sup>106</sup> the ECtHR applied a general principle that if a right cannot be protected effectively without the provision of resources then they must be

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<sup>96</sup> *McCann* (n.42), [147]

<sup>97</sup> *Starmer* (n.44), 203, *Mowbray* (n.45), 226 and *McCann* (n.42), [161]

<sup>98</sup> *Aydin v Turkey* (n.68), [192] & [207]

<sup>99</sup> *Mowbray* (n.45), 226

<sup>100</sup> *Kalashnikov v Russia* Application No. 47095/99 (ECtHR 15 July 2002), [95]

<sup>101</sup> *Keenan* (n.44), [111]

<sup>102</sup> *Singh* (n.44), 95

<sup>103</sup> *Starmer* (n.44), 200

<sup>104</sup> *Marckx* (n.55), [31]

<sup>105</sup> *Starmer* (n.44), 196

<sup>106</sup> See *Airey* (n.58) and above p.73

provided.<sup>107</sup> In this case it was therefore held that the state must provide legal aid to enable the applicant to exercise her rights effectively.<sup>108</sup> Similarly, it has been held that states may have an obligation to provide information to individuals where this is necessary for them to protect their Convention rights.<sup>109</sup>

### *Limits of Positive Obligations*

The ECtHR's case law recognising positive obligations is still developing and certain positive obligations, such as a general duty to provide health care services,<sup>110</sup> have yet to be recognised. Additionally, in determining whether or not a positive obligation should be imposed in a particular circumstance which falls within the scope of a right, the ECtHR applies both the principle of proportionality and the margin of appreciation discussed below in the context of the balancing of Convention rights generally.<sup>111</sup>

When applying the proportionality test to the determination of the existence of a positive obligation the ECtHR will pay close attention to striking a 'fair balance'<sup>112</sup> between the rights of the individual and the interests of the community generally.<sup>113</sup> Similarly, in applying the margin of appreciation to this area Jean-Paul Costa, the former President of the ECtHR, has noted that the Court will generally grant a wider margin of appreciation in relation to positive obligations than it does in relation to negative obligations.<sup>114</sup> This difference in treatment recognises that the imposition of a positive obligation may effect the distribution of 'finite

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<sup>107</sup> Starmer (n.44), 205

<sup>108</sup> *Airey* (n.58), [25]-[28]

<sup>109</sup> Starmer (n.44), 202-203, *Guerra v Italy* (1998) 26 EHRR 357, [58] & [60] and *McGinley and Egan* (1999) 27 EHRR 1, [99]-[101]

<sup>110</sup> Mowbray (n.45), 230

<sup>111</sup> Starmer (n.44), 206 and *Powell and Rayner v United Kingdom* (1990) 12 EHRR 355, [41]

<sup>112</sup> *Costa* (n.57), 453 & also 454

<sup>113</sup> *Rees v United Kingdom* (1987) 9 EHRR 56, [37], *Ovey and White* (n.13), 243 and *Merrills* (n.53), 168

<sup>114</sup> *Costa* (n.57), 453 and *Ovey and White* (n.13), 244

public funds'<sup>115</sup> and that 'national authorities are in a better position to carry out this assessment than an international court.'<sup>116</sup> Thus it is submitted that, as with the question of who has rights, discretion is also given to member States as to the answer to this element of the second fundamental question of rights interpretation.

### ***The Balancing of Rights***

#### *The Need to Balance*

All the rights stated by the Convention as held and possessed against others can be restricted in their application to the member states in specific circumstances. The rights are either limited within the definition of the right,<sup>117</sup> in relation to the circumstances within which they apply,<sup>118</sup> the persons to whom they apply<sup>119</sup> or are subject to a general exceptions<sup>120</sup> in favour of certain interests.<sup>121</sup> Some rights can also be made subject to derogations which exempt designated laws from challenge for infringing specified Convention obligations in a time of public emergency,<sup>122</sup> and treaty reservations can be entered in relation to any of the rights with which a domestic law is incompatible at the time the Convention is signed.<sup>123</sup>

It is in relation to the rights subject to general exceptions and derogations<sup>124</sup> the ECtHR is called upon to balance the protection of the Convention rights against competing interests in

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<sup>115</sup> Costa (n.57), 453

<sup>116</sup> *Sentges v The Netherlands* Application No. 27677/02 (ECtHR 8 July 2003)

<sup>117</sup> Eg. Article 4(3) is only covers forced of compulsory labour.

<sup>118</sup> Eg. Article 5 is not violated by lawful detention.

<sup>119</sup> Eg. Article 16 limits political activities of aliens.

<sup>120</sup> Articles 8 – 11, and also in relation to the Article 15 provision concerning derogations.

<sup>121</sup> See generally, A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62(5) *M.L.R.* 671, 671

<sup>122</sup> Article 15

<sup>123</sup> Article 57

<sup>124</sup> Under Article 15(1) and (2) all the rights baring 'Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (1) and 7' may be derogated from.



order to decide which to uphold, on the facts of a particular case.<sup>125</sup> So important is the balancing to determining the practical effect of the Convention rights that it has been described as key to its practical application.<sup>126</sup>

The ECHR distinguishes between two types of interest against which rights must be balanced.<sup>127</sup> One is the general interests of the community; public interests such as national security and public safety.<sup>128</sup> The specific interests that compose the public interest can be conceptualised in several different ways, under the preponderance, unity and common interest theories.<sup>129</sup> In balancing rights against the public interest the ECtHR must be careful not to use a conception that leads it into a majoritarian analysis which would risk undermining a practical *raison d'être* of rights and the Convention, the protection of individuals from intolerant majorities.<sup>130</sup> This was recognised by the ECtHR in its rejection of the preponderance conception of the public interest.<sup>131</sup>

The second interest is that of individuals. The general qualifying provisions of the Convention<sup>132</sup> make clear that the drafters of the Convention recognised the potential for the

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<sup>125</sup> R. Ryssdall, 'Opinion: The Coming Age of the European Convention on Human Rights' [1996] *E.H.R.L.R.* 18, 23 and S. Greer, "'Balancing" and the European Court of Human Rights: a Contribution to the Habermas-Alexy Debate' (2004) 63(2) *C.L.J.* 412, 413 & 418

<sup>126</sup> D. Irvine, 'The Impact of the Human Rights Act: Parliament, the Courts and the Executive' [2003] *P.L.* 308, 313-314 and Greer (n.125), 421

<sup>127</sup> Greer (n.125), 418

<sup>128</sup> McHarg (n.121), 684, See, for example, the various interests mentioned in Article 8(2) excluding 'the rights and freedoms of others.' As McHarg notes, the term "public interest" is only explicitly used as a limitation of Article 1, Protocol 1 and Articles 2(1) and (4) of Protocol 4.

<sup>129</sup> McHarg defines these as (1) the Preponderance or aggregative conception interprets the public interest has no independent content but instead 'is discovered simply by aggregating individual interests; that which is in the interest of a preponderance of individuals is also in the public interest.' (2) Utility theories the public interest embodies a conception of what people ought to want or what is deemed good for them. (3) Common Interest Theory interpretations argue that are certain interests which all people have in common, as distinct from those of particular individuals or groups, these are discovered by asking what sort of society do we want to live in.

McHarg (n.121), 674-678

<sup>130</sup> Greer (n.125), 431 and G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007), 74 and above p.44, n.46 and accompanying text

<sup>131</sup> *Young* (n.87), [63], see also McHarg (n.121), 674-675 & 683

<sup>132</sup> Articles 8(2), 9(2), 10(2) and 11(2)

rights of different people to come into conflict. Thus, the enforcement of Articles 8-11 can be limited in favour of protecting ‘the rights and freedoms of others.’<sup>133</sup> In practice, under the Convention and HRA, such conflicts occur where a state’s actions or laws protects the rights of one party in a way that limits the rights of others.<sup>134</sup>

It is submitted that it is questionable, however, how far these two categories can or should be said to be distinct. If the public interest is interpreted as the pursuit of an amalgam of individual interests shared by a group of people, which are in turn conceptualised as the furtherance of individual rights, then the distinction becomes obscured, and the public or general interests should be recognised as in fact summations of individuals’ rights. At a principled level, such an approach is more consistent with the deontological rather than teleological foundation for the balancing of rights described above.<sup>135</sup> Steven Greer fails to recognise this in arguing that under Article 8(2) ‘national security’ is a collective good not a right or source of rights, and that protection of ‘morals’ and ‘freedom’ do protect rights.<sup>136</sup> It is submitted that all justifications for the limitation of rights must ultimately be based in individual rights to be consistent with a deontological conception of the Convention. Thus, Dworkin’s contention that it is acceptable to limit rights because of the disproportionate ‘cost to society’ of upholding them,<sup>137</sup> can only be deontologically justified by the effect of upholding such a right on the rights of others. In practical terms, the ECtHR’s approach to balancing, so far as it is discernible,<sup>138</sup> does not procedurally distinguish between the two types of balancing. In cases where rights are explicitly balanced against rights and those

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<sup>133</sup> *Wingrove v United Kingdom* (1997) 24 EHRR 1, [48]

<sup>134</sup> *Evans* (n.32), [83], *Cf. (Dissent)* [OI 13] and Greer (n.125), 418

<sup>135</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth 1997), 199-201 and above p.45-46

<sup>136</sup> Greer (n.125), 418

<sup>137</sup> Dworkin (n.135), 200

<sup>138</sup> Below p.81-83

where they are balanced against general interests the principle of proportionality<sup>139</sup> and the margin of appreciation<sup>140</sup> play key roles.

### *The Approach of the Convention's Adjudicative Bodies*

Although the text of the ECHR makes the need to balance rights against other interests explicit within the ECHR,<sup>141</sup> the Convention itself, like other rights treaties, is silent on how its adjudicative bodies should conduct this balancing.<sup>142</sup> The ECtHR (and previously the Commission) have also been reluctant to reveal the means by which the balancing should be conducted.<sup>143</sup> Consequently it is unsurprising that there is considerable confusion surrounding the Strasbourg jurisprudence in this area.<sup>144</sup> Amidst this uncertainty as to the substantive process of balancing, the principle of proportionality and the margin of appreciation respectively perform the functions of tightrope and safety-net in the ECtHR's approach. Both are key to the judicial approach to questions of balancing.<sup>145</sup>

### *Proportionality*

The principle of proportionality is used by the ECtHR to determine whether a measure restricting a right capable of qualification<sup>146</sup> is necessary,<sup>147</sup> and thus justified, in order to protect some other interest.<sup>148</sup> In the context of balancing different principles, proportionality generally can be defined as requiring that, where the pursuit of a principle by a particular means interferes with the realisation of another principle 'the degree of non-satisfaction of, or

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<sup>139</sup> Harris (n.4), 10 and Eg. *Evans* (n.32), [94]-[95]

<sup>140</sup> Harris (n.4), 12 and Eg. *Evans* (n.32), [92] and *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1, [52]

<sup>141</sup> Harris (n.4), 10 citing *Soering* (n.71), [89]

<sup>142</sup> Greer (n.125), 418

<sup>143</sup> *Ibid*, 412

<sup>144</sup> McHarg (n.121), 672

<sup>145</sup> Greer (n.125), 418 & 424

<sup>146</sup> Applies most obviously to the expressly qualified Articles 8-11 but can also apply to implied limitations of rights (Harris (n.4), 10 and *Mathieu-Mohin* (n.140), [52])

<sup>147</sup> *Handyside v United Kingdom* (1979-80) 1 EHRR 737, [48] and Greer (n.125), 415

<sup>148</sup> Harris (n.4), 10

detriment to, one principle...[must be justified by the]...greater...importance of satisfying the other.’<sup>149</sup> It is this approach that the ECtHR has adopted in balancing the Convention rights against competing interests.<sup>150</sup> The Court thus seeks to ensure that there is a ‘reasonable relationship between the means employed, including their severity and duration, and the public objective to be sought.’<sup>151</sup>

At a substantive level the ECtHR has adopted an ‘evolutive interpretation’ of rights and of proportionality.<sup>152</sup> This involves the recognition that social attitudes within the member states can change over time, and thus what may come within the scope of a right<sup>153</sup> or be a proportionate restriction of a right can also change with time.<sup>154</sup>

The practical application of the proportionality principle to a given conflict between rights, and between rights and general interests, is attended by some uncertainty which contributes to the wider uncertainty surrounding the balancing of Convention rights. The ECtHR’s reluctance to set out a detailed proportionality analysis in every case limits the ability of the case law to give guidance on how future questions of balancing will be resolved.<sup>155</sup> Aileen McHarg notes also that the variation in the ECtHR’s approach to answering the questions the proportionality test raises leads to uncertainty in this area.<sup>156</sup> She argues<sup>157</sup> that the ECtHR

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<sup>149</sup> R. Alexy, ‘Constitutional Rights, Balancing and Rationality’ (2003) 16 *Ratio Juris* 131, 136, see also Greer (n.125), 416

<sup>150</sup> *Golder v United Kingdom* (1979-80) 1 EHRR 524, [45], *Handyside* (n.147), [48]-[49] and *Silver v United Kingdom* (1981) 3 EHRR 475, [97]

<sup>151</sup> Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002), 193

<sup>152</sup> *Ibid*, 197

<sup>153</sup> *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, [31]

<sup>154</sup> Arai-Takahashi (n.151), 199, cites the development of the ECtHR’s jurisprudence concerning the rights of homosexuals as an example of this.

<sup>155</sup> *Ibid*, 193

<sup>156</sup> McHarg (n.121), 687

<sup>157</sup> *Ibid*

oscillates ‘between factual inquiries into the necessity of interferences,<sup>[158]</sup> again with varying degrees of rigour,<sup>[159]</sup> and more substantive evaluation of the relative importance of rights and exceptions,<sup>[160]</sup> sometimes turning on the absence of impairment of the “very essence” of a right.’<sup>161</sup> It is, however, possible within this uncertainty to ascertain certain trends in cases of balancing of rights and interests which will be described below.<sup>162</sup>

### *The Margin of Appreciation*

The margin of appreciation has been developed by the judicial organs of the Convention specifically to be applied in relation to the issue of balancing Convention rights against other rights and competing interests. It has thus been utilised in relation to all but the four non-derogable rights in their negative senses<sup>163</sup> and it is at the core of the balancing conducted under Articles 8-11.<sup>164</sup>

This adjudicative approach originated in the Commission’s decision in *Greece v United Kingdom*<sup>165</sup> and was first used by the ECtHR in *Ireland v United Kingdom*.<sup>166</sup> The key codification of the ECtHR’s thinking on the margin of appreciation came in *Handyside v United Kingdom*.<sup>167</sup> Here it was stated that that, in relation to the issue of determining whether an infringement of the scope of a right was covered by one of the protected interests, and whether the domestic measure was necessary to protect that interest, the member states

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<sup>158</sup> Eg. *Webber v Switzerland* (1990) 12 EHRR 508, [50]-[52] and *Campbell v United Kingdom* (1993) 15 EHRR 137, [62]

<sup>159</sup> McHarg contrasts *Campbell* (n.158), [48] & [52] ‘where an interference was held to be disproportionate because there was an alternative, less intrusive means of achieving the same object’, and *James and Others v United Kingdom* (1983) 5 EHRR 440, [51] ‘where the Court stated that the availability of alternative solutions did not by itself render the interference in question unjustified.’

<sup>160</sup> *Observer and Guardian Newspapers v United Kingdom* (1992) 14 EHRR 153, [63]

<sup>161</sup> Cf. *Wingrove* (n.133), [58] where the ECtHR can be seen as giving priority to political speech as the core of Article 10.

<sup>162</sup> Below p. 85-90

<sup>163</sup> *Arai-Takahashi* (n.151), 8

<sup>164</sup> *Ovey and White* (n.13), 233

<sup>165</sup> *Greece v United Kingdom* Application No.176/57 (Commission Decision, 29 October 1958), [143]

<sup>166</sup> *Ireland v United Kingdom* (1979-80) 2 EHRR 25, [207] and *Arai-Takahashi* (n.151), 5-6

<sup>167</sup> *Handyside* (n.147) and *Arai-Takahashi* (n.151), 7

have a margin of appreciation within which the ECtHR will show deference to the state's 'initial assessment'<sup>168</sup> of these issues.<sup>169</sup> The extent of the margin of appreciation given to the state varies depending on the facts of a case.<sup>170</sup> As David Harris and Yutaka Arai-Takahashi have noted,<sup>171</sup> a wider margin of appreciation is given in public emergency cases under Article 15,<sup>172</sup> some cases where national security is claimed as the limiting interest,<sup>173</sup> cases involving the protection of morals<sup>174</sup> and where there is a lack of consensus amongst the member states as to the importance of the interest at stake or the best means of protecting it.<sup>175</sup> The wider the margin of appreciation, the more willing the ECtHR will be to accept the state's view of the necessity of the infringement.<sup>176</sup>

The margin of appreciation exists in recognition that, because states are in 'direct and continuous contact with the vital forces of their countries... [they are] in a better position'<sup>177</sup> than the ECtHR to make judgements on the nature of the general interest and necessity. It also recognises that cultural and legal differences between states may make it difficult to achieve universal agreement amongst them as to standard of rights protection required in a given case.<sup>178</sup> Its existence also acknowledges that '[t]he overall scheme of the Convention is that the initial and primary responsibility for the protection of human rights lies with the contracting parties.'<sup>179</sup>

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<sup>168</sup> *Handyside* (n.147), [48]

<sup>169</sup> Harris (n.4), 12

<sup>170</sup> *Ibid*, 13

<sup>171</sup> *Ibid* and Arai-Takahashi (n.151), 203-204

<sup>172</sup> *Ireland* (n.166), [207]

<sup>173</sup> *Leander v Sweden* (1987) 9 EHRR 433, [59] and *Klass v Germany* (1979-80) 2 EHRR 214, [49]

<sup>174</sup> *Wingrove* (n.133), [58]

<sup>175</sup> *Evans*(n.32), [77]

<sup>176</sup> Arai-Takahashi (n.151), 204

<sup>177</sup> *Handyside* (n.147), [48]

<sup>178</sup> Arai-Takahashi (n.151), 4 and *ibid*

<sup>179</sup> Harris (n.4), 13, Arai-Takahashi (n.151), 4 and *Belgian Linguistics* (1979-80) 1 EHRR 252, [10]

However, the ECtHR retains to itself alone the decision as to what amounts to an infringement of the scope of a Convention right although, as described above, the ECtHR qualified this approach in *Vo* by applying a margin of appreciation in relation to the question of the nature of the person that can fall within their scope.<sup>180</sup> The margin of appreciation is a creation of the ECtHR and thus it ultimately reserves to itself the ability to set aside the margin of appreciation and decide for itself the nature of the competing interest and the necessity of the interference.<sup>181</sup>

The application of the margin of appreciation by the ECtHR to the question of determining whether an infringement of a rights is *necessary* to further a protected interest<sup>182</sup> conceptually connects it to the proportionality analysis and makes it part of the balancing enquiry.<sup>183</sup> If a margin of appreciation is applied then the Court will accept the member state's assessment as to whether the balance between the right in question and the competing interest at issue makes the infringement of a right necessary and justified. Thus, the margin of appreciation gives the states a safe area of discretion within which to conduct a proportionality balancing act.

### *Walking the Rope*

Although it is possible to determine the nature of tools that the ECtHR uses when called upon to balance Convention rights and competing interests, the question remains as to how these are applied in individual cases. The unstructured case by case approach adopted by the judicial organs has led to a conclusion amongst commentators that their approach is 'not

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<sup>180</sup> *Vo* (n.6), (Dissent) [O-III 8] and above p.66-67

<sup>181</sup> *Handyside* (n.147), [49] and *Ireland* (n.166), [207]

<sup>182</sup> *Ovey and White* (n.13), 232

<sup>183</sup> *Harris* (n.4), 12

underpinned by any clear or coherent rationale.<sup>184</sup> However, it is possible to identify certain trends in the jurisprudence of the Commission and Court.<sup>185</sup> McHarg argues that by studying the case law in relation to the balancing of rights against the public interest, it is possible to conceptually isolate three coherent approaches. Which approach is applied by the Court is determined by the court's interpretations of the various rights and their exceptions.<sup>186</sup>

In cases where the public interest invoked by the state is one of national security or the prevention of crime and disorder, the ECtHR will focus 'on the factual *necessity* of the interference'<sup>187</sup> to the pursuit of that purpose. The court recognises the importance of these interests, and thus if the necessity of a measure is established it will accept the legitimacy of balance struck by the member state's act.<sup>188</sup> An example of this approach can be seen in the *Klass* case where the court focused very closely on whether the particular surveillance techniques were needed for the purposes in question.<sup>189</sup>

An alternate approach adopted by the court involves a more 'definitional'<sup>190</sup> analysis, focusing on the *extent* of the interference with the right at issue rather than the necessity of that interference.<sup>191</sup> This approach is applied where a state action interferes with the core purpose of a right.<sup>192</sup> Here the Court will seek to determine whether the purpose pursued by the measure is sufficiently important to justify the infringement. Thus, in *Lingens v Austria*, in determining whether the infringement of Article 10 was justified, the ECtHR took account

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<sup>184</sup> Greer (n.125), 417 & 425 and McHarg (n.121), 673

<sup>185</sup> McHarg (n.121), 684 and Greer (n.125), 425

<sup>186</sup> McHarg (n.121), 688

<sup>187</sup> Ibid (my emphasis)

<sup>188</sup> Ibid,

<sup>189</sup> *Klass* (n.173) [49], [52] and [59]-[60], see also *Golder* (n.150), [45]

<sup>190</sup> McHarg (n.121), 671

<sup>191</sup> Ibid, 688

<sup>192</sup> Ibid, 690-691



of the importance of the protection of political speech under the Convention and held that greater protection should be given to such speech.<sup>193</sup>

Thus, whether the necessity or definition focused approach is taken depends on what purpose is pursued by the right in question and the extent to which the impugned act infringes that purpose.<sup>194</sup> McHarg recognises that in cases where the state act infringes the core of a right, but also pursues a particularly important interest, there will be uncertainty as to which approach will be applied.<sup>195</sup> In such situations, where the right and competing interest are evenly matched, the ECtHR will take neither approach and will attempt to strike the balance it feels appropriate.<sup>196</sup> This approach is also taken where the ECtHR is ‘uncertain both about the purpose of the right and about its ability to assess what the public interest requires’,<sup>197</sup> such as cases concerning Article 1 of Protocol 1.<sup>198</sup> However, in this latter form of balancing the ECtHR will only find that the right has been infringed where the impugned measure imposes ‘an individual and excessive burden’.<sup>199</sup>

### *Rights against Rights*

As noted above,<sup>200</sup> the text of the Convention recognises the potential for the rights belonging to different persons to conflict where a state action or law infringes one individual’s rights in order to protect those of another. This requires the states and the ECtHR to balance the

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<sup>193</sup> *Lingens v Austria* (1986) 8 EHRR 407, [42], see also on Article 8: *Dudgeon v United Kingdom* (1982) 4 EHRR 149, [52], see also McHarg (n.121), 690

<sup>194</sup> McHarg (n.121), 690-691

<sup>195</sup> *Ibid*, 692

<sup>196</sup> McHarg (n.121), 693, eg. *Worm v Austria* (1998) 25 EHRR 454, [39]-[40], [47], [50] & [56]

<sup>197</sup> McHarg (n.121), 694

<sup>198</sup> *Ibid*

<sup>199</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35, [69] & [73], *Håkansson and Sturesson v Sweden* (1991) 13 EHRR 1, [51] and *Ibid*

<sup>200</sup> Above p.78-79

rights<sup>201</sup> against each other to determine which it is appropriate to give precedence to on the facts of a particular case.<sup>202</sup>

In balancing the rights the ECtHR seeks to determine what weight should be given to the exercise of each right on the facts of the case.<sup>203</sup> The assessment of their weight requires the court to consider nature and extent of the interference with rights of both individuals that would result from giving effect to the rights of the other party. Thus, in *IA v Turkey* the ECtHR considered the gravity of the religious offence caused under Article 9<sup>204</sup> and then the protection of expression that Article 10 was supposed to give and the nature of the speech at issue.<sup>205</sup> Similarly, in *Von Hannover*, detailed scrutiny of the extent of the intrusion into the applicant's private life and the purpose of the publication of the photographs was conducted to determine the relative importance of the exercise of the rights interests at issue.<sup>206</sup>

Once the weight of each right is determined, the ECtHR applies a proportionality analysis to assess whether it is justifiable for the applicant's right to be infringed by the state to protect the rights of another individual.<sup>207</sup> All three elements of the proportionality analysis are analysed.<sup>208</sup> In the context of conflicts between rights, unlike a conflict between a right and a public interest, the ECtHR considers the proportionality of the interference with *both* rights at issue, to determine whether the applicant's right or the competing right of another should be upheld.<sup>209</sup> Consequently, in *Éditions Plon* the ECtHR considered the justification for infringing each of the conflicting rights. It was held that the applicant publisher's Article 10

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<sup>201</sup> *Evans*(n.32), [83]

<sup>202</sup> Harris (n.4), 481-482, citing *Éditions Plon v France* (2006) 42 EHRR 36, [30]

<sup>203</sup> *IA v Turkey* (2007) 45 EHRR 30, [42] and *Von Hannover v Germany* (2005) 40 EHRR 1, [58]

<sup>204</sup> *Ibid*, [44-45]

<sup>205</sup> *Ibid*, [43-44]

<sup>206</sup> *Von Hannover* (n.203), [63-69] & [76]

<sup>207</sup> *Hachette Filipacchi Associés v France* (2009) 49 EHRR 23, [41] & [43]

<sup>208</sup> *Wingrove* (n.133), [36]

<sup>209</sup> *Éditions Plon* (n.202), [47] & [51]

rights were proportionately infringed in favour of the protection of other's Article 8 interests by the initial injunction, because of the limited impact on the publisher of a short term injunction and the severe infringement of the family's grief.<sup>210</sup> However, the ECtHR felt that after nine and a half months, there was a greater interest in knowing about the truth about President Mitterrand's health which outweighed the Article 8 rights of the family.<sup>211</sup> Similarly, in *Hachette Filipacchi Associés* the extent of the interference,<sup>212</sup> and justification for the interference<sup>213</sup> with both Article 8 and with Article 10, were considered in the course of the Court's proportionality analysis.

Just as when it is called upon to consider the proportionality of the infringement of a right in favour of a public interest, the ECtHR has made it clear that it may choose to grant a margin of appreciation to state determinations as to the balance that should be struck between competing Convention rights.<sup>214</sup> The ECtHR has held that, in cases of conflicting rights, a margin of appreciation is most likely to be granted where there is a lack of consensus amongst the States as to what the rights at issue should be interpreted as requiring,<sup>215</sup> where the rights in conflict are of an equal weight<sup>216</sup> and where the question of the balance to be struck raises difficult moral questions.<sup>217</sup>

The ECtHR's jurisprudence, however, demonstrates that it will not always grant states a margin of appreciation on the question of which right should have priority in conflicts between rights.<sup>218</sup> When it does balance competing rights the ECtHR determines which

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<sup>210</sup> Ibid, [47]

<sup>211</sup> Ibid, [53]

<sup>212</sup> *Hachette* (n.207), [48]-[49], [53]-[54] & [58]-[62]

<sup>213</sup> Ibid, [37]-[38]

<sup>214</sup> *Evans* (n.32), [77] and *Harris* (n.4), 482 and see also *Wingrove* (n.133), [58]

<sup>215</sup> *IA* (n.203), [40], *Evans* (n.32), [79]-[80] and *Harris* (n.4), 483

<sup>216</sup> *Evans*(n.32), [90]

<sup>217</sup> Ibid, [81]

<sup>218</sup> *Harris* (n.4), 482, eg. *Éditions Plon* (n.202), [44]

should have priority by applying an approach similar to the ‘definitional’ approach described by McHarg in the context of the balancing of rights against competing public interests.<sup>219</sup> Thus, in *Wingrove* the ECtHR noted that freedom of expression gave the greatest protection to political speech<sup>220</sup> and, in ultimately deciding in favour of interests protected by Article 9,<sup>221</sup> observed that the speech at issue did not fall within this core protection.<sup>222</sup> This focus on the core of the right is consistent with the ECtHR’s statement that there would be less scope for the application of the margin of appreciation where the core of a Convention right was infringed.<sup>223</sup>

In addition to considering the nature of the rights at issue, the ECtHR also considers the factual extent of the interference with the right. Thus, in *Éditions Plon* the Court paid close attention to diminishing interference with the President’s family’s Article 8 rights that the exercise of the publishers Article 10 rights would cause over time, ultimately finding that the party whose right should have priority had switched with time.<sup>224</sup> As part of this factual scrutiny,<sup>225</sup> as in cases where a public interest interferes with a Convention right, the ECtHR will also consider the ‘necessity’ of interfering with one right to further the protection of another.<sup>226</sup> This approach can be seen in *Hachette Filipacchi* where the ECtHR observed that the measure at issue, which protected Article 8 at the expense of Article 10, was as the ‘least restrict[ive]’<sup>227</sup> means of protecting the Article 8 interest and thus deemed proportionate.<sup>228</sup>

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<sup>219</sup> Above p.86-87

<sup>220</sup> *Wingrove* (n.133), [58]

<sup>221</sup> *Ibid.*, [48]

<sup>222</sup> *Ibid.*, [61] & [65]

<sup>223</sup> *Ibid.*, [58]

<sup>224</sup> *Éditions Plon* (n.202), [47], [51] & [53]-[54]

<sup>225</sup> *Harris* (n.4), 481

<sup>226</sup> Above p.86

<sup>227</sup> *Hachette* (n.207), [61]

<sup>228</sup> *Ibid.*, [51], [53], [58] & [61]-[63]

It is submitted that in light of the ECtHR's case-by-case approach to the balancing of conflicting rights and rights conflicting with general interests, and lack of clear general principles, the Convention and ECtHR's current balancing tools can be applied in a manner which is consistent with the characterisation of the conflict between rights described above. The manner in which this new approach to the assessment of conflicts between rights and general interests, as conflicts between competing rights, can be implemented by the domestic courts will be described below.

### ***Will and Interest Conceptions of Rights***

The distinction between the will and interest conceptions of rights and their implications for the waiving of the benefits of human rights was outlined briefly above. As conceptions of rights generally, they seek to describe and classify the fundamental nature of the schemes of rights to which they apply and give different conceptions of what characteristics a norm as a right.<sup>229</sup> Due to their more complex nature as theoretical conceptions of rights they need to be understood in the appropriate level of detail in order to make engagement with this debate coherent.

#### *The Will Conception*

The fundamental feature of theories of rights that fall under the will conception is that all rights seek to protect and give pre-eminence to manifestations of an individual's self-determination.<sup>230</sup> The leading proponent of the will conception was Herbert Hart whose definition of what constitutes a legal or moral right is premised on the protection of the

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<sup>229</sup> N. MacCormick, 'Rights in Legislation' in P. Hacker and J. Raz (eds), *Law, Morality and Society* (Clarendon 1977), 192

<sup>230</sup> *Ibid* and Kramer (n.230), 62

freedom of choice of individuals.<sup>231</sup> For this reason the will conception is sometimes also described as the choice conception.<sup>232</sup>

Hart argued that there was only one natural right; the right of all men to be free,<sup>233</sup> possessed by any human capable of choice.<sup>234</sup> This right, Hart argued, formed the basis for moral rights by giving a moral justification for limiting the freedom of another person.<sup>235</sup> It justifies the imposition of duties on specific individuals in certain relationships with the rights holder,<sup>236</sup> or on persons generally, to refrain from interfering with the rights holder's freedom of choice<sup>237</sup> because of the equal right to be free the natural right embodies.<sup>238</sup>

Based on his premise of the underlying natural right to freedom, Hart characterises the duty relationship it creates as binding only the duty bearer and not the right holder. Thus, he argues that the duty relationship 'is not that of two persons bound by a chain, but of one person bound, the other end of the chain lying in the hands of another to use if he chooses.'<sup>239</sup> In this way Hart is able to argue that the rights holder is free to choose to waive the benefit of his right and decline to demand the performance of the duty he is owed,<sup>240</sup> allowing another to act in a manner from which the right purports to protect the holder.<sup>241</sup>

Hart's general legal philosophy is positivist, declaiming any necessary conceptual connection between law and morality, the validity of the former being argued not to be dependent on the

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<sup>231</sup> H. Hart, 'Are There Any Natural Rights?' (1955) 64(2) *Phil. Review* 175, 175 and H. Hart 'Definition and Theory in Jurisprudence' (1954) 70 *L.Q.R.* 37, 49

<sup>232</sup> N. MacCormick, *H.L.A. Hart* (Edward Arnold 1981), 90

<sup>233</sup> H. Hart, 'Are There Any Natural Rights?' (1955) 64(2) *Phil. Review* 175, 175

<sup>234</sup> *Ibid*

<sup>235</sup> *Ibid*, 178, 183 & 188

<sup>236</sup> *Ibid*, 183-185, 187 & 190

<sup>237</sup> *Ibid*, 175

<sup>238</sup> *Ibid*, 188

<sup>239</sup> *Ibid*, 181

<sup>240</sup> MacCormick (n.232), 89

<sup>241</sup> D. Beylveveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001), 56

latter,<sup>242</sup> a position which this thesis will reject. However, as with his conception of moral rights, Hart's definition of *legal* rights also has choice as a fundamental element.<sup>243</sup> For Hart, a person can only be said to have a legal right under a law which imposes some duty on another if the one who has a right, 'or some other person authorised to act on his behalf [has the choice]...as to whether the corresponding duty shall be performed or not.'<sup>244</sup> This focus on the choice of the rights holder as to whether or not to enforce the duty as necessary and sufficient for the existence of rights<sup>245</sup> is the fundamental idea underlying all will conceptions of rights.<sup>246</sup>

In so far as *moral* rights under Hart's will conception are based on protecting the freedom of choice of the individual, he concedes that children and animals cannot be said to have such rights.<sup>247</sup> They do not have the capacity for choice which is a prerequisite for the natural right which forms the basis of the moral rights recognised by the will conception.<sup>248</sup> However, Hart nonetheless claims that it is possible for children to have *legal* rights under the will conception which protect some other interest<sup>249</sup> and do not have a basis in the current possession of the capacity for choice. This is possible because, under his definition of a legal right, the choice as to whether to require the performance of the duty owed, which is an essential element of his definition of rights, need not be exercised by the person to whom the duty is owed.<sup>250</sup> It can be exercised by a person authorised to act on the behalf of a right holder, such as a child, who does not have the capacity for choice.<sup>251</sup>

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<sup>242</sup> H. Hart, *The Concept of Law* (2<sup>nd</sup> edn, OUP 1997), 209-210

<sup>243</sup> H. Hart 'Definition and Theory in Jurisprudence' (1954) 70 *L.Q.R.* 37, 49 and MacCormick (n.229), 192

<sup>244</sup> Hart (n.243), 48-49

<sup>245</sup> Kramer (n.230), 62

<sup>246</sup> *Ibid* and L. Sumner, *The Moral Foundations of Rights* (Clarendon Press 1986), 42

<sup>247</sup> Hart (n.233), 181

<sup>248</sup> MacCormick (n.229), 198

<sup>249</sup> Hart (n.243), 43

<sup>250</sup> *Ibid*, 49

<sup>251</sup> *Ibid*

The freedom of choice which underlies Hart's will conception of rights contains an inherent limitation, which in turn constitutes the limit on the exercise of moral and legal rights under the will conception. Hart argues that if all men have a natural right to be free<sup>252</sup> then the liberty of the individual must, on occasion, be constrained in order to protect freedom of others.<sup>253</sup> Thus, choice as to how to exercise rights under the will conception put forward by Hart can be limited to prevent actions 'coercing or restraining or designed to injure other persons.'<sup>254</sup>

### *The Interest Conception*

The interest conception of rights differs from the will conception in that it does not see choice as to enforcement as the key means of determining what norms should be classed as rights.<sup>255</sup> Instead, the interest theory contends that the essential feature of a legal or moral right is that it seeks to protect one or more aspects of the holder's interests or welfare.<sup>256</sup> These may, but need not necessarily, 'include some aspect of the person's freedom.'<sup>257</sup>

The foundations of the interest theory can be found in the writings of Jeremy Bentham who argued that the people who can be said to possess rights are those who benefit from the duty or obligation imposed on others by the law.<sup>258</sup> This benefit takes the form of freedom from interference by others with the rights holder's action<sup>259</sup> protected by the law.<sup>260</sup> A right exists

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<sup>252</sup> Hart (n.233), 175

<sup>253</sup> Ibid, 183

<sup>254</sup> Ibid, 175

<sup>255</sup> Kramer (n.230), 62

<sup>256</sup> Ibid, 61-62 and MacCormick (n.229), 192

<sup>257</sup> Kramer (n.230), 61

<sup>258</sup> J. Bentham, *Of Laws in General* (Collected Works of Jeremy Bentham, University of London: Athlone Press 1970), 57-58, J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Collected Works of Jeremy Bentham, University of London: Athlone Press 1970), 206, J. Bentham and J Boweing (ed), *The Works of Jeremy Bentham: Vol III* (William Tait 1843), 181, Sumner (n.246), 40 and H. Hart, 'Bentham on Legal Rights' in A. Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press 1973), 171 & 177,

<sup>259</sup> J. Bentham and J Boweing (ed), *The Works of Jeremy Bentham: Vol III* (William Tait 1843), 159

<sup>260</sup> Ibid, 160



under Bentham's theory even if the person who benefits from the obligation would not deem themselves to have been advantaged by the possession of the right.<sup>261</sup> This is the case because under his view that the existence of rights is a matter of law,<sup>262</sup> although such laws can ultimately be critiqued using the overarching utilitarian principle to assess whether the harm that it causes is outweighed by good that it does.<sup>263</sup>

Neil MacCormick was a leading exponent of the interest theory and critic of Hart's will conception. In his theory MacCormick argued that the key feature that classifies norms<sup>264</sup> as rights 'is that they have as a specific aim the protection or advancement of individual interests or goods.'<sup>265</sup> He argues that the interest protected is of greater significance than the duty imposed by the right, thus a right to money under the rules of intestacy can be said to exist even though there is no duty to pay the money until an executor is appointed.<sup>266</sup> Although the interest theory has its roots in Bentham's philosophy, MacCormick's theory takes a deontological approach. He argues that for a norm conferring a benefit to be a right, the norm must also protect members of a class of persons as 'individuals separately, not simply as members of a collective enjoying a diffuse common benefit'.<sup>267</sup>

Under this conception the difficulties apparent in relation to the will conception of whether children can possess rights so defined does not arise. A child, animal or mentally incompetent adult need not possess the capacity for choice to hold a right. They need only have the interest which a right seeks to protect.

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<sup>261</sup> Sumner (n.246), 40 and MacCormick (n.229), 202

<sup>262</sup> Bentham (n.259), 160, where he describes rights and obligations as 'the children of the law' and J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Collected Works of Jeremy Bentham, University of London: Athlone Press 1970), 206

<sup>263</sup> Bentham (n.259), 160 & 185

<sup>264</sup> MacCormick (n.229), 205

<sup>265</sup> Ibid, 192 & 204

<sup>266</sup> Ibid, 200-201

<sup>267</sup> Ibid, 205, see also 202 & 203

The different definition of rights under the interest conception also has fundamental consequences for the capacity of rights holders to waive the benefits of the duties they are owed under rights. Under the interest conception rights do not arise solely from the furthering the freedom of choice of the holder which prevents norms creating unwaivable duties from being classed as rights under the will conception.<sup>268</sup> Thus, it is possible for a norm to fall within the definition of rights given by an interest conception even if the holder of the right cannot waive the benefit of the duty they are owed under the right.<sup>269</sup> However, although not required by the interest theory's conception of rights generally, MacCormick argues that 'individuals ought normally to have the power of waiving the duty in particular cases affecting only themselves'.<sup>270</sup> If it is an individual good that persons ought to be able to waive the benefit of a right, it follows that a norm which ensures respect for this capacity can be classified as a right.<sup>271</sup> However, unlike under a will conception such a right of waiver would not be part of the definition of rights generally and thus it need not necessarily apply to the exercise of all other rights.<sup>272</sup> Under his conception of the interest theory the question of whether the benefit of a right can be waived is conceptually separate from the question of what is a right.<sup>273</sup> MacCormick thus argues that this power of waiver should be seen as a remedial power which is 'consequential on the recognition or conferment of, rights'<sup>274</sup> rather than a core element of the rights themselves.

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<sup>268</sup> Ibid, 196 and above p.91-92

<sup>269</sup> Ibid, 196, see also 208 and Beyleveld and Brownsword (n.241), 80

<sup>270</sup> MacCormick (n.229), 207

<sup>271</sup> Ibid, 204-205 & 207

<sup>272</sup> Ibid, 207-208

<sup>273</sup> Ibid, 208

<sup>274</sup> Ibid

### *The Convention and ECtHR's Approach to Waiving Rights*

The Convention and the ECtHR clearly recognise that there is potential for rights to conflict with other rights and other interests. This is explicitly apparent in the reference to the 'rights and freedoms of others' in qualifications to Articles 8, 9 & 11 as conditions for limiting the exercise of these rights. However, the extent to which the Convention recognises the ability of rights holders to waive the benefits in cases where an action would otherwise conflict with their Convention rights is not nearly so obvious.

#### The Convention Text

Like other international human rights treaties, the ECHR 'has no provision permitting an individual to waive [the benefits of] his rights, or to consent to treatment which would otherwise be impermissible.'<sup>275</sup> Conversely however, the Convention also contains no explicit exclusion of the capacity of an individual to waive the benefit of his rights.<sup>276</sup>

John Merrills has argued that this lack of explicit exclusion of waiving allows for the possibility that the ECtHR may read its permissibility into the ECHR.<sup>277</sup> More strongly Beyleveld and Brownsword have argued that the fact that rights treaties 'do not outlaw boxing, mountain-climbing, and other dangerous activities, and do not require persons to vote, etc., shows that the will conception...is to be applied to at least some of the rights.'<sup>278</sup> They proceed from this to argue that, as the will and interest positions are conceptions of rights generally, the identification and recognition of some rights within the Convention as will rights entails that all of the Convention rights must be will rights.<sup>279</sup> Interest theorists such as MacCormick's would, however, explain these activities, and any waiving of rights

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<sup>275</sup> Merrills (n.53), 178-179

<sup>276</sup> *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, [35] and *ibid*, 179

<sup>277</sup> Merrills (n.53), 181 and Starmer (n.44), 192

<sup>278</sup> Beyleveld and Brownsword (n.241), 81

<sup>279</sup> *Ibid*, 81-82

involved, as allowed in the furtherance of an underlying protected interest, and not as part of the conception of a rights. The text of the Convention is thus inconclusive on this question of rights interpretation.

### The Approach of the Convention Organs

It is apparent from the Strasbourg jurisprudence that the Court has allowed the waiving the benefits of rights in some cases,<sup>280</sup> although whether this is under a will or interest conception has to some extent deliberately<sup>281</sup> not been made explicit. The main development of the waiving jurisprudence has occurred in relation to Articles 6 and 8.<sup>282</sup> Here the ECtHR has explicitly held that the benefit of rights to a public hearing,<sup>283</sup> access to a judicial determination<sup>284</sup> and to the confidentiality of medical records<sup>285</sup> may be waived. Additionally, although willing in some cases to accept that people can waive rights' benefits, Strasbourg has been reluctant to lightly hold that they have been waived.<sup>286</sup> To this end, substantive and procedural limitations have been imposed on when a waiving of a right's benefit should be deemed to be valid.<sup>287</sup>

In the two cases concerning the disclosure of medical records infringing an Article 8 right to confidentiality, the ECtHR has appeared to apply a will conception of the right.<sup>288</sup> The court described the right at issue as one prohibiting the disclosure of the information 'without the consent of the patient'<sup>289</sup> and capable of being waived by the holder.<sup>290</sup> The characterisation

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<sup>280</sup> *Merrills* (n.53), 185

<sup>281</sup> *Harris* (n.4), 493, citing *Blake v United Kingdom* (2007) 44 EHRR 29, [44]-[45]

<sup>282</sup> *Ovey and White* (n.13), 190

<sup>283</sup> *Albert* (n.276), [35]

<sup>284</sup> *Deweert v Belgium* (1979-80) 2 EHRR 439, [49] and *Starmer* (n.44), 356

<sup>285</sup> *Z v Finland* (1998) 25 EHRR 371 and *MS v Sweden* (1999) 28 EHRR 313

<sup>286</sup> *Merrills* (n.53), 179

<sup>287</sup> *Ovey and White* (n.13), 190

<sup>288</sup> D. Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2012) 13 *Human Rts.Rev.* 1, 13

<sup>289</sup> *Z* (n.285), [96] and *MS* (n.285), [35]

of this element of Article 8's protection for privacy, as safeguarding an individual's control over information concerning their medical history, accords closely with the fundamental feature of will rights as protecting the capacity for individual choice described above.<sup>291</sup> It is submitted that with this interpretation of Article 8, it was logical for the Court to hold that it was possible for an individual to waive the protection of the right and allow the disclosure of the information. In the Article 6 cases there was no such characterisation of the right in terms of choice to justify the permissibility of a rights holder choosing to waive it,<sup>292</sup> making the conception of rights which the court applied more uncertain.

In more general terms, the ECtHR has held that the waiving will not be permitted where to do so would 'run counter to any important public interest.'<sup>293</sup> Thus, in *Laskey, Jaggard and Brown*, a case involving consensual sadomasochistic acts, the ECtHR refused to hold that the participants had waived the benefit of any Convention rights to protection by the state from harm by others.<sup>294</sup> Instead the Court found that the limitation of the claimants' autonomy was justified on the grounds of the potential danger of the activities, public health considerations and that such acts of torture 'undermine the respect which human beings should confer upon each other.'<sup>295</sup> Consistent with this approach, in *Schuler-Zgraggen* the public interest was deemed not to prevent a person from waiving the benefit of their right to a public hearing for their social security claim because the efficient running of the system favoured not having such hearings.<sup>296</sup>

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<sup>290</sup> *MS* (n.285), [32]

<sup>291</sup> Above p.91-92

<sup>292</sup> *Deweer* (n.284), [49] and *Albert* (n.276), [35]

<sup>293</sup> *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405, [58], *Håkansson* (n.199), [66]-[67], *Starmer* (n.44), 192 & 369 and *Merrills* (n.53), 182

<sup>294</sup> *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, [40]

<sup>295</sup> *Ibid*, [40] & [44], see also *Beyleveld and Brownsword* (n.241), 81

<sup>296</sup> *Schuler-Zgraggen* (n.293), [58]

This approach to the limitation of individuals' capacity to waive their rights can, however, be seen to support rather than undermine an interpretation of the ECtHR's jurisprudence consistent with a will conception. If, as argued above,<sup>297</sup> the general interests against which rights must be balanced are interpreted as indirectly protecting the rights of others, in accordance with the ECHR's anti-majoritarian aim, then where the waiving of a right is prohibited by the public interest such prohibition in reality protects the rights of others as required by a will conception of rights.<sup>298</sup>

In contrast to the forgoing indications of a will conception approach, in *Albert and Le Compte* the ECtHR stated *obiter* that 'the nature of some of the rights safeguarded by the Convention is such as to exclude a waiver of the entitlement to exercise them'.<sup>299</sup> This statement seems to support an interest conception of rights. However, it is submitted that this *dicta* is anomalous and ought not to be interpreted as a general rejection of a will conception by the ECtHR. In support of its statement, the ECtHR relied on a case where it had previously found that vagrants had not waived the benefit of their Article 5 rights by seeking assistance from the police.<sup>300</sup> However, the refusal to find a waiver in that case was based upon the procedural constraints on waiver which were held not to have been satisfied, and not on a general view that there could be no waiver of the benefits of the Article 5 rights which would indicate the rejection of a will conception of rights.<sup>301</sup>

If a capacity to choose whether to insist on the performance of a duty is not part of the characteristics which give rise to Convention rights, then they cannot be rights under the will

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<sup>297</sup> Above p.79-80

<sup>298</sup> Beyleveld and Brownsword (n.241), 81

<sup>299</sup> *Albert* (n.276), [35]

<sup>300</sup> *De Wilde, Ooms and Versyp v Belgium (No. 1)* (1979-80) 1 EHRR 373

<sup>301</sup> *Ibid*, [65] and Merrills (n.53), 179

conception.<sup>302</sup> The fact that in the case of *Glass v United Kingdom*<sup>303</sup> a disabled child, who never had and never would have the capacity to decide whether or not to insist on the enforcement of a right, was held to have a right under Article 8 would seem to indicate that such a basis was not relied upon by the court.<sup>304</sup> However, both positivist and non-positivist will conceptions of rights can account for the recognition of rights for such persons. If a positivist approach is taken, with the Convention rights viewed as *legal* rights, Hart argued that legal will rights could be possessed by a person who did not themselves have the capacity for choice over actions performed by others to them in relation to the rights, provided that choice was exercised on their behalf by another.<sup>305</sup> In this case, the mother and the courts were deemed to have responsibility to consent to medical treatment of the child, and thus waive the protection Article 8 gives against interference with a person's physical integrity.<sup>306</sup> From non-positivist natural law perspectives, which argue that the possession, interpretation and application of the Convention rights must conform to a particular moral principle to be valid *morally*, it too can be argued that there are duties under the Convention requiring the protection of such persons. Such an approach involves showing that a theory of moral will rights based in a characterisation of agency, of which the capacity for choice is a central feature, requires that the protection of the Convention also be given to those without that capacity as well as those with that capacity. Such an approach will be argued for in detail below.<sup>307</sup>

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<sup>302</sup> H. Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *L.Q.R.* 37, 49 and Hart (n.233), 181

<sup>303</sup> *Glass v United Kingdom* (2004) 39 EHRR 15

<sup>304</sup> *Ibid.*, [7] & [59]

<sup>305</sup> H. Hart, 'Definition and Theory in Jurisprudence' (1954) 70 *L.Q.R.* 37, 43 & 49

<sup>306</sup> *Glass* (n.303), [45], [70] & [83]

<sup>307</sup> Below p.242 & 248-251

Whether the waiving of rights' benefits is permissible and what can constitute a waiver are two distinct questions.<sup>308</sup> In addition to the substantive limitations, the ECtHR imposes procedural criteria which must be satisfied for waiving to be deemed to have occurred.<sup>309</sup> These conditions aim to protect people from too lightly relinquishing the protection of the Convention.<sup>310</sup>

The ECtHR has stated that, to be valid, a person's waiver of the benefits of Convention rights 'must be unequivocal and, where procedural rights are concerned, must accord with the minimum guarantees commensurate with the importance of such rights.'<sup>311</sup> The unequivocal requirement goes to the nature of the act or statement by which a person communicates his desire to waive the benefit of a Convention right. Such a communication can be explicit statement,<sup>312</sup> or tacit action or inaction,<sup>313</sup> but must evince a clear intention to waive the benefit of the right at issue.<sup>314</sup>

The 'minimum guarantees' which must accompany a waiver for it to be valid are procedural requirements designed to ensure that the decision to waive is properly informed. Thus in *Pfeiffer and Plankl* it was held that the applicant's waiving of the benefit of the right to an impartial tribunal was not valid because he had not had the benefit of legal advice before purporting to waive the right's benefit.<sup>315</sup>

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<sup>308</sup> Merrills (n.53), 182

<sup>309</sup> Starmer (n.44), 192

<sup>310</sup> Merrills (n.53), 179 and Starmer (n.44), 192

<sup>311</sup> *Pfeiffer and Plankl v Austria* (1992) 14 EHRR 692, [37] and *Jones v United Kingdom* (2003) 37 EHRR CD269, CD227

<sup>312</sup> *Neumeister v Austria (No. 2)* (1979-80) 1 EHRR 136, [36]

<sup>313</sup> *Håkansson* (n.199), [67] and Merrills (n.53), 181, *Cf. Colozza v Italy* (1985) 7 EHRR 516, [28] which Merrills (n.53), 184 argues 'appears' to require that the waiver of the right to attend one's own trial must be explicit. It is however submitted that the reason there was no waiver in this case was, as Merrills recognises, the facts did not show that the applicant unequivocally (tacitly or otherwise) *intended* to waive the benefit of his right.

<sup>314</sup> *Brozicek v Italy* (1990) 12 EHRR 371, [45], Merrills (n.53), 185 and *Jones* (n.311), CD227

<sup>315</sup> *Pfeiffer* (n.311), [37-39]



The final procedural limitation on waiving under the ECHR requires that people be protected against agreeing to unreasonable restrictions on their Convention rights.<sup>316</sup> This entails that decision to waive the benefit of their rights must be made in the ‘[a]bsence of constraint’.<sup>317</sup> Undue pressure to waive in relation to the right to a trial in favour of paying a fine was thus held to negate any waiver,<sup>318</sup> and the Commission has held that the benefit of Convention rights can only be waived through contract terms which are freely entered into and give rise to a restriction of rights which is ‘not unreasonable’.<sup>319</sup>

Ultimately, however, the lack of a clear decision of principle on the question of possibility of waiving the benefits of the Convention rights by the ECtHR forces the conclusion that the question has not been definitively resolved in either direction. However, as the will and interest approaches are conceptions of a scheme of rights as a whole, a fundamental conception of rights underlying the interpretation of the Convention must be of either one or the other.<sup>320</sup>

### ***Horizontal and Vertical Rights***

It has already been noted in the contexts of positive and negative obligations imposed by rights, and of the balancing of competing rights, that it is possible for individuals as well as the state to interfere with the rights of persons protected by the ECHR. In the past human rights were regarded ‘as interests that required protection only against governmental action’<sup>321</sup> because it was seen as the state’s prerogative to act to protect its citizens from one

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<sup>316</sup>Starmer (n.44), 192

<sup>317</sup> *Deweert* (n.284), [49] and *Merrills* (n.53), 183-184

<sup>318</sup> *Ibid*, [49], [51] & [54] and *Merrills* (n.53), 184

<sup>319</sup> *Rommelfanger v Germany* Application No. 12242/86 (Commission Decision, 6 September 1989)

<sup>320</sup> Above p.58 & 91

<sup>321</sup> M. Forde, ‘Non-Governmental Interferences with Human Rights’ (1985) 56 *B.Y.B.I.L.* 253, 279

another.<sup>322</sup> However, it is arguable that rights generally, and the Convention rights specifically, are applicable to relations between individuals,<sup>323</sup> for individuals are clearly capable of acting in ways that interfere with the interests protected by human rights.<sup>324</sup>

### *The Application of Rights*

In relation to the ECHR specifically, it can be argued that the Convention rights at a conceptual level are applicable not only vertically between individuals and the state, but also are held horizontally by individuals against other individuals where of relevance to their conduct.<sup>325</sup> Although it is possible to infer from the formulation of its various provisions which appear to be explicitly addressed to states<sup>326</sup> that the issue of application of the rights between individuals 'was not taken into account when the Convention was drafted',<sup>327</sup> and some rights such as the right to a fair trial<sup>328</sup> appear only of relevance against a state, a strong argument can be made from the text that the Convention does in fact recognise, or at the very least not exclude, the applicability of its rights to interactions between individuals.

Deryck Beyleveld and Shaun Pattinson argue that because Articles 8(2), 9(2), 10(2) and 11(2) state that the rights or freedoms found in Articles 8(1), 9(1), 10(1) and 11(1) 'are subject to limitation or restriction for (*inter alia*) the protection of the rights or freedoms of others;...all the rights of the Convention are horizontally applicable.'<sup>329</sup> These provisions have this effect because they recognise that the rights of an individual can apply to restrain the rights of another that interfere with them. That other rights, not merely Articles 8-11, apply in such a

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<sup>322</sup> Ibid

<sup>323</sup> P. van Dijk and G. van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn., Kluwer Law International 1998), 23

<sup>324</sup> Forde (n.321), 253

<sup>325</sup> Beyleveld and Pattinson (n.75), 625-626 and G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) *M.L.R.* 878, 881 (inc. note 22) and 895-896

<sup>326</sup> Van Dijk (n.323), 24, eg. Article 2(1) and (2)(b) and (c), Article 4(3)(a) and (b), Article 5 and Article 8(2)

<sup>327</sup> Ibid

<sup>328</sup> Article 6

<sup>329</sup> Beyleveld and Pattinson (n.75), 626, see also Forde (n.321), 280

horizontal manner can be inferred from the fact that recognition of the rights of others in these Articles is not limited to those in Articles 8-11.<sup>330</sup>

As Gavin Phillipson and Alex Williams rightly observe in their cogent analysis of the incremental nature of domestic law of horizontal effect, at Strasbourg individuals cannot directly claim judicial protection for their Convention rights against other individuals and must do so indirectly via an action against a state.<sup>331</sup> However, contrary to their view,<sup>332</sup> this does not amount to a denial of the ‘automatic’ fundamental horizontal applicability of Convention rights where relevant to interactions between persons which will be theoretically justified below,<sup>333</sup> rather it implicitly recognises it by vindicating it. By upholding the indirect effect of the Convention rights, the ECtHR can be seen to be recognise the necessary horizontal applicability of the rights.

Phillipson and Williams’ contention that the protection of the ‘rights of others’ in Articles 8-11 does not signify that the Convention rights bind private actors, and only sets out a duty on the state to protect their interests, is a plausible reading of the substance of these provisions.<sup>334</sup> However, such an interpretation fails to defeat the argument that the reason such a substantive duty upon the state exists, is to uphold the fundamental rights and duties that also exist between individuals and form the protected interests, the horizontal applicability of the Convention rights. Further, it is submitted that the general protection for individuals against the member countries stated by the Convention and the upheld by the Court, would be of little practical relief to individuals if the rights they recognised had no application between individuals, a position the Court’s jurisprudence of indirect effect of the

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<sup>330</sup> Beyleveld and Pattinson (n.75), 627

<sup>331</sup> Phillipson and Williams (n.325), 882

<sup>332</sup> Ibid, 882 & 884

<sup>333</sup> Below p.304 & 307-309

<sup>334</sup> Phillipson and Williams (n.325), 882

Convention has recognised. Article 1 of the UDHR also appears to recognise the importance of the horizontality of rights by stating that '[a]ll human[s] ...should act towards one another in a spirit of brotherhood', supporting the claim that human rights must be respected not only by the state but also by other individuals.<sup>335</sup>

### *The Effect of Rights Against Individuals*

Although it can be said that the Convention rights are horizontally applicable, the distinction between the applicability and effect of rights means that as a matter of law this does not entail that they can be directly enforced by individuals against individuals before the ECtHR.<sup>336</sup> The ECHR contains no procedure for the enforcement of rights against private individuals; only States can be defendants before the ECtHR.<sup>337</sup> This exclusion of the direct horizontal effect of the Convention rights before the ECtHR can be deduced from Articles 19 and 34 and was explicitly stated by the Commission.<sup>338</sup> At a practical level Michael Forde argues that this can be justified on the grounds that hearing applications against individuals would increase the ECtHR's already substantial case load.<sup>339</sup> Additionally, the States might be reluctant to allow the right of petition to the Court for their citizens, if it entailed that ECtHR had jurisdiction over 'numerous aspects of private relations' within their states,<sup>340</sup> for the danger of Strasbourg misunderstanding national law as in *Osman v United Kingdom*<sup>341</sup> would increase under such a regime.

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<sup>335</sup> Beyleveld and Pattinson (n.75), 633

<sup>336</sup> Ibid, 626

<sup>337</sup> Van Dijk (n.323), 23, T. Raphael, 'The Problem of Horizontal Effect' [2000] *E.H.R.L.R.* 493, 493, Ovey and White (n.13), 32 and *ibid*, see also Forde (n.321), 279

<sup>338</sup> *X v United Kingdom* Application No. 6956/75 (Commission Decision, 10 December 1976), 103-104

<sup>339</sup> Forde (n.321), 279

<sup>340</sup> *Ibid*

<sup>341</sup> *Osman v United Kingdom* (2000) 29 EHRR 245, [150]-[152] & [154]

As the ECtHR cannot give effect to a Convention right directly against an individual, ‘the most that the individual can do at Strasbourg is bring an action against the state for failing to protect’<sup>342</sup> them from the actions of an individual. As noted previously, the ECtHR has held that the Convention can put states under positive obligation to protect individuals from having their rights interfered with by other individuals.<sup>343</sup> Thus, horizontal effect can be given to the Convention rights between individuals in an indirect manner.<sup>344</sup>

At a theoretical level, this indirect horizontal effect is justified by the applicability of the Convention rights between individuals described above. Although the recognition of positive obligations to protect individuals imposes a duty on the state, at a deeper level such obligations can be seen to be consistent with a recognition by the Convention rights of the existence of *duties upon individuals* not to interfere with the rights of others.<sup>345</sup> This applicability of the Convention rights between individuals entails that, the possession of a right by an individual directly<sup>346</sup> requires the recognition of at least a negative duty on others not to disproportionately interfere with the individual’s exercise of their rights or their attainment of the object that the right gives them a right to.<sup>347</sup> This duty is apparent in the statement by Article 10(2) that those with rights under Article 10(1) have duties in exercising their right not to infringe the rights of others in a disproportionate manner.<sup>348</sup> The historical reading of this part of Article 10(2) which Phillipson and Williams instead argue for, as recognising the duties imposed on speakers by the pre-existing domestic law of the member states when the Convention was drafted, is a reasonable construction of it.<sup>349</sup> However, the

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<sup>342</sup> Beyleveld and Pattinson (n.75), 626

<sup>343</sup> Raphael (n.337), 493 and *ibid*, 631

<sup>344</sup> Harris (n.4), 20

<sup>345</sup> Beyleveld and Pattinson (n.75), 627 & 628

<sup>346</sup> *Cf.* Ovey and White (n.13), 52 who argue that individuals would only have duties under national law to respect convention rights where a state is under a positive obligation to protect them.

<sup>347</sup> Beyleveld and Pattinson (n.75), 627

<sup>348</sup> *Ibid*, 629-630

<sup>349</sup> Phillipson and Williams (n.325), 883

provision does not seek to exclude an interpretation which takes account of the fundamental nature of the human rights which, by virtue of this nature, were claimed in the preamble also to exist before the Convention or its predecessor the UDHR recognised them. Although the other qualified rights do not explicitly mention such a duty, its general existence can be inferred because to assume that there is no such duty would imply that other rights would always have precedence over freedom of expression where their exercise conflicted with it.<sup>350</sup> That the Articles 8(2), 9(2) and 11(2) make reference to respecting the rights of others (albeit without mentioning a ‘duty’) indicates that this cannot be what was intended.

Further implicit support for the ECHR’s recognition of duties between individuals to respect each others Convention rights can be found in the combination of Articles 8(2) and 13.<sup>351</sup> The former prohibits the interference with Article 8 by public authorities, the latter similarly provides for a remedy for breaches of any of the Convention rights by public authorities. Thus, if Article 8 only gave rights against public authorities Article 13 would be redundant in relation to it.<sup>352</sup> Additionally, Article 7(2)’s statement that Article 7(1) shall not prejudice other liability implies that, in relation to acts of individuals that involve human rights violations (eg. genocide), individuals are culpable for such acts and this implies that they owe duties to others not to commit such actions.<sup>353</sup> Support for the existence of such duties can also be found in the jurisprudence of the ECtHR. Unless the Court’s statement that, independent of the question of state responsibility, the stepfather’s treatment of the applicant in *A v United Kingdom* amounted to a ‘violation of Article 3’,<sup>354</sup> was ‘simply loose talk’,<sup>355</sup> the ECtHR can be seen as recognising that duties under the Convention rights can exist

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<sup>350</sup> *Beyleveld and Pattinson* (n.75), 630

<sup>351</sup> *Ibid*, 631

<sup>352</sup> *Ibid*

<sup>353</sup> *Ibid*, 632

<sup>354</sup> *A v United Kingdom* (n.66), [19], [21]-[22]

<sup>355</sup> *Beyleveld and Pattinson* (n.75), 631

between individuals,<sup>356</sup> and the domestic courts will thus not be barred in fealty to ECtHR jurisprudence from finding that the Convention rights are fundamentally horizontally applicable.<sup>357</sup>

Unsurprisingly, other, less area-specific, justifications for the imposition of positive obligations on states to protect individual's rights from interference by others, mirror those that are used more generally by the ECtHR when imposing positive obligations under the Convention rights. The Article 1 obligation to respect human rights has been held to give rise to such positive obligations.<sup>358</sup> The more general principle of effectiveness<sup>359</sup> has also been invoked to provide a legal basis for decisions giving effect to the horizontal applicability of Convention rights via positive obligations.<sup>360</sup>

More specifically to the horizontality of rights context, the ECtHR has developed a jurisprudence to prevent states escaping from positive obligations to protect rights by means of privatising state activities.<sup>361</sup> The ECtHR has held States remain responsible for the actions of private individuals and bodies where their activities 'falls within the area of a Convention right or is the result of "privatisation"'.<sup>362</sup> The case of *Costello-Roberts v United Kingdom* exemplifies this approach. Here the state was held responsible for failing<sup>363</sup> to protect the Article 3 rights of private school students, subjected to corporal punishment, because the state was deemed responsible for the education of children under Article 2 of Protocol 1,<sup>364</sup> and

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<sup>356</sup> Ibid

<sup>357</sup> Cf. Phillipson and Williams (n.325), 822

<sup>358</sup> *A v United Kingdom* (n.66), [22], *Costello-Roberts v United Kingdom* (1995) 19 EHRR 112, [26] and Harris (n.4), 20

<sup>359</sup> Above p.71-74

<sup>360</sup> *A v United Kingdom* (n.66), [22] and *X and Y* (n.41), [23]

<sup>361</sup> Harris (n.4), 21

<sup>362</sup> Ibid, 20

<sup>363</sup> *Costello-Roberts v United Kingdom* Application No. 13134/87 (Commission Report, 8 October 1991), [37]

<sup>364</sup> Harris (n.4), 21 and *Costello-Roberts* (n.358), [28]

could not ‘absolve itself from responsibility by delegating its obligations to private bodies or individuals.’<sup>365</sup>

The means by which rights are given effect to between individuals by the ECtHR, are however, subject to limitations. As with positive obligations generally, the imposition of obligations to protect individuals from interference with their rights by others are subject to the infringement of the right being found sufficiently disproportionate<sup>366</sup> and not falling within the states’ margin of appreciation. Additionally, although individuals’ rights are protected against the actions of other individuals by the positive obligations borne by the state, those who infringe the rights of others are not directly impacted by an ECtHR finding that there has been a rights violation. In such cases it is for the member state to pay compensation or change the law,<sup>367</sup> and the prohibition on retroactive punishment will limit the extent to which they can be held responsible for their actions.<sup>368</sup> This somewhat limits practical enforcement of the duties individuals have at the conceptual level to respect the rights of others.

### ***Conclusion***

The ECtHR has recognised, and to varying extents engaged with, the five key basic questions of interpretation that arise throughout the Convention. The fundamental nature of these questions of the scope of all the Convention rights makes the ECtHR’s answers to them the pivots upon which the cases before it fall to be decided. However, the failure of the text of the Convention and the Court to provide a clear answer to some of these questions, particularly

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<sup>365</sup> *Costello-Roberts* (n.358), [27], see also *Woś v Poland* (2007) 45 EHRR 28, [51] & [53] and Harris (n.4), 21

<sup>366</sup> *Osman* (n.80), [116]

<sup>367</sup> *Raphael* (n.337), 494

<sup>368</sup> Article 7 ECHR



the key question of who can possess the Convention right, creates uncertainty with consequent scope and need for interpretation.

## **CHAPTER V: THE APPROACH OF THE COURTS OF THE UNITED KINGDOM TO THE PIVOTAL QUESTIONS OF INTERPRETATION RAISED BY THE CONVENTION RIGHTS**

### ***Introduction***

The pivotal questions of rights interpretation described previously are generally addressed in no greater detail by the wording of the HRA than they are by the ECHR, whose substantive elements the Act largely incorporates. It has thus fallen to the domestic courts to engage with the same issues that have previously faced the ECtHR, the resolution of which must be addressed to determine the substantive scope of the Convention's requirements.

### ***Who Can Possess Convention Rights***

The question of who can possess Convention rights has been argued to be logically prior to other questions of the interpretation of the rights. As noted previously, the answers to it describe the characteristics which a being must possess in order for the Convention rights to be capable of application to them, and which precede other characteristics or factual circumstances which must be present for particular Convention rights to be applicable to a being capable of holding rights in general.

### ***Who is a Human Being for the Purposes of Convention rights?***

As with the jurisprudence of the ECtHR, the key domestic decisions on who can possess Convention rights are found in cases concerning the status of foetuses as rights holders, with cases concerning persons with reduced mental capacity also proving instructive. Whilst the case law in this area has had regard to the ECtHR's approach to this issue of interpretation,<sup>1</sup> domestic judges have sought to base their decisions primarily on pre-HRA domestic judicial decisions concerning who is a legal person.

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<sup>1</sup> Eg. *Evans v Amicus Healthcare Ltd and Others* [2003] EWHC 2161 (Fam), [176]

The position under British law as to who is a legal person, as distinct from to whom Convention rights can apply, can be traced back to the 17<sup>th</sup> century.<sup>2</sup> The British courts have consistently held that, although a human foetus is a ‘unique organism’<sup>3</sup> distinct from the mother, it is only said to be a ‘person’ upon being born alive.<sup>4</sup> Thus, it has been held that a foetus cannot be made a ward of court<sup>5</sup> and nor can it be a victim of murder<sup>6</sup> unless an injury inflicted upon it causes it to die after it has been born alive.<sup>7</sup> The legal protection foetuses do receive is specially directed to them as foetuses,<sup>8</sup> they are not treated as having the same legal status as humans who have been born.

This focus on having been born and alive is further apparent in the United Kingdom courts’ approach to the status of those humans in a permanent vegetative state (PVS) who are medically alive, by virtue of a functioning brain stem, but have no consciousness or personality.<sup>9</sup> In *Airedale NHS Trust v Bland* the House of Lords held that, separate from the moral question of what is meant by ‘life’, such an individual is a legal person.<sup>10</sup> On this basis the court was prepared to hold that the common law principle of the sanctity of life and right to life were applicable and required the courts to consider whether they protected the continuance of the life of such a person.<sup>11</sup> On the facts the court held that the right and principle were not absolute and un-qualified, and thus did not require that those treating

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<sup>2</sup> E. Coke, *Institutes of the Laws of England: Part 3* (London, 1648), 50

<sup>3</sup> *A-G's Reference (No. 3 of 1994)* [1998] AC 245, 256

<sup>4</sup> *Ibid*, 254 & 256, *Vo v France* (2005) 40 EHRR 12, [71] and J. Mason, ‘Case Commentary: What’s in a Name?: The Vagaries of *Vo v France*’ [2005] *C.F.L.Q.* 97, 101

<sup>5</sup> *Re F (in utero)* [1988] Fam 122, 142-3

<sup>6</sup> The killing of ‘a reasonable creature, *in rerum natura* under the kings peace’ (Coke (n.2), 47)

<sup>7</sup> *A-G's Reference (No. 3 of 1994)* (n.3), 254 & 260 and Mason (n.4), 102

<sup>8</sup> s.1 Infant Life (Preservation) Act 1929 creates an offence of ‘child destruction,’ separate from the inapplicable ordinary laws of murder and manslaughter, for causing the death of an unborn child who has reached 28 weeks of gestation. See also Mason (n.4), 101

<sup>9</sup> *Airedale NHS Trust v Bland* [1993] AC 789, 856, 858 & 860

<sup>10</sup> *Bland* (n.9), 878-881

<sup>11</sup> *Ibid*, 858-859 & 864

Bland continue to do so.<sup>12</sup> The court held that it did not further Bland's interests to be given treatment which kept him alive, but in a vegetative state from which he could never emerge.<sup>13</sup>

Since the coming into force of the HRA, the case law on who can be deemed to have legal rights under British law has been reflected in the courts' decisions on personhood for the purposes of the possession of the Convention rights. Thus, relying on the common law, in relation to the status of life before birth, the courts have held human embryos and fetuses to be incapable of possessing a right to life under Article 2 because they could not be deemed to be 'persons.'<sup>14</sup>

Similarly, the position adopted in *Bland* has been repeated in relation to the Convention rights. In that case Lord Goff had noted that the common law principle of the sanctity of life applied by the court was recognised by Article 2 of the Convention.<sup>15</sup> It was thus unsurprising when, in a case concerning the continued treatment of a patient in a PVS, the High Court applying *Bland* held that as the patient was still medically alive she was a person for the purposes of the possession of rights under Article 2.<sup>16</sup> Consciously consistent with *Bland*, Dame Elizabeth Butler-Sloss P. in *NHS Trust A v M* also held the non-absolute nature of the positive obligations imposed by Article 2 meant that the state was, however, not required by her right to keep her alive.<sup>17</sup>

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<sup>12</sup> Ibid, 859

<sup>13</sup> Ibid, 859 & 889

<sup>14</sup> Evans (n.1), [175], [178] & [181], *Evans v Amicus Healthcare Ltd and Others* [2004] EWCA Civ 727, [106]-[107] and Mason (n.4), 101

<sup>15</sup> *Bland* (n.9), 864

<sup>16</sup> *NHS Trust A v M* [2001] Fam 348, 356

<sup>17</sup> Ibid, 359-360

It is thus clear that, from the British perspective, the nature of the beings that can be deemed to fall within the terms ‘everyone’, ‘no-one’ or ‘person’, for the purposes of the possession of the Convention rights, is grounded in domestic common law.

Although it is clear from the case law that being born and medically alive is the minimum required for a human to be deemed capable of the possession of Convention rights, and that for Article 2 being human and alive is all that is required to make it relevant, the relevance of other rights to a given case can depend on the presence of other characteristics. Thus Butler-Sloss P. held that Article 3 was not applicable to the removal of nutrition and hydration from a patient in a PVS.<sup>18</sup> Although recognising that they are persons under the Convention,<sup>19</sup> Butler-Sloss P. based this conclusion on the grounds that ‘[A]rticle 3 requires the victim to be aware of the inhuman and degrading treatment which he or she is experiencing or at least to be in a state of physical or mental suffering.’<sup>20</sup> This decision at first appears inconsistent with the above described decision in *Herczegfalvy*, which held that a person’s Article 3 rights could be infringed by physical restraint, even though they were not aware of the restraint through unconsciousness.<sup>21</sup> Munby J. (as he was then), in his admittedly over-wide ranging judgement<sup>22</sup> in *R (Burke) v GMC* also argued that Butler-Sloss was wrong in this conclusion because, in the perception of others the patient’s dignity has been infringed, and therefore Article 3 should have been deemed applicable to the unconscious patient.<sup>23</sup>

It is, however, submitted that a more coherent reading and justification for these two decisions is found by a focus on the reality of the interference. In *Herczegfalvy* there was

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<sup>18</sup> Ibid, 362

<sup>19</sup> Ibid, 356

<sup>20</sup> Ibid, 363

<sup>21</sup> Above p.68-69

<sup>22</sup> *R (Burke) v GMC* [2005] EWCA Civ 1003, [19]-[21]

<sup>23</sup> *R (Burke) v GMC* [2004] EWHC 1879 (Admin), [144]-[146]

actual imposition of physical restraints, in *NHS A* there was no actual interference because the PVS claimant did not have the mental capacity to experience the suffering as a result of the withdrawal of treatment, thus her right to live a life free from suffering that would be caused by the withdrawal of food and water could not be effected, and Article 3 could not apply. Although the ECtHR's judgement holds that a person need not be aware of the interference, such interference must actually occur for the Convention rights to be applicable. Thus, a distinction is maintained between the characteristics necessary to be capable of possessing the Convention rights at all, and the further factual characteristics necessary to make the application of the protection of a right relevant to a particular person and their circumstances.

### *The Substantive Nature of Rights as Imposing Positive and Negative Obligations*

The approach of the United Kingdom courts to the question of the nature of the obligations that the possession of the Convention rights can give rise to, although to some extent involving regard to domestic considerations, has been heavily shaped by the ECtHR's case law. This is, to some extent, unsurprising given that the incorporated Convention rights were a form of norm with which there were few clear analogies in domestic law.<sup>24</sup> As a consequence, it was to be expected that the domestic courts would look to the ECtHR's case law for guidance on the substantive nature of these new rights and their consequent duties, and reasonable for the HRA to require that they do so.<sup>25</sup>

### *The Reception of Positive and Negative Obligations*

Following the incorporation of many of the Convention rights, the British courts have accepted that these rights give rise to both positive and negative obligations which control the

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<sup>24</sup> HC Deb 16 February 1998, vol.306 col.767

<sup>25</sup> s.2(1)(a) HRA

manner in which a person should be treated.<sup>26</sup> Baroness Hale has informatively distinguished the former as concerning a duty to act<sup>27</sup> to give protection to a person<sup>28</sup> and the latter as concerning actions which ought not to have been done.<sup>29</sup>

The presence of positive obligations in British law under the HRA is a significant departure from the previous position. Prior to the enactment of the Act, the common law distinguished between harm caused by actions and harm caused by omissions, with a general rule that there was no positive obligation to act where a failure to do so would cause harm.<sup>30</sup> Similarly, British law has seen the proactive provision of welfare benefits as a matter of politics rather than legal right.<sup>31</sup>

As noted previously,<sup>32</sup> many of the Convention rights are expressly stated in negative terms.<sup>33</sup> A smaller number explicitly impose positive obligations.<sup>34</sup> However, in applying the HRA the British courts have recognised that it is possible and can be necessary to interpret rights phrased in a negative manner, as imposing both negative and positive obligations.<sup>35</sup> This does not undermine the substantive differences in the nature of positive or negative obligations.<sup>36</sup> It merely entails that the positive rights and positive obligations under the Convention are not

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<sup>26</sup> *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66, [77]

<sup>27</sup> *Re E (A Child)* [2008] UKHL 66, [10]

<sup>28</sup> *Limbuella* (n.26), [77]

<sup>29</sup> *Re E* (n.27), [10]

<sup>30</sup> Eg. in negligence: *Smith v Littlewoods* [1987] AC 241, 271, in criminal law: *R v Miller* [1982] QB 532, 539, See further C. McIvor, 'The Positive Duty of the Police to Protect Life' (2008) 24(1) *P.N.* 27, 27

<sup>31</sup> Eg. *R v Secretary of State for Education and Employment ex p. Begbie* [2000] 1 WLR 1115, 1125-1126, see further S. Fredman, 'Human Rights Transformed: Positive Duties and Positive Rights' [2006] *P.L.* 498, 498,

<sup>32</sup> Above p.70

<sup>33</sup> Eg. Article 2 and 3

<sup>34</sup> Eg. Article 6(3)(c) and Articles 1 and 2 of Protocol 1, see also K. Starmer, Positive Obligations Under the Convention in J. Jowell and J. Cooper (eds), *Understanding Human Rights Principles* (Hart 2001), 139 and R. Singh, 'Using Positive Obligations in Enforcing Convention Rights' (2008) 13(2) *J.R.* 94, 94

<sup>35</sup> *Limbuella* (n.26), [91]

<sup>36</sup> Cf. *Ibid.*, [92], disapproved in *Re E* (n.27), [10], see also Fredman (n.31), 500

limited to those it explicitly states, and can arise directly or indirectly from the negative prohibitions in which most Convention rights are stated.<sup>37</sup>

### *The Foundations of the Existence of Positive Obligations*

The case law of the British courts on whether a Convention right imposes a positive obligation on the state, in addition to the clearly stated negative obligations of non-interference, ‘is not yet clearly settled or well developed.’<sup>38</sup> This lack of a settled approach applied in all cases is unsurprising. The British courts have to a large extent relied on ECtHR judgements to justify their imposition of positive obligations and the ECtHR itself has not developed a ‘general theory’<sup>39</sup> of positive obligations.

In *Van Colle and another v Chief Constable of the Hertfordshire Police* it was held that the Article 2 injunction to refrain from depriving people of life could be interpreted as giving rise to an accompanying a positive obligation on the state to protect individuals from being deprived of their life by the actions of others.<sup>40</sup> This obligation was deemed to be borne by the police because they were a public authority for the purposes of s.6 of the HRA and thus must act in accordance with the Convention rights.<sup>41</sup> However, the Lords accepted the existence of this positive obligation under Article 2 by simply applying the ECtHR’s ruling in *Osman v United Kingdom*<sup>42</sup> that such an obligation existed without seeking to state

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<sup>37</sup> Below p.120-121

<sup>38</sup> J. Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell 2008), 257

<sup>39</sup> Starmer (n.34), 139

<sup>40</sup> *Van Colle and another v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [28] & [65] and Singh (n.34), 96

<sup>41</sup> *Van Colle (n.40)* (n.40), [65]

<sup>42</sup> *Osman v United Kingdom* (2000) 29 EHRR 245, above p.75



theoretical reasons for its existence.<sup>43</sup> A similarly simple approach has been taken in other Article 2 cases.<sup>44</sup>

Reliance on ECtHR jurisprudence is unsurprising given that the United Kingdom courts are required by the HRA to take account of ECtHR judgements when making decisions under the Act,<sup>45</sup> an obligation the courts have interpreted as requiring them to conform to ECtHR judgements except in exceptional cases.<sup>46</sup> In some other cases, however, the British courts have sought to find more substantive justifications for the existence of positive obligations.

Some regard has been had to the principle of effectiveness applied by the ECtHR in the context of positive obligations.<sup>47</sup> Thus, Lord Woolf has noted in the context of Article 8 that, in order to ensure effective respect<sup>48</sup> for family life, the Convention 'is capable of imposing on a state a positive obligation to provide support.'<sup>49</sup> Whereas the ECtHR's use of the principle of effectiveness is in part based on the Article 13 right to an effective remedy,<sup>50</sup> this right was not incorporated by the HRA, the creation of the Act and the remedies provided for by s.8 having been argued to satisfy the requirements of this Article.<sup>51</sup> Thus, Lord Woolf had regard to the use of the principle of effectiveness in ECtHR case law to justify its domestic invocation.<sup>52</sup>

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<sup>43</sup> *Van Colle (n.40)* (n.40), [28]

<sup>44</sup> *Re Officer L* [2007] UKHL 36, [19] and *Re E* (n.27), [44] & [48]

<sup>45</sup> s.2(1) HRA

<sup>46</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [20], see further below p.218-223

<sup>47</sup> Above p.72-74

<sup>48</sup> *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [15]

<sup>49</sup> *Ibid*, [43]

<sup>50</sup> Above at p.72

<sup>51</sup> HL Deb 18 November 1997, vol.583, col.475, *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [14], *Re S* [2002] UKHL 10, [61] and F. Klug, 'The Human Rights Act 1998, Pepper v. Hart and all that' [1999] *P.L.* 246, 249

<sup>52</sup> *Anufrijeva* (n.48), [15]

In *R (Limbuella) v Secretary of State for the HD* the House of Lords held that Article 3 imposed no ‘general public duty to house the homeless or provide for the destitute’.<sup>53</sup> However, in spite of this the court held that, by enacting legislation that rendered asylum seekers destitute, the state had breached its *negative* obligation under Article 3 not to subject people to degrading treatment,<sup>54</sup> and consequently had a positive obligation to rectify this situation by providing them with welfare assistance.<sup>55</sup> The Lords justified the imposition of this obligation on the reality that the state was responsible, albeit indirectly,<sup>56</sup> for the situation which infringed Article 3’s negative prohibition and therefore the state had a positive obligation to remedy the situation.<sup>57</sup>

The decision in *Limbuella* also gives guidance on the grounds on which the courts find it acceptable to refuse to impose a positive obligation. Lord Scott based his decision that there is ‘no Convention right to be provided by the state with a minimum standard of living’<sup>58</sup> upon the view that the question of what constituted a minimum level of social support was a matter for the legislature.<sup>59</sup> A similar approach is also apparent in the ECtHR’s judgement, applied in *Ghaidan v Godin-Mendoza*,<sup>60</sup> that there was no positive obligation to be provided with a home because this was a political rather than a judicial decision.<sup>61</sup> The courts’ imposition of this limitation on positive obligations is consistent with the recognition of the post-WWII position that the provision of welfare was a matter of public policy rather than legal right.<sup>62</sup> This in turn reflects their interpretation of Montesquieu’s idea of the separation of powers,<sup>63</sup>

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<sup>53</sup> *Limbuella* (n.26), [7]

<sup>54</sup> *Ibid*, [6]-[7] & [56]-[57]

<sup>55</sup> *Ibid*, [8] & [46]

<sup>56</sup> Beatson (n.38), 258, citing *Ibid*, [92]

<sup>57</sup> Beatson (n.38), 258 and Fredman (n.31), 500, see *Limbuella* (n.26), [46]-[48], [68], [77] and [92]

<sup>58</sup> *Limbuella* (n.26), [66]

<sup>59</sup> *Ibid*

<sup>60</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [6]

<sup>61</sup> *Chapman v United Kingdom* (2001) 33 EHRR 399, [99]

<sup>62</sup> W. Beverage, ‘Social Insurance and Allied Services’ (Cmd 6404, 1942), 2 & 6-7 and Fredman (n.31), 498

<sup>63</sup> J. King ‘Institutional Approaches to Judicial Restraint’ (2008) 28 (3) *O.J.L.S.* 409, 410, 414-415

drawing a distinction ‘between law and politics, implying...that one is for judges and the other for Parliament and the executive.’<sup>64</sup>

The Article 14 right to equality of enjoyment of Convention rights has been used by the ECtHR as a basis for finding positive obligations within the other Convention rights.<sup>65</sup> It is thus unsurprising that it has also been used in this way by the British courts.<sup>66</sup> In *Ghaidan* it was held that, although it is not a freestanding right,<sup>67</sup> equality ‘can turn negative duties into positive duties.’<sup>68</sup> The Lords held that if the state grants a right which falls within the ambit of one of the substantive Convention rights to one group,<sup>69</sup> then it ‘it must not withhold it from others in the same or an analogous situation. It must grant that right equally, unless the difference in treatment can be objectively justified.’<sup>70</sup> Thus, in *Ghaidan* the court noted that Article 8 did not impose a duty on the state to supply everyone with a home nor give everyone the right to succeed to a tenancy.<sup>71</sup> However, the lack of a rational justification<sup>72</sup> for distinguishing between heterosexual and homosexual couples led the Lords to hold that that the distinction made by the law on succession to tenancies on the basis of sexual orientation violated Article 14 when taken together with Article 8.<sup>73</sup>

The nature of the positive obligation imposed by Article 14 was precisely encapsulated by Lord Nicholls as requiring that the state treat like cases alike.<sup>74</sup> However, although the right to equality creates considerable scope for the development of positive obligations,

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<sup>64</sup> Ibid, 415

<sup>65</sup> Fredman (n.31), 515, above p.72-73

<sup>66</sup> Fredman (n.31), 516

<sup>67</sup> *Ghaidan* (n.60), [10]

<sup>68</sup> S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008), 68

<sup>69</sup> *Ghaidan* (n.60), [10]

<sup>70</sup> Ibid, [6] & [135]

<sup>71</sup> Ibid

<sup>72</sup> Ibid, [17]

<sup>73</sup> Ibid, [24]

<sup>74</sup> Ibid, [9], see also [131] per Baroness Hale

particularly in relation to welfare measures which are normally targeted at one group,<sup>75</sup> its contingent and procedural nature limits its utility as a basis for positive obligations<sup>76</sup>.

### *Determining the Extent of Positive Obligations*

In deciding whether an infringement of a positive obligation amounts to an unlawful violation of the Convention rights the British courts have applied proportionality analysis.<sup>77</sup> This analysis has been frequently phrased by the courts in terms of the reasonableness of the state's attempted compliance with the positive obligation in the circumstances of the case.<sup>78</sup> This was a consequence the courts application<sup>79</sup> of the ECtHR's statement in *Osman* that the state must do 'all that could be reasonably expected'<sup>80</sup> of it to fulfil its positive obligation. The courts, however, have made clear that it is a proportionality test that must be satisfied to determine whether the state has satisfied its positive obligations rather than the less intense pre-HRA *Wednesbury*<sup>81</sup> reasonableness standard.<sup>82</sup> This proportionality inquiry involves 'consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available.'<sup>83</sup>

It is apparent that, in contrast to the determination of whether there has been a violation of rights which impose a negative prohibition,<sup>84</sup> the courts have applied proportionality analysis in relation to positive obligations imposed by rights which in their negative manifestation

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<sup>75</sup> Fredman (n.31), 516

<sup>76</sup> Ibid, 519

<sup>77</sup> Beatson (n.38), 257, below p.126-131

<sup>78</sup> *Van Colle* (n.40) (n.40), [30], *Re Officer L* (n.44), [21], *Re E* (n.27), [48] and *Anufrijeva* (n.48), [115], see also Beatson (n.38), 259

<sup>79</sup> *Re Officer L* (n.44), [21], *Re E* (n.27), [45] & [48] and G. Anthony, 'Positive Obligations and Policing in the House of Lords' (2009) 4 *E.H.R.L.R.* 538, 544

<sup>80</sup> *Osman v United Kingdom* (2000) 29 EHRR 245, [116]

<sup>81</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223. 229 & 230

<sup>82</sup> *Re E* (n.27), [13], [51-52] & [54] and *Re Officer L* (n.44), [21]

<sup>83</sup> *Re E* (n.27), [48], see also *Re Officer L* (n.44), [21]

<sup>84</sup> *Re E* (n.27), [45]

allow no scope for proportionality analysis such as Article 3.<sup>85</sup> Although the courts have engaged in a proportionality analysis to determine whether the scope of an unqualified right is engaged by the facts,<sup>86</sup> outside of the contexts of the review of derogations<sup>87</sup> and positive obligations, proportionality is not applied to determine whether the infringement of an unqualified Convention right is justified. This broader application of proportionality is a reflection of the separation of powers concerns discussed above. The courts have recognised that that they do not have the necessary expertise that the executive or legislature have in order to make decisions on positive ‘duties with complex polycentric implications.’<sup>88</sup> This is apparent in Lord Carswell’s recognition of the resource implications of providing police protection<sup>89</sup> and his preparedness to show deference in the assessment of proportionality because of the special expertise of the police in the area in question.<sup>90</sup>

This approach, as well as the application of proportionality by the ECtHR in the context of positive obligations described above,<sup>91</sup> is in line with Lon Fuller’s characterisation of polycentric decisions as those which give rise to a web of repercussions for matters and parties beyond those that are the immediate subject of a decision.<sup>92</sup> That the courts consider the proportionality of the interference with the positive manifestation of a Convention right, is consistent with his argument that decisions imposing positive obligations have more polycentric implications than negative obligations, imposed by a right which only concerns a

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<sup>85</sup> *Limbuella* (n.26), [47]-[48] and *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [78], Eg. *Re Officer L* (n.44), [21]

<sup>86</sup> A. Kavanagh, *Constitutional Review Under the Human Rights Act* (Cambridge University Press 2009), 264-265, eg. *R v A (No. 2)* [2001] UKHL 25, [38] and *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158, [50]-[51]

<sup>87</sup> Eg. *A v Secretary of State for the Home Department (Belmarsh)* [2004] UKHL 56

<sup>88</sup> Fredman (n.31), 512

<sup>89</sup> *Re Officer L* (n.44), [21]

<sup>90</sup> *Re E* (n.27), [58]-[59]

<sup>91</sup> Above p.77-78

<sup>92</sup> L. Fuller, ‘The Forms and Limits of Adjudication’ (1978) 92(2) *Harv.L.R.* 353, 394-395 & 397

specific duty between two parties.<sup>93</sup> It is submitted that, in applying the principle of proportionality in the determination of whether the failure to take a particular action violates a state's positive obligations, the courts can be seen to be considering whether the right at issue is of such a weight, and the interference with it is of such severity, so as to bring the requiring of the particular measure within their adjudicative purview by eclipsing the polycentric ramifications for other parties within society.<sup>94</sup> To be justified in making such a finding of an infringement and upholding a positive obligation they must find that the nature of the particular obligation at issue outweighs the potential polycentric ramifications of such a judgement on questions such as the allocation of resources.

It is thus apparent that the separation of powers plays a key role in the recognition and enforcement of positive obligations by the British courts under the HRA. Although the courts have developed several justifications in which to base positive obligations, influenced by ECtHR jurisprudence, the law in this area is still very much influenced by the traditional post-WWII conception of the state's role in making positive provision for its people. The domestic approach is thus quite legalistic and does not have regard to a more fundamental basis for recognising the existence of positive obligations in the underlying basis of the rights.

### ***The Balancing of Rights***

The conflict of rights was noted above to be an inevitable consequence of a conception of rights which entails their possession by more than one person.<sup>95</sup> Under the HRA the United Kingdom courts have begun to state a coherent structure for resolving the conflicts between the exercise and protection of the Convention rights.

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<sup>93</sup> Ibid, 404-405

<sup>94</sup> Ibid, 398 & 400

<sup>95</sup> J. Locke, *Two Treatises of Government* (J.M. Dent and Sons 1924), 118-120 & 159

### *Areas of Balancing*

Given that the rights within the HRA are taken from the ECHR,<sup>96</sup> the balancing exercises they require the United Kingdom courts to engage in are very similar to those which the ECtHR conducts.<sup>97</sup> The qualified rights found in Articles 8 – 11, and the right to a public hearing under Article 6, require the courts to apply a proportionality analysis<sup>98</sup> to balance conflicting rights and general interests.<sup>99</sup> Similarly, the courts will apply a proportionality analysis to assess the validity of derogations which can be made in relation to certain rights under s.14 HRA,<sup>100</sup> and have the effect in a time of public emergency of exempting a law which would otherwise be an interference with a Convention right from having to comply with the Convention.<sup>101</sup> The courts assess the validity of derogations under Article 15 by balancing the right infringed against the derogation to ensure the derogation is ‘strictly required by the exigencies of the situation’.<sup>102</sup>

The main difference in the balancing that the ECtHR and the United Kingdom courts are required to conduct is that the domestic courts are more frequently and explicitly required to balance the rights of one individual against those of another individual. Although it has been noted above that the ECtHR does indirectly uphold the rights of individuals against infringement by other individuals in the context of positive obligations, it will be argued below that the fact that the domestic courts are themselves bound to comply with the Convention rights in cases between individuals means that, unlike the ECtHR, the United

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<sup>96</sup> Preamble, s.1(3) and Schedule 1 HRA 1998

<sup>97</sup> Above p.88 and below p.133-134

<sup>98</sup> Beatson (n.38), 224

<sup>99</sup> Below p.137-143

<sup>100</sup> Article 15(2) states that there can be no derogation from Article 2 except in respect of lawful acts of war or Articles 3, 4(1) or 7. See also Beatson (n.38), 53

<sup>101</sup> Beatson (n.38), 55

<sup>102</sup> Article 15(1) ECHR, eg. *A v Secretary of State for the Home Department (Belmarsh)* [2004] UKHL 56, esp. [30]

Kingdom courts must resolve cases concerning explicit allegations that a party's Convention rights have been violated by those of another individual.<sup>103</sup> The significance of this distinction is, however, more procedural than substantive because, as argued by this author in the preceding chapter,<sup>104</sup> the general interests against which the courts must balance rights can be seen as being the embodiment of the rights of individuals that they protect, a perspective for which, it is submitted, support can be found within the domestic case law. Lord Nicholls in *Campbell v MGN*<sup>105</sup> seemed to recognise that the conflicting rights of Article 8 and 10 that were at issue between an individual and a private company under the common law of confidentiality in this case, would also be relevant where infringement in question committed by a public authority.<sup>106</sup> Similarly, in the case concerning the indefinite detention of terrorist suspects, Lord Hope noted that the right to life could underlie a general interest of protecting national security.<sup>107</sup> His Lordship also appeared to go on to acknowledge that the counter majoritarian role of human rights required the court to recognise, both the rights of a minority effected by a measure, as well as those of the majority on whose behalf the measure was created.<sup>108</sup>

### *Proportionality*

The tool used by the United Kingdom courts to conduct the balancing required of them, to determine whether an interference with a right is justified, is the proportionality test.<sup>109</sup> This test is used for the same purpose in Strasbourg although the United Kingdom courts have drawn their conception of it from African and Canadian jurisprudence. The cornerstone<sup>110</sup> of

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<sup>103</sup> Below p.156-160

<sup>104</sup> Above p.80-81

<sup>105</sup> *Campbell v MGN* [2004] UKHL 22

<sup>106</sup> *Campbell* (n.105), [17]

<sup>107</sup> *A (Belmarsh)* (n.102), [107]

<sup>108</sup> *Ibid*, [108]

<sup>109</sup> J. Rivers, 'Proportionality and variable intensity of review' (2006) 65(1) *C.L.J.* 174, 174 & 190

<sup>110</sup> T. Hickman. 'The Substance and Structure of Proportionality' [2008] *P.L.* 694, 701



the test applied by the United Kingdom courts was set out by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others*.<sup>111</sup> In this case the court adopted the three part test stated by the Zimbabwean Chief Justice which requires the court, in determining whether an infringement of a right is justified by the pursuit of a legitimate objective, to consider:

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.<sup>112</sup>

Lord Clyde described the third element of the test as the requirement of proportionality.<sup>113</sup> This test was subsequently applied to the context of Convention rights adjudication in *R (Daly) v Secretary of State for the Home Department*.<sup>114</sup>

The first element requires the court to consider whether there is a legitimate objective which could be called upon to justify the impugned norm or action.<sup>115</sup> The second considers whether the impugned ‘decision, rule or policy...is capable of pursuing the legitimate aim identified’.<sup>116</sup> However, the first two elements being questions of fact,<sup>117</sup> the United Kingdom courts focused their adjudication upon the necessity element of the third part<sup>118</sup> which requires the judiciary to engage in a balancing exercise.<sup>119</sup>

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<sup>111</sup> *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others* [1999] 1 AC 69, 80, see also Beatson (n.38), 201

<sup>112</sup> *Nyambirai v National Social Security Authority* [1996] 1 LRC 64, 75

<sup>113</sup> *de Freitas* (n.111), 81

<sup>114</sup> *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [27], see also Hickman (n.110), 696 and Kavanagh (n.86), 234

<sup>115</sup> Rivers (n.109), 196 and Kavanagh (n.86), 235

<sup>116</sup> Rivers (n.109), 196 and Kavanagh (n.86), 235

<sup>117</sup> Beatson (n.38), 226-228

<sup>118</sup> Rivers (n.109), 190 and Hickman (n.110), 701

<sup>119</sup> Kavanagh (n.86), 236

The courts have interpreted the test of the ‘necessity’ of an impugned ‘means’ in a number of different ways, which impose different conditions of justification.<sup>120</sup> These differing interpretations are apparent in the various judgements in the House of Lords decision of *A v Secretary of State for the Home Department*.<sup>121</sup> The majority of the Lords sought to assess whether the restriction of rights in question was the most *efficient* means of achieving the legitimate aim pursued;<sup>122</sup> finding that the restriction was disproportionate because the factual circumstances meant that it could not achieve its aim.<sup>123</sup> Lord Walker who dissented, considered the safeguards which prevented the measure interfering more greatly with the Convention and found the test to be satisfied.<sup>124</sup> However, Lord Nicholls, Lord Hope and Baroness Hale held that it was necessary to ‘compare’<sup>125</sup> the nature of the threat which formed the basis of the legitimate aim against the importance of the right at issue to determine whether the measure was justified.<sup>126</sup> The latter two Law Lords were also influenced by the efficiency arguments in reaching their decision.<sup>127</sup> It is submitted that the difference of approach within this case can be seen to be a reflection of the varying extents to which the Lords were prepared to engage in more substantive review of the actions of the other branches of government required under the HRA.<sup>128</sup> In the non-balancing efficiency approach applied by the majority, can be seen the long shadows of the pre-HRA standard of review which merely asked whether the measure was reasonable in relation to the public policy aims it pursued.<sup>129</sup>

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<sup>120</sup> Rivers (n.109), 189-190

<sup>121</sup> *A (Belmarsh)* (n.102)

<sup>122</sup> Rivers (n.109), 189

<sup>123</sup> *A (Belmarsh)* (n.102), Lord Bingham [43]-[44], Lord Scott [155] and Lord Rodger [185]-[186], [188]-[189]

<sup>124</sup> *Ibid*, [217]

<sup>125</sup> *Ibid*, Lord Hope [116]

<sup>126</sup> *Ibid*, Lord Nicholls [81], Lord Hope [119]-[120], [122] & [124] and Baroness Hale [228]

<sup>127</sup> *Ibid*, Lord Hope [124], [132-133] and Baroness Hale [230]-[231] & [236]

<sup>128</sup> Above similarly p.122-123

<sup>129</sup> *Wednesbury* (n.81), 230, eg. *A (Belmarsh)* (n.102) Lord Rodger [187]-[188]

Although in *A* the court scrutinised closely the necessity of a measure they, as well as courts in other cases, have ignored the other element of the third part of the proportionality test, the requirement that an interference be ‘no more than’<sup>130</sup> the least intrusive means necessary to pursue the legitimate aim.<sup>131</sup> The reason underlying the courts reluctance in this case to engage with the question of whether there was a threat which justified the specific measure of indefinite detention without trial, separate from the question of its efficiency in achieving its aim, can be seen to be a concern for respect for the separation of powers.<sup>132</sup> With the notable exception of Lord Hoffman,<sup>133</sup> the Lords felt that it was not their constitutional place to question the nature of the threat,<sup>134</sup> and this led them to fail to engage with the question of whether it was sufficient to justify such a measure.<sup>135</sup> Sandra Fredman, however, argues that this deference is inconsistent with the courts true role under the separation of powers or holding the other branches accountable by requiring adequate justification for their exercise of power,<sup>136</sup> a role that has been enhanced significantly by the HRA.<sup>137</sup>

Similar deference and lack of engagement with the least intrusive means test can be seen in the case of *R (Williamson) v Secretary of State for Education and Employment* where the court held that it was a matter for Parliament whether a full or partial ban on corporal punishment was the appropriate and thus justified means of achieving its aim.<sup>138</sup> Here the marginalisation of the least intrusive means consideration is clearly apparent in its omission

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<sup>130</sup> *de Freitas* (n.111), 81

<sup>131</sup> S. Fredman, ‘From Deference to Democracy: the Role of Equality under the Human Rights Act 1998’ (2006) 122 *L.Q.R.* 53, 61

<sup>132</sup> *Ibid*

<sup>133</sup> *A (Belmarsh)* (n.102), [95]-[97]

<sup>134</sup> Fredman (n.131), 63, eg. *Ibid*, [29] & [112]

<sup>135</sup> Fredman (n.131), 63

<sup>136</sup> *Ibid*, 62

<sup>137</sup> HL Deb 3 November 1997, vol.582 col.1228

<sup>138</sup> *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [50]-[51]

from Baroness Hale's description of the proportionality test to be satisfied for an infringement of freedom of religion to be justified under Article 9(2).<sup>139</sup>

The consequence of this incomplete application is that the courts will not consider the substance of whether the impingement upon the rights of those affected, justifies rejecting a measure which is efficient in achieving its aim, in favour of one which is less efficient but gives greater respect to the rights of the claimant.<sup>140</sup> *R (Williamson), A and other cases*<sup>141</sup> demonstrate that to apply only the test of necessity is to avoid the balancing of competing interests that 'is crucial to effective protection of human rights'<sup>142</sup> from the actions of the state.

Although less prevalent in *A*, the House of Lords has, however, now explicitly adopted a balancing analysis as a fourth element<sup>143</sup> of the proportionality test to be applied when deciding whether an action of the other branches of government has violated Convention rights.<sup>144</sup> In *Huang v Secretary of State for the Home Department* the House of Lords can be seen to have recognised the deficiency of the *de Freitas* test as applied by the courts, in not involving a requirement to explicitly consider the overall impact of a measure on an individual.<sup>145</sup> In recognising this, Lord Bingham went so far as to describe 'the need to balance the interests of society with those of individuals and groups' as the 'overriding requirement' to be considered in the proportionality analysis.<sup>146</sup>

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<sup>139</sup> Ibid, [79], see also Hickman (n.110), 707-708

<sup>140</sup> Hickman (n.110), 702

<sup>141</sup> Ibid, 704-705

<sup>142</sup> Ibid, 706

<sup>143</sup> Rivers (n.109), 177-178 & 200

<sup>144</sup> *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [19]

<sup>145</sup> Hickman (n.110), 711

<sup>146</sup> *Huang* (n.146), [19], see also *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 at [20]

Striking a balance was arguably part of the *de Freitas* approach of considering whether particular circumstances require a corresponding infringement of rights. However, this was applied as a non-evaluative approach; if a circumstance exists then the state may remedy it but go no further.<sup>147</sup> In contrast the *Huang* balancing involves an additional<sup>148</sup> evaluative assessment<sup>149</sup> of whether the nature or weight of the circumstance *justifies* the infringement of the right,<sup>150</sup> ‘whether overall the measure has struck a “fair balance” between competing interests.’<sup>151</sup> The distinction between the approaches was clearly recognised in the Canadian case of *R v Oakes*<sup>152</sup> whose consideration of balancing in proportionality<sup>153</sup> was influential in *Huang*.<sup>154</sup> In this case Dickson CJ. held that, even if the impugned measure was tailored to the circumstances, it could still be disproportionate if its effect on individual rights is too onerous when balanced against the actual importance of the objective it pursues and outweighs it.<sup>155</sup> Thus, the question of overall balance sits above the *de Freitas* criteria as the ultimate test of proportionality.<sup>156</sup> From a rights protection perspective, this development of the fourth element of the domestic courts proportionality analysis is to be welcomed as increasing the intensity of review from that previously applied under the three part test. In adopting this fourth element the courts can also be seen to be showing an increased willingness to accept a stronger role in the scrutiny of the Convention compliance of the other branches of government.

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<sup>147</sup> Beatson (n.38), 204

<sup>148</sup> Hickman (n.110), 711, noting that although there is some uncertainty as to whether the balancing in *Huang* modifies the third part of the *de Freitas* test or is an additional fourth step. Hickman ultimately agrees that the *Huang* judgement appear to favour the latter conception and the Canadian approach supports this.

<sup>149</sup> Rivers (n.109), 200

<sup>150</sup> Beatson (n.38), 204-205

<sup>151</sup> Hickman (n.110), 711

<sup>152</sup> *R v Oakes* [1986] 1 SCR 103

<sup>153</sup> *Ibid*, [69]-[70]

<sup>154</sup> *Huang* (n.146), [19]

<sup>155</sup> *Oakes* (n.152), [71], see also Beatson (n.38), 204

<sup>156</sup> Beatson (n.38), 213-214 and Hickman (n.110), 711

### *Practical Proportionality*

In applying the proportionality test to the facts of a case, the weight of justification which will determine whether or not the impugned measure violates the Convention rights will vary with the context of the case.<sup>157</sup> At a general level it is apparent that ‘the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required’.<sup>158</sup> Similarly, it is clear that greater weight will be given to rights which the courts deem to be of greater importance amongst the pantheon of rights.<sup>159</sup> Thus, in the pre-HRA case of *ex p Turgut* the court felt ‘most anxious scrutiny’<sup>160</sup> must be applied to determining the *Wednesbury*<sup>161</sup> reasonableness of the infringement of Article 3 because it was ‘both absolute [as opposed to qualified] and fundamental’.<sup>162</sup> Although the standards of *Wednesbury*<sup>163</sup> and the most anxious scrutiny test have subsequently been held not to equate to the intense form of review of whether a decision is justified<sup>164</sup> required by the proportionality test,<sup>165</sup> and the Universal Declaration upon which the Convention is based describes all human rights as fundamental,<sup>166</sup> this case is an early example of the domestic courts considering the weight that should be attributed to Convention rights in assessing the acceptability of their infringement. A similar recognition can be seen in the cases following the commencement of the HRA including *A*, where the individual liberty protected by Article 5 was evaluated as being ‘one of the most fundamental of human rights.’<sup>167</sup>

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<sup>157</sup> Beatson (n.38), 212 and *Daly* (n.114), [28]

<sup>158</sup> Beatson (n.38), 223, eg. *A (Belmarsh)* (n.102), [178]

<sup>159</sup> Beatson (n.38), 212 & 223

<sup>160</sup> *R v Secretary of State for the Home Department Ex p Turgut* [2000] HRLR 337, 344

<sup>161</sup> *Wednesbury* (n.81), 230

<sup>162</sup> *Ex p Turgut* (n.160), 349

<sup>163</sup> *Daly* (n.114), [26]-[28], see generally Hickman (n.110), 695

<sup>164</sup> *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, [30]

<sup>165</sup> *Smith and Grady v United Kingdom* (2000) 29 EHRR 493, [132] & [137]-[138] and *HL v United Kingdom* (2005) 40 EHRR 32, [138]-[139], see also Kavanagh (n.86), 254-255

<sup>166</sup> UDHR Preamble, [5]

<sup>167</sup> *A (Belmarsh)* (n.102), [81]

### *Balancing Rights Against Rights*

In cases where there is an explicit conflict between the qualified rights of different private parties, the proportionality test applies to require that the courts determine which right is of the greater weight and should be vindicated. However, although in such cases the same four part proportionality exercise is applied, the courts have had to tailor its application to recognise that they are balancing the rights of two parties, not a single party's right against an infringing general interest.<sup>168</sup>

The leading judgements on this question are the judgements of the House of Lords in *Campbell v MGN* and *Re S*.<sup>169</sup> In *Campbell*, a case involving the conflict between a model's right to respect for her private life and a newspaper's freedom of expression, the House of Lords upheld the recognition by Hale LJ. (as she was then) in the Court of Appeal in *Re S*<sup>170</sup> that it was necessary to apply a proportionality test to determine the extent to which a parties' right had to be qualified to uphold that of the other.<sup>171</sup> Baroness Hale's approach was also upheld in the House of Lords on appeal in *Re S* in its assessment of the balance between a child's Article 8 rights to anonymity and the press's Article 10 rights to report the details of a trial.<sup>172</sup> In both cases the Lords recognised that, unlike cases where only one right is ostensibly at issue,<sup>173</sup> as both rights could be qualified,<sup>174</sup> it was necessary to apply the proportionality test so as to conduct what has since been labelled a 'parallel analysis'<sup>175</sup> of the competing rights.<sup>176</sup>

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<sup>168</sup> *Campbell* (n.105), [20], [103]-[104] & [126]

<sup>169</sup> *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47

<sup>170</sup> *Re S (A Child) (Identification: Restrictions on Publication)* [2003] EWCA Civ 963

<sup>171</sup> *Campbell* (n.105), [55] and H. Fenwick, 'Judicial Reasoning in Clashing Rights Cases' in H. Fenwick and others (eds) *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press 2007), 282-283

<sup>172</sup> *Re S* (n.169), [12]-[13] & [17]

<sup>173</sup> Cf. the interpretation of general interests argued for above p.80-81

<sup>174</sup> *Campbell* (n.105), [105]

<sup>175</sup> *Re W (Children) (Identification: Restrictions on Publication)* [2005] EWHC 1564 (Fam), [53]

<sup>176</sup> *Campbell* (n.105), [140]-[141] and *Fenwick* (n.171), 283-284

The Court of Appeal's approach<sup>177</sup> requires the courts to consider independently the proportionality of interfering with each of the rights at issue, by considering the weight of each right and the competing justifications for infringing each right.<sup>178</sup> Following this, 'the proportionality of interfering with one [right] has to be balanced against the proportionality of restricting the other',<sup>179</sup> to determine which should have priority in an 'ultimate balancing test'.<sup>180</sup> In *Campbell* this involved a very detailed factual analysis of the importance of the two rights,<sup>181</sup> and the gravity of the interference with each right of allowing or prohibiting publication.<sup>182</sup> Based upon its conclusions answers to these questions, the Court determined where the balance should be struck between the protection required by both rights and decided what information could be disclosed.<sup>183</sup> In *Re S* the House of Lords closely considered the relative importance of the nature of the Article 8 interest at issue,<sup>184</sup> the extent of and justification for the potential interference with the child's Article 8 rights,<sup>185</sup> the court had regard to the underlying principle of democracy in assigning weight to the competing Article 10 right.<sup>186</sup> Ultimately it was consideration of these values that lead Lord Steyn to find that the press's Article 10 rights outweighed the child's right.<sup>187</sup> From this, Helen Fenwick argues that a starting point in the parallel analysis 'is to examine the extent to which the values accepted as underlying either article are at stake in any particular instance,'<sup>188</sup> if

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<sup>177</sup> *Re S* (n.170), [52]-[53], [60], [64] & [110] and *Campbell* (n.105), [141] (Baroness Hale dissenting on the facts but with the other members of the court of appeal adopting her analysis of the law), see generally Fenwick (n.171), 280-281

<sup>178</sup> *Re S* (n.170), [52], [53] (quoting Lord Woolf CJ. in *A v B plc*. [2002] EWCA Civ 337, [6], [56] & [58], *Campbell* (n.105), [141] and *Re S* (n.169), [17]

<sup>179</sup> *Campbell* (n.105), [140]

<sup>180</sup> *Re S* (n.170), [60], *Re S* (n.169), [17] and *Re W* (n.175), [53] and see generally Fenwick (n.171), 286

<sup>181</sup> *Campbell* (n.105), [81], [83], [107], [143-145], [147], [149] & [151]

<sup>182</sup> *Ibid*, [81]-[84], [117-120], [152] & [154]

<sup>183</sup> *Campbell* (n.105), [121], [124] & [152]

<sup>184</sup> *Re S* (n.169), [27]

<sup>185</sup> *Ibid*, [25]-[26]

<sup>186</sup> *Ibid*, [28]-[31]

<sup>187</sup> *Ibid*, [37]-[38], noted in *Re W (Children) (Identification: Restrictions on Publication)* [2005] EWHC 1564 (Fam), [53] and by Fenwick (n.171), 286

<sup>188</sup> Fenwick (n.171), 294



they are comparatively less at stake, being qualitatively less relevant to the facts, then it is more likely an interference with that right is to be justified.<sup>189</sup>

Behind the courts' approach of parallel analysis and ultimate balancing is a recognition that neither of the competing rights at issue has presumptive priority over the other.<sup>190</sup> This approach under which the weight of neither right is taken to be predetermined stated by Hale LJ. was upheld in *Campbell*,<sup>191</sup> and it is because of this position that it is necessary to conduct the analysis and balancing described in *Re S*, to determine which on the facts of a case has greater weight.<sup>192</sup> This approach was held in both cases also to entail that s.12 HRA, which requires particular regard to be had to Article 10 in cases where they are considering granting injunctions which might restrain that right, did not give pre-eminence to one right over the other within the balancing exercise conducted by the court.<sup>193</sup>

In relation to unqualified rights the United Kingdom courts have generally held that a proportionality analysis is not applicable because the form of the rights do not allow for it.<sup>194</sup> Two exceptions to this rule are applied by the courts. Firstly, positive obligations imposed on the state by an unqualified right have been held not to be unqualified and absolute on the grounds of the respect for the separation of powers described above.<sup>195</sup> Secondly, as noted above, a proportionality test will be applied in relation to unqualified rights when the courts are determining whether a derogation concerning such a right is justified and therefore valid.<sup>196</sup>

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<sup>189</sup> Ibid

<sup>190</sup> Ibid, 260 & 280

<sup>191</sup> *Re S* (n.170), [52] and *Campbell* (n.105), [55] and [138]

<sup>192</sup> *Re S* (n.170), [60] and *Campbell* (n.105), [140]-[141]

<sup>193</sup> *Re S* (n.170), [52] and *Campbell* (n.105), [111], see generally Fenwick (n.171), 280-283

<sup>194</sup> *Limbuela* (n.26), [55]

<sup>195</sup> *Limbuela* (n.26), [55], see further above p.123-124

<sup>196</sup> Above p.123 & 128

The key case concerning a potential conflict between unqualified rights was decided ten days before the coming into force of the HRA. In *Re A* the Court of Appeal had to decide whether to permit the separation of conjoined twins.<sup>197</sup> This was necessary to maximise the chance that the stronger twin would survive, if left un-separated both would die within months, but separating them would inevitably result in the death of the other twin within minutes. Thus Ward LJ. held there was a clash between the common law rights to life of both children,<sup>198</sup> and recognised the need to balance the rights to life of both children to decide the case, but conceded that both must on their face ‘weigh equally.’<sup>199</sup> Ward LJ. thus had regard to the sanctity of life principle, as underlying the right to life, to resolve the case by guiding the balancing of the competing rights and on this basis held that the separation should be allowed as the lesser of two evils, for it would ensure the survival of one of the twins rather than allowing both to ultimately die.<sup>200</sup>

Although it was argued in *Re A* that Article 2 would apply to both children and that the same conclusion would have been reached under it,<sup>201</sup> it is uncertain on what basis the United Kingdom courts would now decide such a case. They might take Ward LJ.’s approach of declining to apply proportionality and conduct a balancing exercise based on an underlying principle. Alternately the *Limbuella* decision would suggest that proportionality could be applied if one of the competing rights imposed a positive obligation. However, such an approach alone would be a one-sided proportionality analysis and therefore could only ever result in a stalemate or the positive obligation being overridden which in *Re A* would have resulted in the death of both twins, the positive obligation being to keep alive the twin who

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<sup>197</sup> *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147

<sup>198</sup> *Ibid*, 201-202 & 204

<sup>199</sup> *Ibid*, 203

<sup>200</sup> *Ibid*

<sup>201</sup> *Ibid*, 204 & 238

could live independently.<sup>202</sup> This would be the logical conclusion unless the court, as Ward LJ. did in *Re A*, interpreted the case as within the Article 2(2)(a) exception for self defence on the part of the twin who could live independently and thus not a violation of the other twin's Article 2 rights.<sup>203</sup> Alternately the court could circumvent the problem of balancing<sup>204</sup> as Lord Justices Brooke and Walker did in *Re A*, by finding the operation did not violate the weaker twin's Article 2 rights because the intention of the doctor conducting the operation could not be said to be to be the intentional deprivation of life, rather it was to at least save the life of one twin.<sup>205</sup> It is submitted that Ward LJ.'s approach is to be preferred as engaging most closely with the fundamental nature of the rights, which, in the form of the basis on which rights are possessed, will be argued below<sup>206</sup> to provide principled guidance in the resolution of such conflicts of rights.

### *Balancing Rights Against General Interests*

When balancing the weight given to the Convention rights against interests other than competing rights under the proportionality test, the key question is the determination of the weight to be given to competing interests, and the courts' determination of this has been influenced by institutional and constitutional factors.<sup>207</sup> These determine the degree of deference to be given by the court<sup>208</sup> to the assessment, by the impugned branch of government, of the importance and degree of necessity of the pursuit of the interest at issue which forms its weight within the proportionality balancing exercise, and determines whether the infringement of a right is justified.<sup>209</sup>

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<sup>202</sup> Ibid, 201

<sup>203</sup> Ibid, 203-204

<sup>204</sup> Ibid, 259

<sup>205</sup> Ibid, 238 & 256-257

<sup>206</sup> Below p.287-288 & 292-293

<sup>207</sup> A. Young, 'Deference, Dialogue and the Search for Legitimacy' (2010) 30(4) *O.J.L.S.* 815, 826, see also Kavanagh (n.86), 238

<sup>208</sup> Beatson (n.38), 273, eg. *A (Belmarsh)* (n.102), [81]

<sup>209</sup> *Huang* (n.146), [16], *Rivers* (n.109), 180 & 200, *Young* (n.207), 820 and *Kavanagh* (n.86), 237

This deference, sometimes called a ‘margin of discretion’,<sup>210</sup> is congenitally distinct from the margin of appreciation applied by the ECtHR.<sup>211</sup> The latter has its origins in the nature of the relationship between the ECtHR and member states, in the recognition of the differences between member states.<sup>212</sup> The nature of the relationship between the domestic courts and the other branches of the state is shaped by different considerations, and thus the courts have found the margin of appreciation inapplicable to their application of the proportionality test.<sup>213</sup> In practical terms the margin of appreciation permits member states to make the initial judgement on whether an interference with a right is proportionate,<sup>214</sup> under domestic deference the courts do not allow the other branches of state to make that judgement,<sup>215</sup> although Baroness Hale has indicated that the courts may find it harder to hold the decision of a public authority to be disproportionate where it has given proper consideration to that issue.<sup>216</sup> Domestic deference thus differs from mere submission to the views of the legislature or executive, the courts determine what weight to give to the opinion of the other branches of state,<sup>217</sup> they do not simply accept their opinion that a measure is justified,<sup>218</sup> they reserve the ultimate conclusion of Convention compatibility to themselves.<sup>219</sup> For the courts to abdicate this ultimate decision would be to fail to fulfil their role in the protection of rights.<sup>220</sup>

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<sup>210</sup> *A (Belmarsh)* (n.102), [107]

<sup>211</sup> Above p.83-84

<sup>212</sup> Above p.84

<sup>213</sup> *R v DPP ex p Kebilene* [2000] 2 AC 326, 360, Lord Steyn, ‘Dynamic Interpretation Amidst an Orgy of Statutes’ [2004] *E.H.R.L.R.* 245, 346, Beatson (n.38), 270, but *Cf.*, 271 for reliance on the margin of appreciation by domestic courts.

<sup>214</sup> Above p.84-85

<sup>215</sup> *Ex p Kebilene* (n.213), 387

<sup>216</sup> *Belfast CC v Miss Behavin’* [2007] UKHL 19, [37]

<sup>217</sup> *Ibid* [32] & [37]

<sup>218</sup> Kavanagh (n.86), 240

<sup>219</sup> Young (n.207), 817-818 and *Miss Behavin’* (n.213) [32] & [37]

<sup>220</sup> T. Allan, ‘Human Rights and Judicial Review: A Critique of “Due Deference”’ (2006) 65(3) *C.L.J.* 671, 694-695

The constitutional deference given by the domestic courts derives from ‘respect for other branches of government and in recognition of their democratic decision-making role’.<sup>221</sup>

The courts have also acknowledged the authority the distribution of power amongst the three branches of government, under the separation of powers within the British constitution, gives to their own judgements.<sup>222</sup> Thus, constitutional deference is a manifestation of the tension between the respect for parliamentary sovereignty and the protection of fundamental rights which the HRA attempts to negotiate.<sup>223</sup> Disagreement about where a type of decision falls on the spectrum between the courts’ and the other branches’ constitutional responsibilities gives rise to disagreement about the amount of deference that should be shown.<sup>224</sup>

In his lengthy consideration of deference, Laws LJ. on a constitutional basis thus argues that ‘greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts.’<sup>225</sup> The examples he gave were decisions concerning defence and the rule of law respectively.<sup>226</sup> Similarly, the courts have taken into account general constitutional considerations of democratic legitimacy.<sup>227</sup> This has led members of the judiciary to argue that more weight should be given to impugned measures produced by the legislature because of their democratic pedigree,<sup>228</sup> the courts arguing that decisions of Parliament carry with them democratic legitimacy.<sup>229</sup>

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<sup>221</sup> Steyn (n.213), 349, Young (n.207), 822, Allan (n.220), 672 and *A (Belmarsh)* (n.102), [29]

<sup>222</sup> *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [49] and *R (Pro-Life Alliance) v BBC* [2003] UKHL 23, [75]-[76], see also Steyn (n.221), 247-248 and Young (n.207), 822

<sup>223</sup> F. Klug, ‘Judicial Deference under the Human Rights Act 1998’ (2003) 2 *E.H.R.L.R.* 125, 129 and *Roth* (n.86), [81]

<sup>224</sup> Klug (n.223), 129 and *Roth* (n.86), [77]

<sup>225</sup> *Roth* (n.86), [85] and Klug (n.223), 129, a similar list of grounds for deference was given by Lord Hope in *Ex p Kebilene* (n.213), 381, noted in *A (Belmarsh)* (n.102), [39]. For a critique of such lists see Allan (n.220), 674-976

<sup>226</sup> *Roth* (n.86), [85]

<sup>227</sup> *Ex p Kebilene* (n.213), 381 and Young (n.207), 823

<sup>228</sup> *Roth* (n.86), [82-83] and Steyn (n.221), 349

<sup>229</sup> *A (Belmarsh)* (n.102), [39], *Rehman* (n.222), [62] and Beatson (n.38), 267-268

Less closely connected to constitutional considerations<sup>230</sup> and more practical in nature, the courts have also grounded deference in the relative institutional decision making competences of the different branches of government.<sup>231</sup> Laws LJ. considered that ‘greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts.’<sup>232</sup> This ground of deference was also acknowledged in *Belfast CC v Miss Behavin*’.<sup>233</sup> At the basis of it is the view, not that another branch of government has the constitutional authority to resolve the question, rather that they are more likely to be able to attain ‘the right balance between rights and other interests than the courts.’<sup>234</sup> The general application of this approach has been that, whereas the executive bodies are likely to have special expertise, ‘courts are not suitable bodies for resolving “polycentric” questions’<sup>235</sup> and deference in the form of extra weight to the decision makers’ decision should be given.<sup>236</sup> Thus, on the facts of *Roth*, in the course of considering the necessity of the impugned norm, Laws LJ. argued the assessment of the social consequences of immigration fell more within the executive’s competence.<sup>237</sup>

The different factors that determine whether deference is shown by the courts are not mutually exclusive in their relevance to the facts of a given case. As in the case of *R (Animal Defenders International) v SoS for Culture, Media and Sport*<sup>238</sup> both institutional and constitutional factors may influence a court’s decision. In this judgement, of the three reasons Lord Bingham gave for deference, the view that it is ‘reasonable to expect that our

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<sup>230</sup> *Roth* (n.86), [87]

<sup>231</sup> *Rivers* (n.109), 182 & 192, *Beatson* (n.38), 267 and *Young* (n.207), 822

<sup>232</sup> *Roth* (n.86), [87]

<sup>233</sup> *Miss Behavin*’ (n.213) [37]

<sup>234</sup> *Young* (n.207), 816, see also *Begum* (n.164), [34] & [98]

<sup>235</sup> *Rivers* (n.109), 176

<sup>236</sup> *Beatson* (n.38), 269

<sup>237</sup> *Roth* (n.86), [87]

<sup>238</sup> *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15

democratically-elected politicians will be peculiarly sensitive to measures necessary to safeguard the integrity of our democracy<sup>239</sup> is an institutional concern, as is the observance that Parliament had closely scrutinised the measure in question.<sup>240</sup> However the view that it is Parliament's role to decide how to provide protection for freedom of speech when enacting general provisions<sup>241</sup> appears more constitutional in nature. Similarly, Alison Young argues that *R (Countryside Alliance) v Attorney-General*<sup>242</sup> demonstrates an institutional concern for the correct balance can shade into fealty to maintaining constitutional balance.<sup>243</sup> In this Article 1 of Protocol 1 case it was recognised that their representative nature mean that '[i]t is, in the first instance, for Parliament to decide what laws are necessary in accordance with what it judges to be in the general interest.'<sup>244</sup> However, this apparent institutional recognition of competence and consequent need for deference was aided by a constitutional reluctance to find against a recently enacted statute because of the democratic legitimacy of Parliament.<sup>245</sup>

The final factor the courts will take into account in determining the amount of deference that will be shown is whether the right at issue is qualified or unqualified.<sup>246</sup> Laws LJ. argued that 'there is more scope for deference where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified'.<sup>247</sup> Julian Rivers argues that the reason for less deference in relation to unqualified rights is that, except in cases of derogations from unqualified rights such as in *A* and positive conceptions of unqualified rights, the courts only consider proportionality in relation to unqualified rights to determine

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<sup>239</sup> Ibid, [33]

<sup>240</sup> Ibid

<sup>241</sup> Ibid

<sup>242</sup> *R (Countryside Alliance) v A-G* [2007] UKHL 52

<sup>243</sup> Young (n.207), 825

<sup>244</sup> *Countryside Alliance* (n.242), [47]

<sup>245</sup> *Countryside Alliance* (n.242), [45]

<sup>246</sup> Kavanagh (n.86), 260

<sup>247</sup> *Roth* (n.86), [84], see also Kavanagh (n.86), 260

the scope of the right and whether that has been violated,<sup>248</sup> not whether the violation is justified. They have required very strong arguments to be persuaded to consider proportionality in this way because the unqualified nature of the rights does not invite the attribution of weight to state opinion in the way that qualified rights do.<sup>249</sup>

The functioning of this ground of deference can also it is submitted be seen as influenced by the courts' giving of greater weight to unqualified rights.<sup>250</sup> This can be seen to result in a reluctance to give weight to competing interests, which would cancel out the greater weight given to unqualified rights. Thus, in *A* the Lords recognised the 'fundamental'<sup>251</sup> and 'absolute nature'<sup>252</sup> of Article 5 and refused to give the wide margin of deference sought by the government.<sup>253</sup> The approach to deference in *A*, however, also thus demonstrates the overlapping nature of the considerations that go into the calculation of the deference to be shown. Here, whilst recognising that the assessment of the nature of the threat to national security fall within the executive's competence and thus should be shown some institutional deference,<sup>254</sup> the Lords found that it was within the constitutional responsibility of the courts to assess whether the nature of the national security concern at issue justified the extent of the restriction of rights enacted.<sup>255</sup>

From the foregoing it can be seen that the weight that the courts give to rights and interests, and to the assessment of necessity within the proportionality analysis, will vary according to the rights engaged and the context of the case.<sup>256</sup> However, it is also clear that the courts have

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<sup>248</sup> Kavanagh (n.86), 262 & 265, above p.123

<sup>249</sup> Rivers (n.109), 204 and Allan (n.220), 674

<sup>250</sup> Above p.132

<sup>251</sup> *A (Belmarsh)* (n.102), [106]

<sup>252</sup> *Ibid*, [107]

<sup>253</sup> *Ibid*

<sup>254</sup> *A (Belmarsh)* (n.102), [29], [96]-[97], [112], [175], [192], Cf. *Rehman* (n.222), [50], [52]-[53] & [62]

<sup>255</sup> *A (Belmarsh)* (n.102), [39], [41]-[42], [176]-[178] & [226]

<sup>256</sup> *Ibid*, [80]



reserved to themselves the final decision on the necessity of the interference and the balance that exists, between the weight of the right and competing interests, to determine whether a measure is disproportionate and violates Convention rights.<sup>257</sup> This is the courts' role under the separation of powers, one they refuse to abdicate.<sup>258</sup>

The approach of the British courts when asked to balance rights thus has a number of influences. The approach of the ECtHR has only had a limited impact. The main source of influence has been domestic constitutional factors which have shaped the structure of the balancing process and practical decisions reached by the courts.

### ***The Will and Interest Conceptions of Rights***

#### *The United Kingdom Courts Approach to Waiving Rights*

As with the ECtHR's jurisprudence, there has yet to be a clear authoritative statement from the British courts on whether the Convention rights should be interpreted using a will or interest conception of rights. Judicial statements in the case law can be found in favour of both conceptions, and opaque reasoning can make it unclear which conception has been applied in a given case.

The case of *R v Brown*<sup>259</sup> demonstrates that prior to the enactment of the HRA the courts had not clearly adopted a position on will and interest debate, with elements of the judgement being justifiable under both theories. This case raised the question of whether a person could consent to serious injuries inflicted in the course of sado-masochistic activity for the purposes of relieving the inflictor of liability under the Offences Against the Person Act 1861. Phrased

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<sup>257</sup> *Ex p Kebilene* (n.213), 387 and *Rehman* (n.222), [31,] *Roth* (n.86), [27] & [81] and *Rivers* (n.109), 201

<sup>258</sup> *Roth* (n.86), [27] & [81], *Steyn* (n.221), 350-351 & 355 and *Rivers* (n.109), 192

<sup>259</sup> *R v Brown* [1994] 1 AC 212

in terms of rights, the question was whether the victim could waive the benefit of their legal right to be free of such harm.

Lord Templeman noted that the common law accepted that consent is a defence to the infliction of harm as part of some lawful activities, such as medical surgery and violent sports such as boxing.<sup>260</sup> In holding that this defence was not applicable in this case, the need to protect ‘society’ against the un-civilising effects of such activity was held to justify its inapplicability.<sup>261</sup> Lord Lowry and Lord Jauncey similarly saw public interest considerations as decisive in determining whether consent could be a defence.<sup>262</sup> They held that it did not favour allowing for consent to the harm in these circumstances because of the potential for harm to others.<sup>263</sup>

The recognition by Lord Templeman in the leading judgement, that it was possible to waive the benefit of the legal right in question, opens the possibility that he was applying a will conception. However, his insistence that there was no general principle that everyone may do what they like with their own body<sup>264</sup> can be interpreted as denying the basic choice premise of the will theory. On the other hand, he may have been arguing, consistent with the will theory, that individual freedom is subject to the freedom of others under Mill’s general libertarian principle.<sup>265</sup> However, his perception of consent as a remedy rather than part of a right is also inconsistent with the adoption of the will theory.<sup>266</sup>

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<sup>260</sup> Ibid, 231 & 234, see also 244-245 per Lord Jauncey

<sup>261</sup> Ibid, 237

<sup>262</sup> Ibid, 245 & 253

<sup>263</sup> Ibid, 246 & 255

<sup>264</sup> Ibid, 235

<sup>265</sup> J. Mill, *On Liberty* (Yale University Press 2003), 80

<sup>266</sup> Above p.96

In spite of this, the fact that the Lords held that the protection of the Act could not be waived on the facts of the case does not of itself mean that the Court must have been applying an interest conception of rights. The Lords focused on the wider harm to society as justifying the refusal or recognise waiver by consent and, as noted above, the will conception does allow restrictions on the waiving of the benefit of rights in order to protect the freedoms of others. Similarly, the fact that the Court held that the duty not to inflict the same level of harm could be waived in one situation (eg. medical surgery) but not in another (eg. sado-masochistic mutilation) favours a will conception because it focuses not on protecting an individual's interest from a particular harm but instead on the wider consequences of the act in question.

Thus, the Court's decision in *Brown* shows a lack of a coherent approach to resolving questions of whether the benefits of the duties imposed by rights can be waived with elements of the decision pointing to different conceptions. This conceptual ambiguity is confirmed by the interpretation of the Lords' judgements in the post HRA case of *Mosely v NGN*.<sup>267</sup> Here Eady J. distinguished *Brown* as a case involving more serious harm to the individual and creating the risk of harm to others.<sup>268</sup> This regard to the extent of the need to protect the interest of the individual from freely chosen harm, as well as the need to protect society, shows that again the court was influenced by factors from both conceptions.<sup>269</sup>

In other cases the courts appear more to apply only a single conception of rights. In *R (Pretty) v DPP*<sup>270</sup> the applicant sought a declaration from the DPP that he would not prosecute her husband if he assisted her to commit suicide. At the basis of this case was the applicant's

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<sup>267</sup> *Mosely v NGN* [2008] EWHC 1777 (QB)

<sup>268</sup> *Ibid*, [116]

<sup>269</sup> *Ibid*, [117]

<sup>270</sup> *R (Pretty) v DPP* [2001] UKHL 61

wish to choose when to die.<sup>271</sup> Outside of the issue of whether Pretty had a positive right to be assisted to die, she wished to waive the protection that Article 2 ECHR gave her under the HRA against the taking of her life by another person.<sup>272</sup> The House of Lords, in contrast to the claimant's argument that Article 2 protected her choice as to whether to live or die,<sup>273</sup> held that Article 2 protected the principle of the sanctity of life.<sup>274</sup> The Court recognised explicitly that this conflicted with the view that the 'autonomy of individuals is predominant'<sup>275</sup> in questions of rights, and went on to hold that consent could not override the sanctity of life protected by Article 2 in the form of the law of assisted suicide.<sup>276</sup> This shows the Court taking an approach protecting the objectively determined interests of the applicant and rejecting a will based conception focusing on choice as a fundamental element of what identifies a right. This interest approach is also apparent in the fact that, although considered in justifying the refusal to find a positive right to be assisted to commit suicide, questions of the public interest which could justify denying a power of waiver in a particular case under the will conception were not considered by the court in determining whether Pretty could waive her Article 2 right not to be killed.

In this case some of the Lords described Article 8 as protecting the autonomy of the individual.<sup>277</sup> However, the *Pretty* approach to Article 2 colours the interpretation of the other Convention rights in this case. Given their approach to Article 2, the later regard to autonomy cannot be seen as an acceptance of it as a general principle providing a foundation for all rights in the way that the will conception entails; instead, it appears to be an assertion of the particular scope of Article 8. Similar reasoning can be applied to the Lords' hypothetical

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<sup>271</sup> Ibid, [84]

<sup>272</sup> Ibid, [88]

<sup>273</sup> Ibid, [4]

<sup>274</sup> Ibid, [5] & [59]

<sup>275</sup> Ibid, [54]

<sup>276</sup> Ibid, [110]-[111]

<sup>277</sup> Ibid, [23] & [61]

statements that, were Article 8 to in fact be engaged by the facts, as has since been held, the prohibition on assisted suicide would be justified under Art 8(2) because of the need to protect the vulnerable from being coerced into assisted suicide.<sup>278</sup> It is possible to interpret this approach inline with a will conception, as giving protection to an individual's capacity for choice. However, it is submitted that the court's approach to Article 2 favours interpreting it as concerned to protect individual autonomy as an interest protected under Article 8, rather than as recognising choice as a fundamental feature underlying all rights.

However, following this decision, in the recent and related case of *R (Purdy) v DPP*, some increased indication of the judicial application of a will conception of the Convention rights can be gleaned. In determining whether the DPP's failure to publish clear guidance on the exercise of his discretion to prosecute assisted suicide, the House of Lords held that the prohibition at issue engaged the claimant's Article 8 right because it interfered with her ability to choose how to end her life.<sup>279</sup> This finding is consistent with courts previous definition of Article as a right specifically protecting a person's choice as to how to live their life<sup>280</sup> and several of the Lords in *Purdy* described this right as one protecting autonomy.<sup>281</sup> However, Lord Hope in his interpretation seemed to go further, relying in finding that Article 8 was engaged and violated upon the ECtHR's more general statement in *Pretty* that '[t]he very essence of the Convention is respect for ... human freedom' which led Strasbourg to find that Article 8 was engaged.<sup>282</sup> This can tentatively be seen as a step towards an application of a broader domestic recognition of individual freedom of choice as a fundamental feature which all Convention rights protect, consistent with the will conception.

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<sup>278</sup> Ibid, [28]-[30], [62] & [101]

<sup>279</sup> *R (Purdy) v DPP* [2009] UKHL 45, [38] & [61]

<sup>280</sup> *Pretty* (n.270) [61] & [100] and *Mosely* (n.267), [125]

<sup>281</sup> *Purdy* (n.279), [32], [60], [71]

<sup>282</sup> Ibid, [38], citing *Pretty v United Kingdom* (2002) 35 EHRR 1, [65]

In the lower courts, some application of a will conception is also apparent. In a case raising the question of where it was possible to consent to the risk of contracting HIV through sex with a known carrier, the court held *obiter* that it was possible to consent to the risk of harm to their own health.<sup>283</sup> Judge LJ. appeared to apply a will based analysis, for he held that to prohibit individuals from undertaking risky activities is an ‘interference...with personal autonomy [which]...may only be made by Parliament.’<sup>284</sup> This focus on autonomy as justifying individual risk taking, coupled with an insistence that only Parliament, a body representative of the public interests, could restrict such activities, is consistent with the protection of choice that is the key element of the will theory. The Court’s attempt to distinguish *Brown* on the grounds that the activity in that case was harmful on public policy grounds, shows an attempt by the court post-HRA to interpret that case in accordance with the will conception.<sup>285</sup>

It is thus submitted that it is clear that different judges in different cases have applied different conceptions of rights which result in a lack of a settled approach to whether it is possible to waive the benefits of the Convention rights under the HRA. This has resulted in uncertainty as to the approach the courts will apply.

### ***Horizontal and Vertical Effect of Convention Rights***

Practically correlative to the issues of who has rights, and what is their substantive nature, is the question of who they hold those rights against? The issues of the *enforceability* of rights between private persons stems from a recognition that the Convention rights are *applicable*, not only to state actions that affect the individual, but also to the actions of individuals that

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<sup>283</sup> *R v Dica (Mohammed)* [2004] EWCA Crim 1103, [49]-[51]

<sup>284</sup> *Ibid.*, [52]

<sup>285</sup> *Ibid.*, [46]

affect other individuals.<sup>286</sup> As noted in more depth previously, individual actions are equally able to infringe the individual interests that are protected by the rights recognised within the ECHR, and thus if the rights are to be effectively upheld there must be protection from such actions.<sup>287</sup> However, the extent to which the British courts can give effect to this applicability has been held to be subject to limitations contained within the HRA, just as the ECtHR's ability to give effect to it has been held to be subject to its position as an international court.<sup>288</sup>

### *Vertical Effect*

It is apparent from statements made during its passage through Parliament, that there was an intention that under the HRA the Convention rights would only be directly enforceable in a vertical manner against the state, although the indirect horizontal effect of Convention rights was not excluded.<sup>289</sup> The Lord Chancellor stated that the Act was intended to protect individuals against 'the misuse of power by the state'<sup>290</sup> and Jack Straw, who was partially responsible for the document which paved the way for the HRA,<sup>291</sup> claimed that its scope would encompass all bodies that the British government could be held answerable for before the ECtHR.<sup>292</sup> This intention can be seen to be manifest in the absence of any provision explicitly purporting to bind purely private parties to comply with the Convention rights.<sup>293</sup> Thus, s.6 HRA which sets out the conditions under which an action or decision that breaches

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<sup>286</sup> Beatson (n.38), 372

<sup>287</sup> Ibid and above p.104-106

<sup>288</sup> Above p.106-107

<sup>289</sup> D. Beyleveld and S. Pattinson, 'Horizontal Applicability and Horizontal Effect' (2002) 118 *L.Q.R.* 623, 645 and HL Deb 24 November 1997, vol.583, col.783, below p.145

<sup>290</sup> HL Deb 3 November 1997, vol.582, col.1228

<sup>291</sup> J. Straw and P. Boateng, 'Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into UK law' (1997) 1 *E.H.R.L.R.* 71

<sup>292</sup> Hansard HC vol 314 col 406 (17 June 1998), this argument was also referred to in *Anton Cantlow* at [6], see also Beatson (n.38), 343

<sup>293</sup> G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74(6) *M.L.R.* 878, 890

a Convention right can be challenged as unlawful, only applies to the actions and omissions of public authorities,<sup>294</sup> the definition of which is thus central to the scope of the Act.<sup>295</sup>

The courts have held that there are two types of public authority caught within s.6.<sup>296</sup> ‘Core’ public authorities are those ‘whose nature is governmental in a broad sense of that expression’<sup>297</sup> and they must act in accordance with Convention rights in everything that they do.<sup>298</sup> The House of Lords has described the features of such ‘governmental organisation[s]’<sup>299</sup> as including ‘special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution’<sup>300</sup> and encompassing bodies such as the police, government departments and local authorities.<sup>301</sup>

Outside of these core public authorities, it is possible for private bodies to be liable under s.6 as a public authority for breaching the Convention rights, but only where they are deemed to have gone beyond the activities of a private person or entity and are exercising functions of a public nature.<sup>302</sup> The bodies that fall within this scope of the Act as having both public and private functions are described by the courts as ‘hybrid public authorities.’<sup>303</sup> However, what constitutes functions of a public or private nature for the purposes of the s.6(3)(b) and (5) is not defined by the Act, it has thus been left to the courts to draw the line which demarcates the outer limits of vertical effect.

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<sup>294</sup> s.6(1) & s.6(6) HRA

<sup>295</sup> Beatson (n.38), 337

<sup>296</sup> Ibid, 341

<sup>297</sup> *Aston Cantlow v Wallbank* [2003] UKHL 37, [7]

<sup>298</sup> Ibid, [7]

<sup>299</sup> Ibid, [47], see also Beatson (n.38), 342

<sup>300</sup> Ibid, [7]

<sup>301</sup> Ibid

<sup>302</sup> s.6(1), (3) & (5) HRA

<sup>303</sup> *Aston Cantlow* (n.297), [11]



In the leading case of *YL v Birmingham CC*,<sup>304</sup> the majority of the House of Lords held that in deciding whether a person or body could be said to be performing ‘functions of public nature’, did not depend on the nature of the function in question being performed.<sup>305</sup> The Lords held that, instead, regard should be had to the nature and character of the body or person performing the function and the nature of the obligations under which they performed the function.<sup>306</sup>

Lord Neuberger reconciled this approach with the language of s.6(3)(b) by arguing that a distinction should be drawn between ‘functions’ and ‘acts’ with the former being less specific and more conceptual and composed of various acts.<sup>307</sup> He argued that, on the facts of this case, the question which had to be decided was whether providing care for the elderly *as the care home did* was a public function.<sup>308</sup> On the facts, the majority of the Lords held that a private care home could not be said to be performing a function of a public nature in providing care to the elderly. The Lords were influenced by the various characteristics of the care home including the fact it was a commercial entity, it did not receive a public subsidy, it had private law contracts with its residents and it had no special statutory powers, although the presence or absence of these such powers were held not to be decisive.<sup>309</sup>

It is submitted that that the courts have not been activist in defining the coverage of s.6(3)(b). The majority’s explicit rejection of the alternate approach, of focusing on whether the character of the particular service provided was of a public nature,<sup>310</sup> was based upon a recognition that such an approach could *de facto* create the direct horizontal effect the HRA

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<sup>304</sup> *YL v Birmingham CC* [2007] UKHL 27

<sup>305</sup> *Ibid*, [29] & [119]

<sup>306</sup> *Ibid*, [31], [102]-[103]

<sup>307</sup> *Ibid*, [130]

<sup>308</sup> *Ibid*

<sup>309</sup> *Ibid*, [26]-[28], [101], [148], [150] & [168]

<sup>310</sup> *Ibid*, [29]

was not intended to bring about. The Lords argued that if the courts merely looked at whether the particular activity in question was also carried out or contracted out by a public authority then what could be a public function for the purposes of s.6(3)(b) would be limitless.<sup>311</sup>

The Lords were also keen to avoid an arbitrary approach.<sup>312</sup> The court thus rejected a test of whether the private body was performing the function in question under a contract it had with a core public body, whereby people receiving services a private body had a contract with a core public authority to provide would be able to claim, but a person paying independently for such services would have no HRA claim.<sup>313</sup> However, the consequence of the Lords' approach is that, although the test of what amounts to a public function avoids the problems of unlimited scope, it does not avoid uncertainty as each case will have to be considered on its individual facts.<sup>314</sup>

This uncertainty is to some extent in line with the deliberate choices made in drafting s.6, as Lord Neuberger observed, it is 'not conspicuous for the clarity of its drafting.'<sup>315</sup> The provision for liability of hybrid public authorities was created to reflect that as a result of privatisation, outsourcing and private finance initiative projects, '[t]he public/private distinction can no longer be conceptualised in terms of an institutional dichotomy between state and non-state entities.'<sup>316</sup> The uncertainty of the division requires a test sufficiently broad and flexible to reach the appropriate decision on where to draw the line in particular cases so that rights can be adequately protected against the state.<sup>317</sup>

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<sup>311</sup> Ibid, [30], [142] & [153], see also [164] and Beatson (n.38), 351

<sup>312</sup> Beatson (n.38), 351 and *YL* (n.304), [151]

<sup>313</sup> *YL* (n.304), [117], [151] & [169]

<sup>314</sup> Beatson (n.38), 345

<sup>315</sup> *YL* (n.304), [130]

<sup>316</sup> Beatson (n.38), 339

<sup>317</sup> HL Deb 24 November 1997, vol.583, col.808

### *Horizontal Effect*

Beyond the reach of s.6 as it is currently interpreted, private bodies and persons cannot have actions brought directly against them under the HRA for acting in contravention of another's Convention rights.<sup>318</sup> Unlike the position in the Republic of Ireland where the Supreme court has held that constitutional rights are enforceable between private individuals and corporations,<sup>319</sup> there was no intention to create a 'constitutional tort' for breaches of the Convention rights<sup>320</sup> and the courts have consequently held that there is no direct horizontal effect under the Act.<sup>321</sup>

The argument by Beyleveld and Pattinson for the horizontal applicability of the rights within the Convention, argued for above in the context of the rights supranational application,<sup>322</sup> similarly applies to the rights as incorporated rights within the HRA at the domestic level. The domestic judiciary have themselves recognised this reality, that it is possible for private persons' actions to impinge upon the rights of others. In *Campbell v Media Group Newspapers*, Lord Nicholls, although dissenting in his judgement on the facts, recognised the general principle that '[t]he values embodied in articles 8 and 10 are as much *applicable* in disputes between individuals or between an individual and a non-governmental body...as they are in disputes between individuals and a public authority.'<sup>323</sup> This horizontal applicability of rights forms the theoretical foundation of the indirect horizontal effect the courts deem themselves obliged to give to the Convention rights.<sup>324</sup>

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<sup>318</sup> Beatson (n.38), 371

<sup>319</sup> *Meskeil v C oras Iompair  ireann* [1973] IR 121, 132-133 & 136, see also C. O'Conneide, 'Taking Horizontal Effect Seriously: Private Law, Constitutional Rights and the European Convention on Human Rights' (2003) 4(1) *H.L.J.* 77, 78 & 83-84

<sup>320</sup> Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act' 7th Report HC (2003-04) 382 / HL (2003-04) 39, 30 and M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *P.L.* 423, 429 & 438

<sup>321</sup> *X v Y* [2004] EWCA Civ 662, [54(2)] & [58(3)], see also Beatson (n.38), 375

<sup>322</sup> Above p.104-105

<sup>323</sup> *Campbell v MGN* [2004] UKHL 22, [17] (my emphasis)

<sup>324</sup> *Ibid*, [18] and Beyleveld and Pattinson (n.289), 628

This indirect horizontal effect takes the form of the courts striving to act in accordance with the Convention rights in applying, interpreting and developing the law in cases between private individuals.<sup>325</sup> That the rights would have effect between individuals in this manner was specifically foreseen in the passage of the HRA in the rejection of an amendment which would have restricted the rights to vertical effect.<sup>326</sup> It is submitted that this can also be seen as part of the intention, apparent in the passage of the HRA, that the Act should create a human rights culture within British society which would encourage all public and private bodies to consider whether their actions were compatible with the Convention rights.<sup>327</sup> The legal means by which the courts have been able to give effect to the horizontal applicability of the rights are to be found in s.3 and s.6 of the Act.<sup>328</sup>

#### The Interpretive Obligation

S.3 imposes a mandatory obligation<sup>329</sup> upon the courts to interpret and give effect to all legislation in a manner which is compatible with the Convention rights as ‘far as it is possible to do so’.<sup>330</sup> The Act does not restrict this canon of construction to legislation governing relations between the individual and the state, it also has a horizontal arc of fire.<sup>331</sup> The courts must interpret legislation which is relevant in a case between private parties in a manner which is compatible with the Convention rights, or if a Convention compliant interpretation is impossible, make a declaration of incompatibility under s.4(2) HRA in relation to it.<sup>332</sup> Thus, indirectly horizontal effect can be achieved in some cases.<sup>333</sup>

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<sup>325</sup> Hunt (n.320), 430-431

<sup>326</sup> HL Deb 24 November 1997, vol.583, col.783 and Ibid, 440-441

<sup>327</sup> HL Deb 3 November 1997, vol.582, col. 1228 and HL Deb 27 November 1997, vol.583, col.1163

<sup>328</sup> Joint Committee on Human Rights (n.320), 30 and Beatson (n.38), 375

<sup>329</sup> *Re S* (n.51), [37]

<sup>330</sup> s.3(1) HRA

<sup>331</sup> N. Bamforth. ‘The True “Horizontal Effect” of the Human Rights Act 1998’ (2001) 117 *L.Q.R.* 34, 37

<sup>332</sup> Beatson (n.38), 375 & 379 and Ibid, 40

<sup>333</sup> Hunt (n.320), 426

An example of the courts indirectly giving effect to the Convention rights in this manner can be seen in the case of *Ghaidan v Godin-Mendoza*.<sup>334</sup> This case concerned the legal relationship between a private landlord and the homosexual partner of the deceased tenant under the Rent Act 1977. The issue was whether a provision, which allowed the ‘spouse’ of a deceased tenant (defined as encompassing persons living with the original tenant ‘as his or her wife or husband’)<sup>335</sup> to succeed to the tenancy, violated the Convention rights of those in homosexual relationships if it was interpreted as not applying to them. The House of Lords held that such an exclusionary interpretation did engage Article 8 and violate Article 14.<sup>336</sup> The court, however, held that it was possible to avoid this violation by using s.3 to interpret the provision as encompassing both heterosexual and homosexual couples.<sup>337</sup> Thus, the landlord was compelled to respect the Convention rights of another private individual.

However, the ability of the courts to use s.3 to give horizontal effect to the Convention rights is limited by the fact that the power of interpretation that it grants ‘is not unlimited.’<sup>338</sup> In *Re S* Lord Nicholls recognised that the constraints on the interpretive obligation are constitutional in nature and then held that, for an interpretation using s.3 to be legitimate, it must respect parliamentary sovereignty by remaining within the sphere of interpretation and not usurping Parliament’s power of legislation.<sup>339</sup> On the facts of the case Lord Nicholls held that, as the approach taken by the Court of Appeal under s.3 created a considerable departure from the original legislation, this amounted to illegitimate judicial legislation by amendment,

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<sup>334</sup> Beatson (n.38), 379

<sup>335</sup> Sched. 1, Para. 2(2) Rent Act 1977

<sup>336</sup> *Ghaidan* (n.60), [12], [24], [128] & [135]

<sup>337</sup> *Ibid*, [35], [128] & [144]

<sup>338</sup> *Re S* (n.51), [38]

<sup>339</sup> *Ibid*, [39]

which was not permissible under s.3.<sup>340</sup> It is apparent that, in assessing whether an interpretation in fact amounts to illegitimate judicial legislation, the courts will be influenced by considerations of whether it has the capacity and expertise to evaluate the impact of adopting a particular interpretation.<sup>341</sup> The influence of constitutional propriety in determining the scope of s.3 can be further seen from the in Lord Nicholls's refusal to use the interpretive power in *Bellinger*, on the grounds that the government had already made it clear that it would bring forth legislation to effect the change required.<sup>342</sup>

### The Courts as Public Authorities

As noted above, core public authorities are required to act in accordance with the Convention rights in all their actions. The only bodies to be explicitly named in the Act as falling within this category are courts and tribunals.<sup>343</sup> Special care was also taken to ensure that the Judicial Committee of the House of Lords was included within this category in s.6(4) HRA, although this provision is now irrelevant following the creation of the Supreme Court which will be covered by the general provision covering courts and tribunals.<sup>344</sup>

As a consequence of being bound in this way, it is unlawful for the courts to give a judgement which infringes the Convention rights.<sup>345</sup> This entails that the courts must develop and apply the common law in a manner that respects the requirements of the Convention, where they could 'be regarded as responsible for the breach...that would result by applying the law in an un-modified way.'<sup>346</sup> Thus, in *Campbell* Baroness Hale held that compliance with the Convention rights under s.6 required court to develop the common law of

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<sup>340</sup> Ibid, [40], [42]-[43]

<sup>341</sup> *Bellinger v Bellinger* [2003] UKHL 21, [37], [43]-[45] & [48] and Ibid, [40]

<sup>342</sup> *Bellinger* (n.341), [37]

<sup>343</sup> s.6(3)(a) HRA

<sup>344</sup> s.23(1) Constitutional Reform Act 2005

<sup>345</sup> s.6(1) and (2) HRA

<sup>346</sup> *Beatson* (n.38), 377

confidentiality in a way that respected the privacy protection contained within Article 8 in a case between two private parties.<sup>347</sup> She was, however, the only member of the House of Lords to rely s.6 as the basis for altering the common law,<sup>348</sup> the other Lords having regard to the horizontal applicability of rights,<sup>349</sup> the shared basis of confidentiality and Article 8 privacy in the principles of autonomy and dignity,<sup>350</sup> and the more general influence of the relevant Convention rights upon the pre-existing balancing exercise required by the common law.<sup>351</sup> Gavin Phillipson notes that this reluctance to rely openly upon s.6 is unsurprising in that it is consistent with the pre-HRA reluctance to allow the Convention to strongly permeate the common law, with avoidance of reliance upon Convention rights in favour of identical common law principles.<sup>352</sup> He suggests, however, that the true reason for the reluctance to rely upon s.6 in this case was a wish to avoid having to rule explicitly on the extent of horizontal effect that it required the courts to give to the Convention rights.<sup>353</sup> Based on this contrast between the use of the Convention to resolve the case by all the Lords, and the disagreement as to the basis and scope of its applicability between individuals, Phillipson thus argues the general question of existence, basis and extent of horizontal effect under the HRA remains unresolved.<sup>354</sup> This judicial position further makes it unlikely that the courts would be prepared to adopt an interpretation of the s.6 judicial obligation as allowing for direct horizontal effect, such as that which Beyleveld and Pattinson have argued is possible.<sup>355</sup> Although conceptually justified by the above argued horizontal applicable nature

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<sup>347</sup> *Campbell* (n.323), [132] and see also Beatson (n.38), 387-388 and G. Phillipson, 'Clarity Postponed Horizontal Effect After Campbell' in H. Fenwick and others (eds) *Judicial reasoning under the UK Human Rights Act* (Cambridge University Press 2007), 158

<sup>348</sup> G. Phillipson, 'Clarity Postponed Horizontal Effect After Campbell' in *Judicial reasoning under the UK Human Rights Act* (n.171), 158-167

<sup>349</sup> *Campbell* (n.323), [17]-[18] per Lord Nicholls (Dissenting) and above p.193, see also Phillipson (n.348), 161

<sup>350</sup> *Campbell* (n.323), [50]-[53] per Lord Hoffman (Dissenting), see also Phillipson (n.348), 164

<sup>351</sup> *Campbell* (n.323), [86], [105]-[106] per Lord Hope, see also Phillipson (n.348), 159

<sup>352</sup> Phillipson (n.348), 145, eg. *A-G v Guardian Newspapers (No2)* [1990] 1 AC 109, 283 and *Derbyshire v Times Newspapers* [1993] AC 534, 551

<sup>353</sup> Phillipson (n.348), 161, 163-164 & 166

<sup>354</sup> *Ibid*, 167

<sup>355</sup> Beyleveld and Pattinson (n.289), 633-646

of the Convention rights,<sup>356</sup> and morally supported by the interpretive approach to the rights to be argued for below,<sup>357</sup> it would be a substantial departure from their current tentative approach.

As well as developing the substantive requirements of the common law, the courts are also bound by s.6 to act in accordance with the Convention rights when granting remedies.<sup>358</sup> The rights and the positive obligations they can create, may require the courts to refuse or grant relief in circumstances in which they would not normally do so in order to avoid violating their obligation under s.6. Thus, in the case of *South Bucks DC v Porter* the House of Lords, noting that they had discretion as to whether to create injunctions, held that s.6 required that they should only do so if it did not infringe the Convention rights and it was proportionate to do so.<sup>359</sup> It was similarly held in *Venables v NGN* that s.6 could require the courts to grant an injunction where this was necessary to respect the positive obligations imposed by a Convention right.<sup>360</sup>

This statutory means of giving horizontal effect to the Convention rights is, however, subject to limits which arise from its statutory source and, in common with horizontal effect through the application of the interpretive obligation, constitutional constraints. Whilst the application of the Convention may show a domestic law to violate an individual's rights, the breach may be beyond the court's constitutionally constrained statutory powers to directly remedy.<sup>361</sup> The s.6 requirement that the courts act in accordance with the Convention rights also states a constitutional exception to this rule: where a decision which infringes Convention rights is

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<sup>356</sup> Above p.104-106

<sup>357</sup> Below p.307-308

<sup>358</sup> Beatson (n.38), 381

<sup>359</sup> *South Bucks DC v Porter (No1)* [2003] UKHL 26, [37], [53] & [87]

<sup>360</sup> *Venables v NGN* [2001] Fam 430, 445, 463, 368, see also Beatson (n.38), 389

<sup>361</sup> Phillipson and Williams (n.293), 886-887



compelled directly or indirectly by primary legislation the courts must obey the legislation.<sup>362</sup> This limitation seeks to ensure respect for parliamentary sovereignty as the core tenet of the British constitution, and against which the only remedy where a compatible interpretation is not possible is a declaration of incompatibility.<sup>363</sup>

Additionally, constitutional concerns control the extent to which the courts can change the common law in order to ensure their decisions comply with the Convention rights. The courts have held that they cannot use their s.6 obligation to create new common law causes of action.<sup>364</sup> Such a departure from the common law's incremental method has been held to put the courts in danger of usurping the role of the legislature under the separation of powers.<sup>365</sup> Phillipson and Williams cogently suggest, however, that although the British constitution must be the ultimate arbiter of the courts' power to protect Convention rights, this prohibition on new causes of action is too blunt an application of constitutional concern.

The courts will not always be able to provide a remedy under s.6 for fear of straying into legislation, whose constitutional illegitimacy can be seen in the care taken to preserve parliamentary sovereignty under the HRA and s.6 in particular.<sup>366</sup> The core constitutional tenets – parliamentary sovereignty's respect for democratic decision making, the separation of power's recognition of different spheres of institutional competence, the rule of law's concern to ensure that the law is capable of being known by having clarity and lacking retroactivity<sup>367</sup> – entail that it would be illegitimate for the courts to depart from the incremental development of the common law and reach a judgement which did not have roots

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<sup>362</sup> s.6(2), see also Beatson (n.38), 375

<sup>363</sup> s.4 HRA

<sup>364</sup> *Wainwright v Home Office* [2003] UKHL 53, [31]

<sup>365</sup> *Ibid*, [31] & [33], see also Beatson (n.38), 376 & 385

<sup>366</sup> Phillipson and Williams (n.293), 892-893 and HC Deb 16 February 1998, vol.306, col.772

<sup>367</sup> Phillipson and Williams (n.293), 888-889

in pre-existing common law principles, creating *de novo* causes of action.<sup>368</sup> However, within these constraints, the development of new causes of action is possible because the incremental development of the common law is consistent with these constitutional constraints.<sup>369</sup> The creation of the modern cause of negligence in *Donoghue v Stephenson*<sup>370</sup> was an incremental development from the previous cause of action on the case,<sup>371</sup> and post-HRA application of the law of confidentiality does appear to be developing a new tort of misuse of private information in spite of the House of Lords earlier statements.<sup>372</sup>

The courts' approach to this question of the interpretation of rights, of against whom they can be held and enforced, is more developed than in relation to the other four questions discussed above. They have directly confronted this issue in recognising the horizontal applicability of rights and consequently given horizontal effect to them. They have, however, considered themselves restricted to indirect horizontal effect through incremental development of the common law and statutory interpretation.

### ***Conclusion***

The courts have recognised and engaged with the five fundamental questions of rights interpretation which must be addressed in the process of applying any of the incorporated Convention rights. Given that the HRA has only reached its 14<sup>th</sup> birthday it is unsurprising that there is still uncertainty in the courts answers to these questions. However the fact that they recognise these issues shows that they are recognising and engaging with the fundamental nature of rights.

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<sup>368</sup> Phillipson and Williams (n.293), 903-904 & 908-909, see generally *R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin), [74]-[79]

<sup>369</sup> Phillipson and Williams (n.293), 901, 906-907

<sup>370</sup> *Donoghue v Stevenson* [1932] AC 562, 579-580

<sup>371</sup> W. Rogers, *Winfield and Jolowicz on Tort* (17<sup>th</sup> edn, Sweet and Maxwell 2006), 53-55

<sup>372</sup> Phillipson and Williams (n.293), 901-902, citing *Campbell* (n.323), [14]

## **CHAPTER VI: METHODOLOGY: FINDING ANSWERS TO THE OPEN TEXTURE OF RIGHTS IN MORAL PHILOSOPHY**

### ***Introduction***

In light of the uncertainty of the requirements of the Convention rights established above, given their open textured and semantic nature and the extent to which the courts have left fundamental question of rights interpretation unanswered or unclear, this chapter puts forward Gewirth's Principle of Generic Consistency (PGC) as a moral principle that can give guidance in their interpretation. It will be shown not only that the principle is itself justified as a guide to action, but also that its interpretative use within the Convention context is consistent with fundamental features of the ECHR and legally possible within the current relationship between the domestic courts and the ECtHR.

### ***The Question of the Interpretation of Convention Rights***

The ECHR, in common with the UDHR whose protection for rights its preamble claims to further, has been argued above to contain rights which are of uncertain meaning. The interpretation of these rights has been argued to pivot around the answers to five questions which dictate the general scope and practical impact of the rights in individual cases. This uncertainty of the rights requirements is facilitated by the wording of the Convention, which is deliberately composed in open textured language. However, the congenital root of this uncertainty is that the written statements of the Convention rights are a semantic attempt to conceptualise the constructed concepts of rights, freedoms and duties.<sup>1</sup> They are an attempt to make tangible the idea that there are some treatments and conditions individuals must not be subject to.

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<sup>1</sup> Above p.23-24

As a consequence of this open textured language, the scope of the incorporated Convention rights, including those explicitly stated to be subject to limitations and exceptions, must through interpretation be given a definite content. Under the HRA this task is allotted to the judiciary.<sup>2</sup> The intentionally cultivated open textured nature of the Convention rights through the adoption of open language, has successfully achieved its aim in enabling 47 states across Europe to the shoreline of the Pacific, with differing ideas of what should be protected by rights, to agree to a single Convention.<sup>3</sup> However, the member states of the Council of Europe recognised the need for detailed, authoritative, fact specific clarification of requirements of their obligations imposed by their people's rights by creating a Commission and Court.<sup>4</sup> For until interpreted, the practical requirements of the written rights are unknown; the five key questions which fundamentally give meaning to the rights and consequent duties are unanswered.

***The Need to Find a Rational way of Resolving Disputes about the Interpretation the Convention Rights***

Given the different possible approaches, and their consequences, that have been highlighted in the preceding chapters' investigation of the current approaches of the ECtHR and the domestic courts, an intellectually coherent construction of the five questions of interpretation is required by the pivotal nature of these questions to the meaning of the Convention rights. To be a valid interpretation the approach taken must respect the features fundamental to the ECHR which it also shares with human rights treaties more generally. Dworkin makes this point clearly in his argument that, for a judge to be interpreting a constitution to determine

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<sup>2</sup> s.2(1) and 7 HRA

<sup>3</sup> Above p.25-26

<sup>4</sup> Former Articles 19 and 31 ECHR, see Council of Europe, *European Convention on Human Rights Collected Texts* (Council of Europe Press, Strasbourg 1994), 21 & 27 and Articles 19 and 32 ECHR as amended.

the meaning of a right rather than rewriting it, his interpretive approach must fit the constitution's fundamental settled core characteristics.<sup>5</sup>

An interpretive approach to the Convention rights must also be one justified by reason rather than subjective individual intuition or feeling. As Kant argues, empirical happiness or intuitive 'moral feeling'<sup>6</sup> cannot provide a basis for an impartial moral determination of what is right or wrong; their subjectivity prevents them from providing a universal 'uniform standard' against which acts can be measured,<sup>7</sup> something international human rights treaties claim to be.

Both Kant and Gewirth recognise a principle of morality, determining what acts are right and wrong, derived through the use of reason, will not suffer from this inherent subjectivity as its logical conclusions will be binding upon all rational beings.<sup>8</sup> Kant thus derives his Categorical Imperatives governing all action from the capacity for reason which he describes as the 'metaphysics of morals';<sup>9</sup> the basis upon which a supreme principle of morality must rest.<sup>10</sup> He claims that it is because pure reason is 'altogether *a priori*', free from empirical considerations such as perfection, happiness, moral feeling, fear of god, etc., that it can form an impartial basis for deducing morals controlling conduct.<sup>11</sup> Similarly, Gewirth in his theory applies reason in a dialectically necessary manner which asks what statements and claims an agent must rationally make because of his position as an agent, and what these logically

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<sup>5</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth 1997), 105-106 and R. Dworkin, *Law's Empire* (Hart 1998), 66 & 379-380

<sup>6</sup> I. Kant, *The Groundwork of the Metaphysics of Morals*, M. Gregor (ed.), C. Korsgaard (intro.) (Cambridge University Press 1997), 49

<sup>7</sup> *Ibid*, 48-49

<sup>8</sup> *Ibid*, 23 and A. Gewirth, *Reason and Morality* (University of Chicago Press 1978), 44

<sup>9</sup> Kant (n.6), 21

<sup>10</sup> *Ibid*, 21

<sup>11</sup> *Ibid*, 22-24

imply.<sup>12</sup> This approach leads him to argue that an agent will arrive at the Principle of Generic Consistency as the supreme principle of moral action requiring respect for the generic rights with ‘a strict rational justification.’<sup>13</sup>

### ***Consistency with the Fundamental Features of the Convention’s Human Rights Protection***

The specific fundamental features of human rights, and of the Convention in particular, with which an interpretive approach addressed to them must fit, can be determined from the text of the leading human rights documents with which the ECHR is closely connected and from judicial statements attempting to identify the Convention’s underlying principles. These fundamental features are the universality, inalienability, and inherent possession of rights, as well as a primacy of focus on rights rather than duties.

These three core characteristics arise from the context in which the Convention rights were drafted. They are derived from both what was described above as the internal context, the text of the Convention itself, particularly its preamble, and also the external context, the factual circumstances which influenced the creation of the ECHR, the Second World War and human rights movement that found expression in the UDHR.<sup>14</sup> Given the role of context in the interpretation of words generally, by being consistent with this context, even if not necessarily being derived directly from it, an approach to the interpretation of the Convention can be said to be a legitimate construction of it.<sup>15</sup>

### ***Universality***

The use of an interpretive approach, based in the application of reason, immediately has consistency with a fundamental feature of the ECHR and human rights law generally: the

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<sup>12</sup> Gewirth (n.9), 43 & 46

<sup>13</sup> Ibid, 47

<sup>14</sup> Above p.20

<sup>15</sup> Above p.20-21 and below p.175-176, 191-192 & 195-201

universality of human rights. That universalism forms ‘one of the basic assumptions of human rights’,<sup>16</sup> is textually apparent from its prominent position in the title and preamble of the Universal Declaration of Human Rights in which subsequent rights treaties, including the ECHR, have claimed ancestry.<sup>17</sup>

Substantively, universality requires the recognition that all human rights are possessed by all beings who have the fundamental characteristics which give rise to the rights, regardless of what other characteristics such as gender, religion, or race they possess.<sup>18</sup> The call in the first paragraph of the UDHR’s preamble for the recognition of the rights, of ‘all members of the human family’, states this universal scope of the rights it contains and is emphasised in second paragraph of the ECHR’s preamble. Furthermore, the commitment of the states in the sixth paragraph to the ‘universal respect for and observance of human rights and fundamental freedoms’ demonstrates that they are not legal rights deriving from the law of particular states but rather attach to the individuals regardless or in spite of their states’ laws.

An interpretative approach to rights based in reason is consistent with the universal nature of human rights, for both see the recognition of the possession of rights as uninfluenced by subjective factors that are not part of the fundamental characteristics to which human rights attach. In this way such an interpretive approach also avoids being relativistic. In the human rights context relativism asserts ‘that no human rights are absolutes..., that there is infinite cultural variability, and that all cultures are morally equal or valid’,<sup>19</sup> and what is moral or correct is dictated by the views that prevail within a community.<sup>20</sup> [...] If the universalist conception of human rights binding upon all states embraced within the UDHR’s preamble is

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<sup>16</sup> M. Nowak, *Introduction to the International Rights Regime* (Martinus Nijhoff 2002), 12

<sup>17</sup> Preamble, ECHR, ICCPR, ICESCR, UNCROC etc.

<sup>18</sup> Nowak (n.16), 14

<sup>19</sup> J. Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20(2) *Hum.Rts.Q.* 201, 228

<sup>20</sup> A. Etzioni, ‘A Moderate Communitarian Proposal’ (1996) 24(2) *Pol.Theory* 155, 164 and *ibid*

accepted, even if only in a dialectically contingent manner, as accepted by choice as opposed to being logically entailed by an initial position of agency,<sup>21</sup> such a position is incompatible with holding the views which characterise relativism. This must be the case because universalism holds that rights are not deemed to be granted or held by the grace of societal agreement but rather individuals are entitled to them by virtue of their worth ‘independent of the community.’<sup>22</sup>

It is submitted that support for universality as a fundamental feature of rights can be seen in the ECtHR’s recognition of equality as one of the principles underlying the Convention described above.<sup>23</sup> It can also be seen to be manifested in the prohibition on discrimination in relation to the enjoyment of other Convention rights,<sup>24</sup> where the European Court and the domestic courts have rejected unjustified attempts to deprive particular groups of the protection of rights that are held by others on the grounds of their subjective status rather than some objective reason.<sup>25</sup> The presence of judicial adjudication upon the interpretation of the Convention rights more generally can also be seen as a rejection of relativism in the protection it grants. By giving an international court the final judgement on their requirements,<sup>26</sup> rather than giving the decision on their applicability to the national governments, the rights are insulated from direct influence by interpretations which may be grounded only in popular majority opinion within a particular country.<sup>27</sup>

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<sup>21</sup> Beyleveld and Brownsword (n.21), 78

<sup>22</sup> L. Henkin, ‘The Universality of the Concept of Human Rights’ (1989) 506(1) *Annals Am.Acad.Pol. & Soc.Sci.* 10, 11

<sup>23</sup> Above p.43-44

<sup>24</sup> Article 14 ECHR

<sup>25</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [9] and *Belgian Linguistics* (1979-80) 1 EHRR 252, [10]

<sup>26</sup> *Wingrove v United Kingdom* Application No. 17419/90 (Commsision Decision 10 January 1995), [57]

<sup>27</sup> This aim can be seen to be expressed in paragraph 4 of the ECHR preamble.



However, although universal of nature in this manner, the recognition of different values within societies can be legitimately taken into account in the application of rights conceptualised as universal, and can be seen to be already a part of the ECtHR's jurisprudence, accepted for practical reasons. The Court's margin of appreciation is a recognition that the views of the different societies who are members of the Council of Europe as to the priority of rights, can form part of the factual context to be considered in determining the weight to be given to the rights.<sup>28</sup> The ECtHR, in recognition of the disagreements between states,<sup>29</sup> thus in some cases allows member states to determine for themselves the correct balance between conflicting Convention rights;<sup>30</sup> the margin exists in recognition that although rights are universally possessed their application can be a matter on which reasonable people can disagree. Unlike the relativism such as that of a Communitarian moral theory which contains no abstract standard of justice, it is submitted that the Convention with the margin of appreciation does provide such a standard for all states, but one which does take account of different distributive priorities of the states.<sup>31</sup>

Additionally, this relinquishment of judgment does not, with the isolated exception of the question of whether foetuses have rights under the Convention,<sup>32</sup> relate to the ground on which rights are held and thus is consistent with perceiving them to have a universal nature. Even the margin of appreciation applied in relation to foetuses does not, however, amount to relativism because it does not undermine the Convention's perception that there are identifiable rights held universally by humans. Rather it allows for the disagreements

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<sup>28</sup> *Handyside v United Kingdom* (1979-80) 1 EHRR 737, [48] and Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002), 4

<sup>29</sup> *Handyside* (n.28), [48]

<sup>30</sup> D. Harris and others, *Law of the European Convention on Human Rights* (2nd edn., OUP 2009), 12

<sup>31</sup> A. Ferrara, 'Universalisms: Procedural, Contextualist and Prudential' in D. Rasmussen (ed), *Universalism vs Communitarianism* (MIT Press 1990), 20 & 33

<sup>32</sup> Above p.66-67

amongst states on the question of whether fetuses are factually a human for the purposes of the Convention.<sup>33</sup> The underlying recognition of universality is reinforced by the fact that the court retains to itself the jurisdiction to determine when a margin of appreciation is appropriate and so retain ultimate adjudicative power.<sup>34</sup> Indeed, as noted above, the very existence of a supranational court insulates rights from interpretations which are grounded only in the popular majority opinion that exists in a particular country.<sup>35</sup>

### *The Inherent and Inalienability Nature of Rights*

The second fundamental feature with which an interpretive approach to human rights documents must fit is connected to the feature of universality. The universal nature of human rights exists because those rights are possessed by virtue of an *inherent* characteristic of worth possessed by humans. In the first line of the UDHR preamble this shared characteristic is labelled ‘dignity.’<sup>36</sup> It is this upon which the rejection of the relativism by human rights is founded and upon this that the UDHR goes on to claim that the rights it states are *inalienable*.<sup>37</sup>

The basis in dignity acknowledged in the preamble of the UDHR, performs a ‘founding function’<sup>38</sup> in conceptualising the recognition that there is a characteristic which unites mankind and the existence of which is not dependant on its factual recognition by states.<sup>39</sup>

Paragraph 5 of the preamble affirms that this value is so fundamental that knowledge of it,

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<sup>33</sup> Allowing the approach advocated below p.247

<sup>34</sup> *Handyside* (n.28), [49] and *Ireland v United Kingdom* (1979-80) 2 EHRR 25, [207]

<sup>35</sup> This aim can be seen to be expressed in paragraph 4 of the ECHR preamble concern to create a ‘...common understanding and observance of...human rights....’

<sup>36</sup> Nowak (n.16), 2

<sup>37</sup> UDHR Preamble, para. 1

<sup>38</sup> K. Dicke, ‘The Founding Function of Human Dignity in the Universal Declaration of Human Rights’ in D. Kretzmer and E. Klein, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002), 114

<sup>39</sup> Dicke (n.38), 114

and the need for its protection, can be pre-supposed.<sup>40</sup> Thus, the Declaration makes reference to dignity to describe the characteristic embodying the worth of individuals which justifies the recognition of and respect for their rights.<sup>41</sup>

The importance of inalienability to the concept of human rights can be found in the early rights protection set out in the French Declaration of the Rights of Man and the Citizen and the American Declaration of Independence, both of which influenced the ECHR.<sup>42</sup> The French Declaration claimed ‘to set forth...a solemn declaration the natural, unalienable and sacred rights of man’.<sup>43</sup> The combination of the claim to ‘set forth’ together with the actions of ‘declaring’, ‘natural’, and ‘unalienable’ norms suggest that a view of the rights as pre-existing and which the Assembly merely sought to give recognition to, rather than seeing the rights as the normative means of an attempt to achieve some other goal. The American Declaration similarly acknowledged the rights to life, liberty, and the pursuit of happiness to be so fundamental to the nature of man that they were recognised as being ‘unalienable’ and ‘self-evident.’<sup>44</sup> Thus, the twin characteristics of inherence and inalienability can be seen to be long established traits of human rights protecting documents.

Within the European Convention itself, in addition to the influence that the above rights documents have had upon it, commitment to the inalienability of the Convention rights can be inferred from the Article 14 prohibition of discriminatory treatment in relation to the enjoyment of the substantive Convention rights. The recognition in this Article, that the

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<sup>40</sup> Dicke (n.38), 115

<sup>41</sup> M. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001), 146

<sup>42</sup> C. Ovey and R. White, *Jacobs and White: The European Convention on Human Rights*, (4<sup>th</sup> edn OUP 2006) and Council of Europe, *Collected Edition of the “Travaux Préparatoires”* (Council of Europe 1964), vol.4, p.851

<sup>43</sup> National Assembly of France, *Declaration of the Rights of Man and of the Citizen* (26 August 1789), preamble

<sup>44</sup> United States Declaration of Independence 1776, para 2

possession of rights cannot be effected by the having of various other characteristics and statuses, is consistent with the position that rights are connected to the dignity of the individual, with their possession incapable of being alienated from that dignity by other circumstances or characteristics.

### *The Emphasis on Rights*

In their titles and in the wording of their substantive articles, the ECHR and other major international human rights treaties speak in terms of rights. Section one of the Convention, which contains the substantive rights, is entitled 'Rights and Freedoms' and many<sup>45</sup> of the Articles contained within it are classified as such<sup>46</sup> and expressed in these terms.

The idea of rights is common in laws and morality, although there are different conceptions of rights and their requirements. Early in the 20<sup>th</sup> Century, Wesley Hohfeld recognised that in the legal context the terms of both 'rights' and 'duties' were often used in an overbroad manner, to describe using the same labels concepts which had fundamentally different natures.<sup>47</sup> Amongst the various legal concepts often described in legal and judicial writings as 'rights', including powers, immunities, and privileges,<sup>48</sup> Hohfeld argued that only those norms which involved a 'claim' that another should do or not do something in relation to the holder (thus known as claim-rights) should properly be described as a right.<sup>49</sup>

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<sup>45</sup> Articles 3, 4 and 7 are not.

<sup>46</sup> Eg. The title of Article 2

<sup>47</sup> W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (D. Campbell and P. Thomas eds, Ashgate 2001), 11-12

<sup>48</sup> *Ibid*, 12

<sup>49</sup> *Ibid*, 13

Hohfeld's more precise conception of rights, as correlating to duties owed by others to act in relation to them in a particular manner,<sup>50</sup> finds support in the writings of thinkers who both preceded him and those who have subsequently sought to define rights. For example, Bentham saw rights and obligations as 'inseparably connected.'<sup>51</sup> He argued that 'every legal command by imposing a duty on one party, if the duty be not of a self regarding kind, confers a right to services upon another.'<sup>52</sup> Dworkin's conceptualisation of rights, also recognised their interconnectedness with duties arguing that, to say that someone has a right to something, in the most common sense of the word, is to say that 'it would be wrong to interfere with his doing it, or at least that some special grounds are needed for justifying any interference.'<sup>53</sup> Rights are hence norms which *prima facie* make a claim, requiring or prohibiting particular actions in order to ensure some good for or goal of a particular individual, rather than to ensure some good or goal for the community as a whole.<sup>54</sup> It is argued that the connection between rights and duties is further reflected by the recognition that to have a right to do something a person must also have no duty not to do it, although under Hohfeld's analysis this would be a mere privilege or liberty if it did not also make a claim on others in relation to the action.<sup>55</sup> Rights and duties are thus best conceptualised as correlative displacing spheres.

The ECHR recognises rights as norms which impose such corresponding obligations upon others (primarily the state) in this way. The Convention rights are not mere civil liberties<sup>56</sup> against whose infringement there is no control, this is apparent from the statement in Article

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<sup>50</sup> Ibid

<sup>51</sup> J. Bentham and J. Bowring (ed), *The Works of Jeremy Bentham: Vol III* (William Tait 1843), 159

<sup>52</sup> J. Bentham, *Of Laws in General* (Collected Works of Jeremy Bentham, University of London: Athlone Press 1970), 57-58

<sup>53</sup> R. Dworkin, *Taking Rights Seriously* (Duckworth 1997), 188

<sup>54</sup> Ibid, 91

<sup>55</sup> Hohfeld (n.47), 14, 17 & 20

<sup>56</sup> Ibid, 17

1 of the Convention of an obligation upon the signatory states to respect human rights, in the Article 13 duty to provide a remedy for their violation, and in the requirement of specific justifications for the limitation of the qualified rights which have been argued above to be based upon respecting the rights claims of others.<sup>57</sup> From this nature of the Convention rights, it follows that any interpretive approach to be applied to them must be able to account for both rights and duties.

Deontological conceptual foundations for normative rights and their interpretation are argued by Dworkin to be distinguishable from each other by the way in which they address individual's actions, as being either rights or duty theories. Theories of duty focus on whether the actions of individuals comply with a given code of behaviour.<sup>58</sup> For example, under Kant's theory, lying is always wrong regardless of the consequences.<sup>59</sup> Conversely, rights bases are 'concerned with the independence rather than the conformity of individual action.'<sup>60</sup> They seek to protect what they perceive as the inherent and underlying value of individual choice.<sup>61</sup> Under Dworkin's theory for instance, all individuals and their choices should generally be given equal concern and respect.<sup>62</sup> Although both rights and duty based theories make use of moral rules and codes of conduct, duty theories treat the codes as the essence of the theory, whereas under rights based theories the codes are instrumental in the protection of rights rather than having intrinsic value in themselves.<sup>63</sup> Consistent with this, whereas duty based theories primary focus is upon restraining actions to conformity with the moral rules or code, rights based theories seek to allow freedom of action.

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<sup>57</sup> Above p.80-81 & 126

<sup>58</sup> Dworkin (n.53), 172

<sup>59</sup> I. Kant, *The Metaphysics of Morals*, M. Gregor (ed.), R. Sullivan (intro.) (Cambridge University Press 1997), 182, see also Ibid

<sup>60</sup> Dworkin (n.53), 172

<sup>61</sup> Ibid

<sup>62</sup> Ibid, 272

<sup>63</sup> Ibid, 172

Although formal phrasing cannot be conclusive of the substantive conception the treaty is most consistent with, the full title of the ECHR as the Convention for the Protection of Human *Rights* and Fundamental *Freedom*s should not be disregarded. It can be tentatively seen to show a focus on the rights humans have and the importance of freedom to them, rather an intention to create a code of conduct for states or individuals which focuses on their duties.

The statement in the Convention's preamble that the UDHR – to which the Convention claims to give effect – aimed at 'securing the universal and effective recognition and observance of the rights therein declared' can, however, be interpreted as consistent with both bases. The preamble and the UDHR's title talk in terms of rights, but the ECHR reference to it can also be seen to be presenting the Declaration as a code to which states must conform, presenting a more mixed perspective. Guidance as to which interpretation the UDHR is more amenable can, however, be found in its more detailed preamble. This foundational statement pre-dating the ECHR, talks in terms of the 'inherent dignity' and 'inalienable rights' of human beings noted above. This recognition of dignity and rights of 'all members of the human family' is then described as 'the foundation of freedom, justice and peace in the world'. This opening sentence of the Declaration thus places fundamental emphasis upon the protection of the freedom of individual action rather than requiring particular actions as a duty based norm would be expected to. Further weight is given to this sentiment by its reiteration in paragraph 4 of the preamble.

Another factor which favours viewing the Convention as more reflective of a rights theory conception in its substantive content, is that the statements of the rights contained within it

appear to be addressed to the person who possesses the right, rather than to the person who might infringe it. This is particularly clear with those rights that start with the formulation ‘[e]veryone has the right’.<sup>64</sup> There are, however, some articles which are not quite so clearly addressed to the rights holder and are not explicitly expressed in terms of rights, instead being stated as prohibitions.<sup>65</sup> Although it is a characteristic of duty theories that they focus on the restraint of action, these Articles do not talk in terms of duties upon others to refrain from the conduct and do not focus on those who might commit the impugned conduct as would reasonably be expected if the rights were clearly duty based. Rather they focus on ensuring individuals freedom and protection from the interference in question (eg. Article 3: ‘[n]o one shall be subjected to torture’) which is consistent with the focus of rights theory on freedom of action. Thus, although less explicitly displaying of a rights theory conception, they are not inescapably incompatible with such a basis.

‘Duties’ or ‘duty’ is explicitly mentioned once in the Convention, as justifying restriction of an individual’s freedom of expression.<sup>66</sup> This mention, even if as argued above the other qualified rights implicitly contain a similar duty respect general interests and others’ rights,<sup>67</sup> does not undermine the idea that the ECHR propounds a rights based conception of rights, because claim rights necessarily by their nature impose duties.<sup>68</sup> It is the right rather than the duty that is the starting point of this Article<sup>69</sup> and, if the limitations on the rights are seen as protecting the rights of others, this use of duty is consistent with a rights basis for the Convention rights. Similarly, the elements of the rights explicitly phrased in terms of the states’ duties (eg. Article 8(2) ‘[t]here shall be no interference by a public authority’) are

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<sup>64</sup> Eg. Article 8

<sup>65</sup> Articles 3, 4 and 7

<sup>66</sup> Article 10(2)

<sup>67</sup> Above p.107-108

<sup>68</sup> Above p.170-171

<sup>69</sup> Article 10(1)



included subsequent to the statement of the right. Therefore, it is submitted that the primary focus of these Articles is upon the freedom of the individual from interference, and the qualifying provisions merely spell out the extent of the duties that are correlative to them.

Thus, although as noted above the open textured nature does not tie the Convention to a particular philosophical basis, in relation to a potential deontological basis, generally the substance of the ECHR can be seen to not only be consistent with but to favour the recognition of interpretative bases for it which are characterised by a focus on rights rather than duties. This focus on individual capacity for choice of rights based theories also accords with the recognition of the possession of rights as based in an inherent characteristic as a fundamental feature of human rights and those of the Convention in particular.

### ***The Principle of Generic Consistency as a Guide to the Interpretation of the Convention***

#### ***Rights***

##### *Moral Answers to Legal Questions*

In the context of the above framework of rights protection within which a moral theory used to guide the interpretation of the Convention rights must fit, it is argued that the ‘Principle of Generic Consistency’ enumerated by Gewirth can provide a rationally justified and practically coherent guide to interpretation. As a moral theory it seeks to answer three questions with which it is necessary to engage to address adequately the interactions between individuals that are the subject matter of morality.<sup>70</sup> First, the authoritative question asks, why should one be moral and recognise that one is bound to conform one’s actions to a given principle purporting to govern action? Second, the distributive question asks, other than his own, of whose interests should the agent take account when deciding how to act? Finally, a

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<sup>70</sup> Gewirth (n.9), 3 & 150 and D. Beyleveld, *The Dialectical Necessity of Morality* (Chicago University Press 1991), 17

principle of morality must describe the interests of which ‘favourable account’ must be taken, the substantive question.

The concern of the distributive question for the determination of the identity of the beings of whose interest account should be taken, is shared with the first of the five key questions that must be answered in giving a comprehensive account of the interpretation of the Convention rights: who is protected by the Convention? Just as the answers to the other four questions of rights interpretation can be traced to the answer to the first, the answer to the substantive question is connected to that of the distributive question. Gewirth’s responses to the distributive and substantive questions as a theory of rights can thus be used answer the five core questions of the interpretation of the Convention system of rights.

The premise of Gewirth’s theory, and his answer to the distributive question, is purposive agency. This agency is defined in a non-question begging manner as possessed by beings with capacity for action.<sup>71</sup> The idea of action is neutral, it is the concern of all moral theories and it neither reflects nor derives from any particular moral theory, in itself it sets out no particular substantive moral claims as to how agents ought to act,<sup>72</sup> it is merely a factual description of a state of being.<sup>73</sup> The substantive content of action is voluntary and purposive behaviour.<sup>74</sup> An agent is thus a being who has the capacity ‘to control his behaviour [in this manner] by his unforced choice with a view to achieving his purposes’.<sup>75</sup> Gewirth takes this as the defining characteristic of an agent because of action’s fundamental nature as the

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<sup>71</sup> Gewirth (n.9), 44-46

<sup>72</sup> Ibid, 24-26

<sup>73</sup> Ibid, 158-159

<sup>74</sup> Ibid, 22 & 26-27 and Beyleveld (n.70), 13

<sup>75</sup> Gewirth (n.9), 46

subject matter of morality, and because it is only possible to address precepts of morality to a being who is capable of such action.<sup>76</sup>

Voluntariness entails that the agent has control over his actions in that he has an unforced choice as to how to act.<sup>77</sup> For such choice to be fully real the agent must have knowledge of the circumstances relevant to his choice of action,<sup>78</sup> including the likely effects and outcomes of his action.<sup>79</sup> This voluntariness has both positive and negative elements,<sup>80</sup> the capacity for the possession of which is necessary to be an agent and the respect for which is necessary for that agency to have fulfilment. In negative terms agents' actions must be free from 'direct compulsion...by someone or something external to the person'<sup>81</sup> or internal causes 'such as reflexes, ignorance or disease.'<sup>82</sup> Similarly, agents must not be subject to indirect compulsion whereby the coercion of another forces an agent into a particular choice.<sup>83</sup> The positive element of voluntariness is the requirement that a person should be able to control their behaviour by their 'own unforced and informed choice.'<sup>84</sup>

Purposiveness is defined as the fact 'that the agent acts for some end or purpose that constitutes his reason for acting, this purpose may consist in the action itself or in something to be achieved by the action.'<sup>85</sup> These purposes can range from the long term and diffuse to the immediate and specific.<sup>86</sup> As agents are not always successful in achieving their purposes, the purposiveness which is a constituent part of what it is to be an agent is conative not

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<sup>76</sup> Ibid, 30, 44-46 & 171

<sup>77</sup> Ibid, 27

<sup>78</sup> Ibid, 27 & 132

<sup>79</sup> Ibid, 132

<sup>80</sup> Ibid, 31

<sup>81</sup> Ibid

<sup>82</sup> Ibid

<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Ibid, 27 & 37

<sup>86</sup> Ibid, 134

achievemental,<sup>87</sup> it can be said to be achievemental only in the general sense that it is to achieve their purposes that an agent acts and undertakes conative action.<sup>88</sup>

The practical connection between voluntariness and purposiveness, the two generic features of agency which are constitutive of action, is that the free choice of action that constitutes voluntariness is directed by an agent's purposes, whether it is merely the pursuit of the action itself or some other purpose.<sup>89</sup> As both the generic features of agency are by definition necessary parts of what it is to be an agent, if an agent is a being who pursues particular purposes, then an agent must therefore also see them both as good in the sense that they are essential if the agent has the purpose of maintaining or exercising his agency.<sup>90</sup> Without voluntariness an agent would be incapable of the action necessary to achieve those things he regards as good and therefore he must see the possession of voluntariness as instrumentally good to that end.<sup>91</sup> Similarly, by virtue of the fact of seeing some specific purpose as good, the generic purposiveness that makes such desire possible must consequently also be seen as instrumentally good by an agent.<sup>92</sup>

This premise of agency encompasses the 'prospective' purposive agent, a being 'who has desires and purposes even when he is not currently acting',<sup>93</sup> for example one who is asleep.<sup>94</sup> This definition of an agent, by being tied to the factual characteristics of action as 'the voluntary pursuit of purposes',<sup>95</sup> forms the non-question begging cornerstone of Gewirth's

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<sup>87</sup> Ibid, 58

<sup>88</sup> Ibid

<sup>89</sup> Ibid, 25 & 37-38

<sup>90</sup> Ibid, 52 & 61

<sup>91</sup> Ibid, 52

<sup>92</sup> Ibid, 49 & 53

<sup>93</sup> Ibid, 62

<sup>94</sup> Ibid, 60

<sup>95</sup> Ibid, 48 and Beyleveld (n.70), 14

moral theory.<sup>96</sup> It is from this that the answers to the authoritative and substantive questions are derived. To do this, to this conception of agency Gewirth applies the dialectically necessary method of reasoning which asks what statements, assumptions and claims an agent must – objectively and rationally – logically make from his position as an agent who desires to achieve his purposes,<sup>97</sup> and what judgements and claims they can be shown to subsequently imply.<sup>98</sup> This approach of dialectical enquiry is thus consistent with Habermas’s contention that that if a proposition is to be said to be true it must be able to withstand ‘all attempts to refute it under the demanding conditions of rational discourse.’<sup>99</sup>

The first stage under this method is the recognition that, by acting to attempt to achieve a purpose, an agent must think that his purpose is good.<sup>100</sup> This must be the case, for if an agent did not value his purpose he would not act in order to achieve it.<sup>101</sup> It is this valuing by the agent ‘according to whatever criteria lead him to try to achieve his purpose’<sup>102</sup> which makes the purpose at least an instrumental ‘good’ from the agent’s perspective.<sup>103</sup>

From the dialectical necessity of an agent’s recognition of his purposes as good, such an agent must *a fortiori* also think that the generic features that characterise the actions necessary to achieve any of his purposes are good.<sup>104</sup> These ‘general abilities [of an agent] to pursue, retain, and expand’<sup>105</sup> their purposes are in this way instrumentally good, but not intrinsically good, because they only have value by their relationship to the purposes an agent

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<sup>96</sup> Gewirth (n.9), 44

<sup>97</sup> Ibid

<sup>98</sup> Ibid, 43-44

<sup>99</sup> J. Habermas, *On the Pragmatics of Communication* (M. Cooke ed., Polity Press 1999), 367, see also above p.28

<sup>100</sup> Gewirth (n.9), 48-49

<sup>101</sup> Ibid, 49

<sup>102</sup> Ibid, 50

<sup>103</sup> Ibid, 49-52

<sup>104</sup> Ibid, 52

<sup>105</sup> Beyleveld (n.70), 23

values.<sup>106</sup> Thus, these features of action and consequent necessary abilities of an agent constitute the ‘generic goods’<sup>107</sup> of agency.

These generic goods, which must logically be acknowledged by an agent, are the characteristics of ‘freedom’ and ‘well-being.’<sup>108</sup> The former is the voluntariness that is necessary to act for any purpose;<sup>109</sup> an agent’s ability to control ‘each of his particular behaviours by his unforced choice and...his longer-range ability to exercise such control’<sup>110</sup> with the knowledge of the circumstances relevant to their choices.<sup>111</sup> This freedom can be further defined into two elements. The first is particular freedom or occurrent freedom, which is limited where a particular action is prevented; this may not prevent an agent from achieving all their purposes but it can prevent an agent from achieving whatever purpose they regard as good.<sup>112</sup> The second element is long-range freedom or dispositional freedom which makes all or most purposive action possible, it is affected by interferences such as imprisonment and slavery<sup>113</sup> and ‘is necessary in order to pursue or achieve any purpose at all’.<sup>114</sup>

In addition to the generic need for freedom, as a being who deems their purposes to be good an agent must also instrumentally value their ‘generic purposiveness as a necessary good.’<sup>115</sup> Well-being is thus composed of the capacities, abilities, and conditions for action<sup>116</sup> which

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<sup>106</sup> Ibid, 23-24

<sup>107</sup> Gewirth (n.9), 52

<sup>108</sup> Ibid, 62-63

<sup>109</sup> Ibid, 52

<sup>110</sup> Ibid

<sup>111</sup> A. Gewirth, ‘The Basis and Content of Human Rights’ (1979) 13 *Ga.L.Rev.* 1143, 1149

<sup>112</sup> Gewirth (n.9), 52 and Beyleveld (n.70), 19

<sup>113</sup> Gewirth (n.9), 52

<sup>114</sup> Beyleveld (n.70), 19

<sup>115</sup> Gewirth (n.9), 53, see also 57

<sup>116</sup> Gewirth (n.111), 1149

enable an agent 'to act with some hope of fulfilling in general the purposes of their action.'<sup>117</sup>

Under the dialectically necessary method, from the agent's perspective, well-being in the form of an agent's generic purposiveness can be seen to be composed of three kinds of goods: basic, non-subtractive, and additive.<sup>118</sup>

The basic goods are those an agent regards as 'basic aspects of his well-being that are the proximate necessary preconditions of his performance of any and all of his actions.'<sup>119</sup> These are the goods generically necessary for 'any agent's purposive actions'.<sup>120</sup> In more substantive terms they include 'physical and psychological dispositions ranging from life and physical integrity...to mental equilibrium and a feeling of confidence as to the general possibility of attaining one's goals.'<sup>121</sup>

An agent's non-subtractive goods 'consist in his retaining and not losing whatever he already has that he regards as good',<sup>122</sup> so that his capacity for action and his level of purpose fulfilment is maintained.<sup>123</sup> This necessarily encompasses the retention of the basic goods, but extends to whatever the agent had before acting and regards as a necessary good for the achievement of his purposes.<sup>124</sup> Conversely, for an agent, an additive good is the fulfilment of their generic purposiveness that results from the attainment of the goal or objective for which the agent acts.<sup>125</sup> Thus, Gewirth observes that '[t]he particular contents of non-subtractive and

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<sup>117</sup> Gewirth (n.9), 60

<sup>118</sup> Ibid, 53

<sup>119</sup> Ibid

<sup>120</sup> Ibid, 54

<sup>121</sup> Ibid

<sup>122</sup> Ibid

<sup>123</sup> Ibid, 53 & 233

<sup>124</sup> Ibid, 54

<sup>125</sup> Ibid, 53 & 55

additive goods are relative both to each person's status quo regarding his possession of goods and to what he views as goods.'<sup>126</sup>

In avoidance of contradiction, and because of the nature of purposive agency from which they derive, the three elements of well-being should be viewed 'generically-dispositionally', and recognised as consisting of 'the general conditions and abilities required for fulfilling any...particular purposes'<sup>127</sup> in a successful manner.<sup>128</sup> This approach avoids the contradictions that might occur if the three elements were viewed as 'particular-occurrent' goods necessary to perform specific actions rather than for purposive action generally. For example, a specific agent's decision to smoke cigarettes is contrary to their well-being in so far as it harms their health, however, it is consistent with their generically dispositional well-being if by their own purposive action they choose to smoke the cigarette.<sup>129</sup>

Within the three elements of well-being there is a hierarchy which is 'determined by the degree of their indispensability for purposive action.'<sup>130</sup> At the pinnacle are the basic capabilities for action protected by the basic goods, the most necessary without which an agent would be unable to act at all or only in a very restricted way.<sup>131</sup> Amongst the basic goods there is a further hierarchy, 'headed by life and then including various other physical and mental goods, some more indispensable than others for action and purpose fulfilment.'<sup>132</sup> Of the other two forms of well-being non-subtractive goods are higher than additive goods 'because to be able to retain the goods one has is usually a necessary condition of being able

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<sup>126</sup> Ibid, 55

<sup>127</sup> Ibid, 58

<sup>128</sup> Beyleveld (n.70), 20

<sup>129</sup> Gewirth (n.9), 61

<sup>130</sup> Ibid, 62 and Beyleveld (n.70), 21

<sup>131</sup> Gewirth (n.9), 63

<sup>132</sup> Ibid



to increase one's stock of goods.<sup>133</sup> Although both non-subtractive goods and additive goods increase the likelihood of successful purposive action, to lose the capacity for action one already has necessarily causes a greater reduction in the capacity for purposive action than a failure to increase one's ability to act.

It is apparent that that well-being is primarily concerned with the protection of the generic feature of purposiveness because the abilities and conditions it encompasses are relevant to the pursuit of purposes.<sup>134</sup> Conversely, freedom protects voluntariness because it prohibits interference with a person's control of their behaviour.<sup>135</sup> The differences between voluntariness and purposiveness thus make the generic needs of freedom and well-being conceptually distinct.<sup>136</sup> The two can, however, be seen in their application to overlap to some extent and the distinction between them can be criticised as unnecessary: freedom can be seen as part of what is necessary for an agent to have well-being in that it is necessary to exercise the purposive feature of agency because it is required to pursue goals.<sup>137</sup> Additionally, the same criteria of relative necessity for purposive action applies to the determination of the hierarchical weight of the generic goods of well-being as to the assessment of the weight to be attributed a particular manifestation of freedom; the greater the interference with freedom, the greater the weight the competing generic good must have to justify the interference.<sup>138</sup> However, the two classes of goods are conceptually distinguishable by the different features of action they derive from, and it is submitted that treating them as such helps to give clarity to the nature of generic needs of an agent and their application.

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<sup>133</sup> Ibid

<sup>134</sup> Ibid, 61 & 251, see also Beyleveld (n.70), 403

<sup>135</sup> Gewirth (n.9), 61 & 251, see also Beyleveld (n.70), 403

<sup>136</sup> Gewirth (n.9), 256

<sup>137</sup> Beyleveld (n.70), 19 & 403

<sup>138</sup> A Gewirth (n.9), 254 & 255, see also below p.282-283

It is from purposive agency, and from this first step of the acknowledgement of the instrumental necessity of the generic goods for purposive action by agents on pain of contradicting that agency, that it is argued in the second stage of the dialectically necessary argument to the PGC that agents must rationally recognise that they possess rights to the generic goods. Gewirth concedes that the fact that the possession of the generic goods of agency is deemed desirable or good by an agent is a necessary but not a sufficient condition to give rise to a right to it.<sup>139</sup> If this were the case there would be a proliferation of rights,<sup>140</sup> to the extent that they would become worthless as they would arise from any individual whim. Instead, whether something that appears to an agent to be good entails a right to that good depends on whether the fact of goodness or some superior authority determines what rights an agent should be deemed to possess.<sup>141</sup>

With freedom and well-being it is not a mere desire or inclination which an agent feels to the possession of these that gives rise to a claim of a right to them; it is the vital necessity of these two characteristics to being a purposive agent. As a purposive agent who necessarily thinks his purposes are good, and therefore recognises that his freedom and well-being are good as necessary conditions if he is to act to achieve his purposes, the agent must therefore, dialectically necessarily on pain of contradicting his agency, take the view that he has rights to the generic goods if he is to be a purposive agent.<sup>142</sup> An agent must view his need for freedom and well-being as a rights claim and see himself as having rights to them because, constant with the Hohfeldian definition of a claim right with which an interpretation of the

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<sup>139</sup> Ibid, 76

<sup>140</sup> Ibid, 77

<sup>141</sup> Ibid

<sup>142</sup> Ibid, 64-65 and Beyleveld (n.70), 24

Convention rights must ultimately fit,<sup>143</sup> the needs of freedom and well-being viewed in this way are a claim by the agent that others ought not to interfere with their having the goods in question.<sup>144</sup> That an agent must claim these as rights is the case because, for an agent to believe that it is generally permissible for another to interfere with his freedom and well-being, would be to contradict that these are necessary for their agency.

That the possession of the generic rights by a purposive agent can be shown to be dialectically necessary in this way answers the substantive question of moral theory in setting out the specific rights claimed by agents. However, for a fully reasoned answer to the distributive and authoritative questions, it is necessary to show that the generic rights bind an agent in relation to their treatment of others; if a principle is to be a moral one it must be other regarding.<sup>145</sup>

If the dialectically necessary argument were to stop at this point, Richard Hare and Edward Bond would be fatally correct in their observation that, although it can be dialectically necessarily shown that an agent must claim that others ought not to interfere with his generic goods and thus claim to have generic rights, the second stage argument does not show why other agents must accept that they are bound by these claims and thus to act in accordance with another's freedom and well-being.<sup>146</sup> Thus these critics argue that the second stage is flawed by not proving why agents should have regard to others' interests and thus states no moral obligations.<sup>147</sup>

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<sup>143</sup> Above p.170-171

<sup>144</sup> Gewirth (n.9), 77

<sup>145</sup> Ibid, 129 and K. Baier, *The Moral Point of View: A Rational Basis of Ethics* (Cornell University Press 1958), 188-190

<sup>146</sup> E. Bond, 'Gewirth on Reason and Morality' (1980) 11(1) *Metaphilosophy* 36, 49-50, R. Hare, 'Do Agent's Have to be Moralists?' in E. Regis Jr. (ed), *Gewirth's Ethical Rationalism* (Chicago University Press 1984), 54 and Beyleveld (n.70), 201-203

<sup>147</sup> Bond (n.146), 50, Hare (n.146), 54 and Beyleveld (n.70), 201-203

However, although what Hare and Bond say is true, Gewirth does not in fact claim the second stage requires the recognition of such moral duties by other agents.<sup>148</sup> Rather, the rights and duties claimed in the second stage are only *prudential* in nature, in that they are only necessarily claimed by, and must be recognised from, the perspective of the agent to whose reasoning the dialectically necessary method is applied.<sup>149</sup> At this stage, no reasons are intended to be given why other agents must recognise another agent's generic rights, and thus the rights and consequent duties claimed are not at this stage argued by Gewirth to be moral. The prudential nature of these rights does not prevent their claims and conclusions being logically sound, even though at this stage other agents need not recognise their claims. As Beyleveld notes, a claim and conclusion can be logically valid even if the claims are not accepted by a person they claim to apply to,<sup>150</sup> for example, the law stating that cars on British roads should be driven on the left, and drivers have a consequent duty to do so, applies to a car driven by a holidaying continental anarchist who declaims state law and chooses to drive on the right.

From this second stage, just as through dialectic reasoning an agent must prudentially recognise themselves as possessing the generic rights, or else contradict their agency and its requirements, the transition to the statement of a moral principle concerning the recognition of the rights of others, and setting out the consequent limits on treatment of others, can be achieved through the continued application of the dialectically necessary method. The basis of such a principle, because of the merely prudential nature of the second stage, must necessarily be sufficient in itself to justify the claim to the norms of action such as rights and

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<sup>148</sup> Beyleveld (n.70), 202 & 204

<sup>149</sup> Gewirth (n.9), 79 & 94, Gewirth (n.111), 1153-11154 and Beyleveld (n.70), 202 & 204

<sup>150</sup> Beyleveld (n.70), 205

their correlative obligations protected by the principle,<sup>151</sup> and thereby answer the authoritative question of morality.<sup>152</sup> Such a basis will also contain a ‘description or descriptive characteristic’ of the person protected by the moral principle<sup>153</sup> and to which the protection of the moral principle attaches,<sup>154</sup> thus also providing an answer to the distributive question of moral theory.

The piece of dialectical reasoning, which forms the third and final stage in the argument by which a moral principle of the PGC is derived from such a characteristic, is the ‘formal principle of universalisability’.<sup>155</sup> Under this rule of logic, once a person claims to have rights only because they possess a particular characteristic, as occurs in stage two with the generic rights being prudentially derived from the needs of agency, they must necessarily also recognise that any other being who also possesses that characteristic must also have the rights that characteristic gives rise to.<sup>156</sup> It would be contradictory for a person to claim that the rights they have are not universalised in this way because, if they were to deny that another being with the same characteristics which gives the former person rights has those rights, then they would be contradicting their view that the characteristic they have as a rights holder is sufficient to possess the rights.<sup>157</sup>

However, the principle of universalisability is only formal; it has no substantive content to determine the nature of the rights that are universalised, moral content is given to the moral principle by the characteristics which are universalised as the basis of rights.<sup>158</sup> Thus, the

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<sup>151</sup> Gewirth (n.9), 104

<sup>152</sup> Above p.8

<sup>153</sup> Gewirth (n.9), 104

<sup>154</sup> Ibid, 105

<sup>155</sup> Ibid

<sup>156</sup> Ibid

<sup>157</sup> Ibid

<sup>158</sup> Ibid, 106-107

question of what characteristic is both necessary and sufficient to enable a person to claim to have rights takes on a crucial character.<sup>159</sup> In his ‘argument for the sufficiency of agency’ (ASA) Gewirth shows that this fundamental characteristic is the purposive agency, which was shown in the second stage of the dialectically necessary argument to form the basis of an agent’s prudential claim to have rights to the generic features of action.<sup>160</sup>

As established in the second stage of Gewirth’s argument, an agent must prudentially think on pain of self-contradiction that that he has generic rights by virtue of his agency, because of the necessity of rights to freedom and well-being to being a purposive agent.<sup>161</sup> From the perspective of an agent, freedom and well-being are ‘the most general and proximate necessary conditions’<sup>162</sup> for the pursuit of his purposes to be possible or stand a chance of success.<sup>163</sup> As a consequence of this necessity, an agent must think that he ought to pursue, and have, these generic conditions of agency, to avoid contradicting that he is an agent by implicitly denying that he values his purposes for which the generic goods are necessary.<sup>164</sup> This belief by an agent that he *ought* have freedom and well-being was shown logically<sup>165</sup> to entail that an agent must necessarily think that he has a *right* to freedom and well-being which imposes a duty on others to refrain from interfering with his possession of the generic goods so that he *can* pursue his purposes.<sup>166</sup> However, if an agent were to state that he did not have these generic rights, because he lacked some characteristic other than his agency, he would in effect be arguing that he does not need freedom and well-being to pursue his purposes. But, as freedom and well-being *are* essential to the pursuit of any purpose, he

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<sup>159</sup> Ibid, 109-110

<sup>160</sup> Ibid

<sup>161</sup> Ibid, 110 & 112

<sup>162</sup> Ibid, 65

<sup>163</sup> Ibid

<sup>164</sup> Ibid, 66 & 75 and Beyleveld (n.70), 30

<sup>165</sup> By virtue of the logic that it only makes sense for it to be said that a person ought to do something if he can do it: Beyleveld (n.70), 27

<sup>166</sup> Gewirth (n.9), 65-66 and Beyleveld (n.70), 24 & 27

would also logically be denying that he had purposes and that would be to contradict his agency, of which purposiveness is the identifying feature.<sup>167</sup>

The consequence of the ASA is that, because it can be established through it that a purposive agent must, on pain of contradiction, prudentially claim in stage two of the argument to have the generic rights only because of his agency,<sup>168</sup> the application of the principle of universalisability entails that an agent must accept that all ‘agents who have purposes they want to fulfil have the rights of freedom and well-being.’<sup>169</sup> An agent cannot deny this logic without contradicting that his agency is the necessary and sufficient reason for his possession of the generic rights and consequently contradictorily denying his own agency.<sup>170</sup>

The practical application of this logic is that when acting in a way that will affect another agent, what Gewirth calls a transactional relationship,<sup>171</sup> an agent must recognise that the agents that are recipients of his actions also have the generic rights to freedom and well-being.<sup>172</sup> This in turn entails that ‘every agent logically must acknowledge certain generic obligations’<sup>173</sup> deriving from the rights of other agents. These obligations Gewirth expresses in the form of the precept addressed to all agents which he calls the ‘Principle of Generic Consistency’ and which requires agents to ‘act in accord with the generic rights of your recipients as well as of yourself.’<sup>174</sup> This is the substantive core of Gewirth’s moral theory.<sup>175</sup>

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<sup>167</sup> Gewirth (n.9), 110 & 111 and above p.176-178

<sup>168</sup> Ibid, 112

<sup>169</sup> Ibid, see also 127

<sup>170</sup> Ibid, 112 and B. Powell, ‘Kant and Kantians on “The Normative Question”’ (2006) 9(5) *Ethic. Theory Moral Prac.* 535, 536

<sup>171</sup> Gewirth (n.9), 132, see also 129

<sup>172</sup> Ibid, 134

<sup>173</sup> Ibid, 135

<sup>174</sup> Ibid

<sup>175</sup> Ibid

The PGC is a moral principle, not a merely a prudential self-regarding statement,<sup>176</sup> because it requires an agent to have regard to the interests of persons other than himself.<sup>177</sup> Bond and Hare have objected to this conclusion on the grounds that it involves the derivation of a moral rule, that agents ought to take account of the generic rights of other agents, from the non-moral prudential premise of the claiming of generic rights.<sup>178</sup> They argue that it is only logically possible to derive a recognition of moral rights for other agents by universalising the claim of rights in the second stage if that claim is itself a moral claim.<sup>179</sup> Thus Hare claims that stage three of the argument can only require a prudential recognition by an agent, that other agents must prudentially claim that they ought to pursue their freedom and well-being, not a moral recognition of their rights.<sup>180</sup> Bond similarly concludes that only prudential (ie. not moral) general principles can be derived from prudential singular prescriptions.<sup>181</sup>

However, Hare in reaching his conclusion appears to misapply the principle of universalisability to an agent's stage two claim to need freedom and well-being rather than, as Gewirth applies it, to the agents prudential claim to have the generic rights with which others must not interfere.<sup>182</sup> However, even if the principle of universalisability is applied to the prudential claim of the rights as Bond recognises it as applying, Beyleveld argues that it does not entail that only a prudential recognition that other agents will prudentially claim the

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<sup>176</sup> Ibid, 146-147

<sup>177</sup> Ibid, 145

<sup>178</sup> Bond (n.146), 50, Hare (n.146), 53-56 and Beyleveld (n.70), 259-260 & 268-269

<sup>179</sup> Hare (n.146), 53-56 and Beyleveld (n.70), 202-203 & 268-269

<sup>180</sup> Hare (n.146), 55 and Beyleveld (n.70), 269-270

<sup>181</sup> Bond (n.146), 260

<sup>182</sup> Hare (n.146), 55 and Beyleveld (n.70), 270



generic rights or be prudentially recognised as have the generic rights can be the resulting conclusion.<sup>183</sup>

This mistaken conclusion is the product of a mistaken application of the principle of universalisability, from the external perspective of considering that other agents must prudentially claim the generic rights, not from the internal perspective of the agent making dialectically necessary claims about his own agency.<sup>184</sup> When applied in this dialectical manner, it is a valid inference that, just as an agent must think that as he has the generic rights because he is an agent, he must also from his perspective think that other agents have these generic rights because they are also agents.<sup>185</sup> Thus, a moral conclusion as to the treatment of those other agents must be accepted by an agent from his prudential premise. This factual premise is non-question begging because the concept of agency and the conclusions drawn from it at the second stage are dialectically necessary premises, and in being prudential it does not claim to be a moral premise itself requiring an agent to recognise others' rights.<sup>186</sup> The necessary recognition of moral obligations by an agent follows subsequently from the application of the principle of universalisability to this premise.<sup>187</sup>

That the PGC becomes a moral principle at the point 'where, through the principle of universalisability, the agent logically must acknowledge that the generic rights he claims for himself are also held by all prospective purposive agents'<sup>188</sup> entails that the PGC is thus an 'egalitarian universalist moral principle'.<sup>189</sup> This is so because it requires an equal distribution of the generic rights necessary for action to all agents. This particularly is

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<sup>183</sup> Beyleveld (n.70), 270

<sup>184</sup> Ibid, 261 & 270

<sup>185</sup> Ibid

<sup>186</sup> Ibid, 261 & 272-273

<sup>187</sup> Ibid, 273

<sup>188</sup> Gewirth (n.9), 146

<sup>189</sup> Ibid, 140

significant if, as argued below, it is to form a principle which fits with the fundamental features of the ECHR, and can therefore be used to interpret it.

#### Alternate Arguments to the PGC

As just noted, the step from the possession of purposive agency, to the dialectical necessity of such an agent claiming the generic rights, has been criticised for its imposition of duties on others as a correlative effect of the claim of rights to freedom and well-being by an agent. This recognition that the ‘is’ of agency involves a recognition of a prudential ‘ought’ claim as a necessary part of that agency – the recognition of the necessity of freedom and well-being entailing the recognition that this need implies a prudential claim of rights which protect their possession – is a statement of prudential obligations on others. Within the dialectically necessary argument for the PGC it precedes the principle of universality and the ASA which seek to justify the imposition of such moral obligations on all agents using dialectically necessarily reasoning from that prudential ought which is an implicit part of agency.<sup>190</sup>

An additional criticism that might be brought against this claim of the generic rights from the perspective of a singular purposive agent, at the second stage of the argument, is that it assumes the moral point of view by assuming, without dialectically necessary justification, that agents ought to take account of the interests of others in deciding how to act and not merely act in their own self-interest,<sup>191</sup> and that therefore others agents owe duties to respect the generic rights an agent must claim they have. Kant makes this assumption in *The Groundwork for the Metaphysics of Morals* and his *Critique of Practical Reason*,<sup>192</sup> attempting to determine what the metaphysics of morals is after assuming that rational beings

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<sup>190</sup> Beyleveld (n.70), 29

<sup>191</sup> Baier (n.145), 188-190

<sup>192</sup> Kant (n.6), 13-14 & 65, See also Powell (n.170), 540 & 542

have an inherent '[r]espect for the moral law'<sup>193</sup> as part of being a person with a capacity for reason.<sup>194</sup> This respect is said to arise from the desire of such persons to be free from the influence of their inclinations upon their actions, to have 'a life independent of animality'<sup>195</sup> and thereby see themselves as possessing value.<sup>196</sup> Kant thus assumes that because of, and as part of, this possession of reason individuals will act so as to take account of the effect of their actions on others.<sup>197</sup>

This criticism of Gewirth's theory is, however, premature. As a whole, the three stage argument to the PGC does not involve an assumption of the moral point of view because it justifies the generic rights as moral rights by showing – which Kant does not – why regard dialectically necessarily *must* be had to the interests of others.<sup>198</sup> It does so using the arguments of universality and the sufficiency of agency.

Additionally, this criticism is unfounded because, as argued in the previous section, the dialectical necessity of the claiming of the generic rights by an agent at this stage of the argument to the PGC, prior to the arguments of universality and the sufficiency of agency, does not, in fact, seek to state obligations that purposive agents must recognise themselves as bearing as agents to other agents. Instead any obligations at this stage are merely the *prima facie* consequences of the prudential rights claimed.<sup>199</sup> Although these rights claimed are 'other-referring or -directed'<sup>200</sup> they are not yet dialectically necessarily 'other-directing.'<sup>201</sup>

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<sup>193</sup> I. Kant, *Critique of Practical Reason*, M. Gregor (ed.), A. Reath (intro.) (Cambridge University Press 1997), 67

<sup>194</sup> Ibid, 88, see also Powell (n.170), 541

<sup>195</sup> Kant (n.193), 133-134

<sup>196</sup> Powell (n.170), 542

<sup>197</sup> Kant (n.6), 51, Kant (n.193), 88, D. Ross, *Kant's Ethical Theory* (Clarendon Press 1954), 6 and Beyleveld and Brownsword (n.21), 68 and Powell (n.170), 541

<sup>198</sup> Beyleveld (n.70), 16-17 and Powell (n.170), 536

<sup>199</sup> Beyleveld (n.70), 33 & 41

<sup>200</sup> Ibid, 41

Rather, as part of the dialectically necessary argument which proceeds from the perspective of a purposive agent, this second stage of the argument for the PGC only involves the recognition that such a purposive agent must logically think of himself<sup>202</sup> as having the generic rights – and think of others as having obligations – in a prudential internal manner.<sup>203</sup> This is the case because, as noted above,<sup>204</sup> from this position it would be incompatible with his agency for such an agent not to believe that others should not interfere with his freedom and well-being, and should assist him to possess these goods, because of the essential nature of these generic goods to his existence as a purposive agent.

However, even if this criticism of this second stage were not premature, it is itself flawed in that this criticism itself assumes the moral perspective. By criticising the imposition of duties on others, it logically assumes that the status of those others must be taken into account in acting, implicitly arguing that others have a status which requires that duties not be imposed upon them and itself assuming the moral point of view. If, however, the moral point of view is presumed in this way then there is no need for the third stage of the argument for the PGC, as the recognition of generic rights flows naturally from the recognition of freedom and well-being as the necessary characteristics of agency. If it is accepted contingently in this way – as opposed to being proved by the dialectically necessary method through the arguments of universality and the sufficiency of agency that form the third stage of the argument of the PGC – that agents should take account of others' needs, then all agents must act in accordance with the generic rights of all other agents and this together with the agent's recognition of their own generic needs establishes the PGC.

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<sup>201</sup> Ibid, 41-42, they are only bending on those who contingently choose to accept the interests of the agent claiming to have the generic rights as governing their actions, it is not at this stage of the argument for the PGC been shown to be dialectically necessary that they must respect the generic rights of other agents.

<sup>202</sup> Gewirth (n.9), 103

<sup>203</sup> Beyleveld (n.70), 24 & 26-27 and Ibid, 64, 78-80

<sup>204</sup> Above p.184-185

Another way in which the PGC can be justified as binding without the need for an acceptance of Gewirth's arguments, beyond the first stage of recognising agency as characterised by purposive action, is to apply to this premise the basic morality of the rule of impartiality, sometimes known as the golden rule. This specific moral point of view states that we should 'treat others only as we consent to being treated in the same situation'.<sup>205</sup> It requires an agent be impartial between their treatment of their own interests and those of another, treating another's interests although they were his own.<sup>206</sup>

The golden rule in itself is not a dialectically necessary principle deriving from the possession of a particular characteristic, merely being an agent does not require its acceptance.<sup>207</sup> Substantively, the difference between the PGC and the rule of impartiality is that, whereas the former has a necessary and definite content composed of the generic needs and consequent rights, the Golden Rule is completely 'open and indeterminate',<sup>208</sup> its content is contingently derived from the interests to which it is applied and therefore is not dialectically necessarily determined. The PGC requires action in accordance with one's own and others' generic rights and interests, but the golden rule has no such tangible content.

However, because of its contingent content, if the rule of impartiality is applied to the conception of a purposive agent whose definition was shown to be dialectically necessary in stage one of the argument to the PGC, even though it is not dialectically necessary that to be so applied,<sup>209</sup> it can be given a content by purposive agency which ultimately entails the

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<sup>205</sup> H. Gensler, *Ethics: A Contemporary Introduction* (Routledge 1998), 104

<sup>206</sup> D. Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2012) 13 *Human Rts.Rev.* 1, 6

<sup>207</sup> Gewirth (n.9), 168 and *ibid.*, 8

<sup>208</sup> Gewirth (n.9), 169, see also 164-165

<sup>209</sup> Beyleveld (n.206), 16

acceptance of the PGC.<sup>210</sup> Agents, as defined in stage one of the dialectically necessary argument, view their freedom and well-being as instrumental generic goods necessary for purposive action. If, to this agency, an assumption of impartiality is applied, then ‘on pain of contradicting this impartiality (or denying that he is an agent)<sup>211</sup> an agent must hold that he categorically ought to act in accordance with the generic interests of freedom and well-being of other agents, unless those other agents are willing to allow damage to those interests.<sup>212</sup> Thus, this contingently accepted obligation of impartiality, by requiring an agent treat other agents’ interests in this way, amounts to an acceptance of a duty to respect other agents’ generic goods in accordance with the other agents’ will, which in turn is an acceptance that other agents have the generic rights to have their freedom and well-being respected.<sup>213</sup> This recognition of the generic rights of all agents is a dialectical acceptance of the PGC.<sup>214</sup> Crucially however, as the acceptance of the golden rule of impartiality is dialectically contingent, unlike the second and third stages of the dialectically necessary argument to the PGC, an agent does not contradict his agency by refusing to make this assumption and thereby avoid the PGC based upon it.<sup>215</sup>

However, a form of this contingent acceptance of the rule of impartiality can be seen to be contained within the foundational statements of the post-WWII human rights era found within the UDHR.<sup>216</sup> The preamble recognises that all humans have ‘inherent dignity and...equal and inalienable rights’, the second sentence of Article 1 states that all human beings ‘are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’ and Article 2 proclaims ‘[e]veryone is entitled to all the rights and

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<sup>210</sup> Ibid, 6

<sup>211</sup> Ibid

<sup>212</sup> Ibid

<sup>213</sup> Ibid

<sup>214</sup> Ibid

<sup>215</sup> Ibid, 16

<sup>216</sup> Ibid, 7

freedoms...[of the UDHR]...without distinction of any kind'. Together, these provisions can be read as collectively claiming that 'all human agents categorically ought to be treated equal in dignity and rights'.<sup>217</sup> Thus, the declaration shows an acceptance by the creators of the UDHR, and thus also by rights documents based upon it such as the ECHR, that regard must be equally had to the rights of others. This regard can itself be coherently read to embody a commitment to being impartial in the treatment of the rights of all individuals.<sup>218</sup>

However, as the above provisions of the UDHR appear specifically concerned with the rights it states, it is arguable that this commitment to impartiality only applies in relation to those rights and is not a statement of a general acceptance of the moral rule of impartiality in relation to all interests.<sup>219</sup> Nonetheless, whichever position is taken on the extent of this commitment to impartiality, it is possible to dialectically derive from the contingent acceptance of the UDHR an acceptance of the PGC.<sup>220</sup>

If the commitment to impartiality is interpreted as only relating to the rights contained within the UDHR, the acceptance of the Declaration and its commitment to impartiality contingently leads to the acceptance of the PGC by virtue of the nature of human rights. To hold that agents who are human have the human rights stated in the Declaration is to implicitly accept that 'human agents have human rights to the generic conditions of agency'.<sup>221</sup> Because 'ought' presupposes 'can', and freedom and well-being are needed so that an agent can exercise any right to act, no matter what human rights and consequent obligations UDHR

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<sup>217</sup> Ibid

<sup>218</sup> Ibid

<sup>219</sup> Ibid

<sup>220</sup> Ibid

<sup>221</sup> Ibid

declares, the existence and respect for human rights to these generic conditions of agency is necessarily implied.<sup>222</sup>

However, under this argument the presupposition by the UDHR of the generic rights does not mean that all the *substantive* rights stated in the UDHR are necessarily generic rights consistent with the PGC. For instance, as argued in detail below, because of the nature of purposive agency the generic rights are rights under the will conception,<sup>223</sup> and although presupposed by the UDHR and therefore also the ECHR which is based upon it, these systems of rights were not drafted to reflect a specific philosophical conception of rights, although to be valid under the PGC their interpretation must be consistent with them.<sup>224</sup>

If, instead, the Declaration's commitment to equality of respect for rights and dignity is interpreted as a commitment to a general moral rule of complete impartiality then, if contingently applied in conjunction with the dialectically necessary conception of agency, the acceptance of the PGC will also be the dialectical consequence.<sup>225</sup> An attitude of complete impartiality towards the generic needs of another agent for generic goods, entails that an agent must consider himself to owe a duty to respect the other agent's generic goods in accordance with their will, by doing so he will thus treat them as possessors of rights to freedom and well-being. Such impartiality also logically entails that an agent must also see himself as possessing the generic rights, to the extent that he too has the same interests in freedom and well-being and will have the same attitude as to their treatment.<sup>226</sup> Thus, it '[i]t follows, on pain of denying that all human beings are equal in dignity and inalienable rights, that it is dialectically necessary for those who [contingently] accept and implement the

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<sup>222</sup> Ibid

<sup>223</sup> Below p.297-299

<sup>224</sup> Above p.25-27

<sup>225</sup> Beyleveld (n.206), 7-8

<sup>226</sup> Ibid, 8



UDHR to consider that all permissible action must be consistent with the requirements of the PGC.<sup>227</sup>

Central to these alternate impartiality arguments, from the UDHR to the PGC, is the application of the golden rule to the concept of an agent stated in stage one of the dialectically necessary argument to the PGC. For impartiality and purposive agency to be so linked it must be the case that the conception of persons deemed to be protected under the UDHR's requirement of impartiality does not conflict with the concept of agency under the PGC. That this is so was, in part, argued to be the case above if the impartiality stated in the UDHR is concerned with the rights specifically contained within the Declaration, in that those rights presuppose that those possessing the rights have the capacity for freedom and well-being that characterise agency in order to exercise them.

However, on its face the description in Article 1 of 'human beings...endowed with reason' does appear to conflict with agency from which the PGC derives, because not all humans are agents and even humans who are not ostensibly agents can have some protection under the PGC.<sup>228</sup> This conflict can, however, be avoided once it is recognised that subsequent international rights documents, such as the UN Declaration on the Rights of Mentally Retarded Persons 1971, have recognised that persons lacking in the capacity for rational thought can be said to have human rights.<sup>229</sup> Beyleveld thus argues that, in order to achieve the necessary consistency, Article 1 should be reinterpreted to say that '[a]ll human beings viewed in terms of the capacities of the human species are born free and equal in dignity and rights. *The Human Species* is endowed with reason and conscience, and all human beings so

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<sup>227</sup> Ibid

<sup>228</sup> Ibid, 9 and below p.242-246

<sup>229</sup> Ibid, 11

endowed should act towards one another in a spirit of brotherhood.<sup>230</sup> Similarly, he necessarily argues that Article 2 of the UDHR should be interpreted as recognising the rights of individuals ‘to the extent that they are capable of exercising them.’<sup>231</sup> Additionally if, as argued below,<sup>232</sup> the characteristic of inherent dignity to which these human rights are inalienably attached in rights treaties is interpreted as purposive agency, then the requirement of equal respect for this dignity in Article 1 can be seen to similarly allow and entail the contingent acceptance of the PGC.

These alternative arguments from the UDHR have an advantage in deriving the PGC from more tangible and legal norms. No country in the UN General Assembly dissented from the ratification of the UDHR<sup>233</sup> and the major UN conventions such as the ICCPR, as well as regional rights documents including the ECHR and the American Convention on Human Rights, explicitly recognise its foundational nature. With such general acceptance, the arguments from it to the PGC must also have similarly wide adherence. As noted above, the implication of the argument is that those who agree to the Declaration must accept that its commitment to impartiality entails that they must act in accordance with the requirements of the generic rights, or else disavow their acceptance of the UDHR or incoherently contradict the dialectically necessary definition of agency established above.<sup>234</sup> With this basis, even if the criticisms of stage two or three of the dialectically necessary method are accepted, these alternate arguments enable the acceptance of the PGC to be argued for from the simple

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<sup>230</sup> Ibid (emphasis in original)

<sup>231</sup> Ibid, 12

<sup>232</sup> Below p.319-320

<sup>233</sup> UN Briefing Papers, ‘Universal Declaration of Human Rights’ (*Human Rights Today*, 27 January 2000)

<<http://www.un.org/rights/HRToday/>> accessed 3 July 2012

<sup>234</sup> Beyleveld (n.206), 16

definition of agency, which has been argued to be a factual premise whose acceptance by agents has been argued to be a dialectically necessity.<sup>235</sup>

However, the strength of these impartiality bases for the PGC in the Declaration's wide acceptance is also the latent weakness of these alternate arguments. Unlike the three stage dialectically necessary argument, the arguments from impartiality and especially the assumption of the moral point of view generally make the adoption of the PGC dialectically contingent rather than dialectically necessary. Of these, the applications of the impartiality rule as a consequence of the contingent arguments from the UDHR are stronger, in that to deny them involves either rejecting the UDHR or self-contradiction. The contingent arguments from an acceptance moral point of view generally, or simple acceptance of the golden rule, are however comparatively weaker because there is no such clear factual basis showing their acceptance, other than their abstract general presence in legal systems generally, and their use in other moral and theological standards.<sup>236</sup>

In contrast to these, the three stage argument for the PGC provides a logically compelling justification of the PGC and which justifies regard to the interests of others. It shows, without any leaps of contingent acceptance, that it is dialectically necessary that regard must be had by agents to the generic rights others, on pain of an agent contradicting his own agency.

#### *Compatibility with the Convention*

Faced with the three fundamental features of Convention rights with which the PGC must fit if it is to be properly said to apply as means for their interpretation, rather than as a critique favouring the redrafting of the Convention, it is submitted that the PGC can be validly

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<sup>235</sup> Ibid, 17

<sup>236</sup> Ibid

applied in this way. It is apparent that its substantive tenets are shared with the three characteristics the Convention rights which have been described above.

### Universality of Rights

The universality which characterises the PGC and which is possessed by the generic rights fits the similarly universal nature that is a fundamental feature of the Convention rights and human rights more generally. As noted above, under the PGC the generic rights are held by any being with purposive agency regardless of any other characteristic they might have, in the way that human rights are held by humans regardless of other personal characteristics. This universal possession of the generic rights similarly mirrors the claim by human rights treaties to give recognition<sup>237</sup> to rights that are possessed prior to the enactment of the treaty, and their explicit protection or respect by the substantive laws of a state. The Convention rights, like the generic rights, must be recognised as held independent of their national legal recognition.

The generic rights to freedom and well-being are universal human rights, insofar as they are rights ‘all humans have as human agents’.<sup>238</sup> Due to their necessity for all purposive action, they can be seen to underlie the substantive Convention rights which protect purposive agency as more specific manifestations of the generic rights to freedom and well-being.<sup>239</sup> It should, however, be reiterated that under the argument for the PGC it is not the fact of being human that gives rise to the generic rights, conversely the Convention and the HRA both explicitly talk in terms of humans’ rights. In the next chapter<sup>240</sup> it will be explained that this apparent inconsistency between the two does not mean that the PGC is unable to provide

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<sup>237</sup> Eg. ECHR Preamble, para 4 and UDHR Preamble, paras 1 & 5-7

<sup>238</sup> Gewirth (n.9), 64

<sup>239</sup> Ibid

<sup>240</sup> Below p.238-246

guidance on the Convention rights of humans who are not also purposive agents; although not possessors of the generic rights, they are not without protection under the PGC.

### Inherently and Inalienably Deontological

The foundation and means by which the PGC is derived brings it within the deontological genus of the fourfold taxonomy of moral bases for rights, the others being theories of virtue ethics, communitarian theories and utilitarian theories. Under this approach rights derive from inherent characteristics possessed by some beings, in the case of the generic rights this is purposive agency.<sup>241</sup> This characteristic is inherent in that it is not derived from any external calculation, it is rather a factual premise.<sup>242</sup> As shown by dialectically necessary argument,<sup>243</sup> it is a constituent part of being a purposive agent that such a being must value the purposes that they have, and it is from this inherent purposiveness that the generic rights derive.

As with Dworkin's conception of rights, with the generic rights 'a collective goal is not a sufficient justification for denying them [as agents] what they wish...to have or to do, or not a sufficient justification for imposing some loss or injury upon them.'<sup>244</sup> The possession of the generic rights cannot be outweighed and disregarded on the grounds that there is a different interest of greater force.<sup>245</sup> Thus, as a consequence of being a deontological conception of rights, the possession of the generic rights is not dependant on calculations of general utility such as those found within Bentham's theory of the moral validity of rights.<sup>246</sup> By virtue of being derived through the dialectical method, the generic rights are inherent to

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<sup>241</sup> Gewirth (n.9), 66

<sup>242</sup> Ibid, 44

<sup>243</sup> Above p.179, 184 & 187

<sup>244</sup> Dworkin (n.53), xi

<sup>245</sup> Ibid, 92

<sup>246</sup> Bentham (n.51), 160

what it is to be a purposive agent; their existence is not dependant on external questions such as the amount of good or ill that they cause.<sup>247</sup> As will be explained in the next chapter, only competing rights or interests based in purposive agency can curtail the exercise of a generic right and these do not effect the inherent possession of the rights to freedom and wellbeing.

Communitarian moral theories share with deontology some regard to the characteristics possessed by individuals in that they claim to give moral recognition to human beings' social nature.<sup>248</sup> However, the spectrum of conclusions that different Communitarian theorists draw from it and their rejection of a basis of rights which does not take into account individual membership of communities<sup>249</sup> distinguishes them from a deontological approach.

At one end of the spectrum of Communitarian rights recognition, theorists, including Daniel Bell and Henry Tam, argue that the morals of a community, and therefore the content of the rights of its members, should be decided through debate within that community which seeks to find accepted and shared morality.<sup>250</sup> At the other end of the spectrum is the argument that membership of a community, together with the capacity for autonomous freedom with which the values of the community can be shaped, are the basic needs of individuals which should be protected by rights.<sup>251</sup> This is the approach which can be seen in Amitai Etzioni's theory which rejects the idea that a set of values are good merely because they 'originate in a

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<sup>247</sup> Cf. *ibid*, 185

<sup>248</sup> D. Bell, *Communitarianism and its Critics* (Clarendon Press 1993), 14, Etzioni (n.20), 164 and C. Taylor, 'Atomism' in S. Avineri and A. de-Shalit (eds) *Communitarianism and Individualism* (OUP 1992), 32

<sup>249</sup> Taylor (n.248), 32, 38 and Bell (n.248), 14 and Etzioni (n.20), 164

<sup>250</sup> Bell (n.248), 14, 35, 37, 65 & 93-94 and H. Tam, *Communitarianism: A New Agenda for Politics and Citizenship* (Macmillan Press 1998), 7-8 & 12-13

<sup>251</sup> Etzioni (n.20), 156, 159-160 & 166-167

community',<sup>252</sup> and argues for community moral values which balance individual needs and community needs.<sup>253</sup>

Bell and Tam claim that in practice certain substantive moral values are accepted by a diverse range of separate communities. Tam argues that four values<sup>254</sup> can be shown to be universally recognised by different cultures over time and that they 'provide the moral bonds that that bring diverse communities together in the context of a global community.'<sup>255</sup> Bell similarly argues that '[e]very society...has come to accept a bare set of prohibitions...which constitute a kind of minimal and universal moral code'<sup>256</sup> that can be used to critique a community's morality because it is accepted by all societies.<sup>257</sup> However, in spite of this claim of a basic level of consistency of fundamental laws, at the centre of this form of communitarianism is the premise that there are no norms separate from those norms and their related rights accepted by a community. Thus, under this moral theory there are no substantive norms connected inherently to the person in the manner claimed to exist in the ECHR or found in the PGC.

Etzioni's communitarianism is different in its recognition that, ontologically, individuals have the capacity for freedom of action, the ability to choose for themselves their own life goals.<sup>258</sup> However, he additionally maintains that we must also recognise that membership of communities has the consequence that the values individuals choose for themselves and the goals they set are influenced by their community, as well as there being the potential for the

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<sup>252</sup> A. Etzioni 'The Responsive Communitarian Platform: Rights and Responsibilities' in A. Etzioni (ed) *The Essential Communitarian Reader* (Rowman and Littlefield 1998), xxvii

<sup>253</sup> *Ibid*, xxvi-xxvii

<sup>254</sup> Tam (n.250), 14

<sup>255</sup> *Ibid*

<sup>256</sup> Bell (n.248), 76, prohibitions 'on murder, deception, betrayal, and gross cruelty'.

<sup>257</sup> *Ibid*

<sup>258</sup> Etzioni (n.20), 156 & 159-160

individual to influence the values of the community.<sup>259</sup> He argues that, through dialogue with others in their community, and through the influence of the shared core values their community, individuals may be lead to reformulate their goals and values to resemble those of their community.<sup>260</sup> Etzioni thus proposes the recognition of a ‘more complex concept of a self, congenitally contextualised within a community,...that accords full status to both individuals and their shared union.’<sup>261</sup> The product of the values agreed through the dialogue form the norms of the society<sup>262</sup> and the rights and responsibilities of the individual members of the society.<sup>263</sup>

Etzioni, however, maintains that his approach does not allow for majoritarianism.<sup>264</sup> He, in contrast to Bell, argues that the community does not hold to be good a set of group values merely because they are held by members of the community generally at the expense of minority and individual rights.<sup>265</sup> Etzioni counters that the basic human needs, possessed by all persons and which underlie individual values, are so fundamental that they must be respected by all societies for that community to function without the risk of revolution.<sup>266</sup> Etzioni argues that this protection can be seen in practice in rights contained in the United States Bill of Rights 1791 such as freedom of speech.<sup>267</sup> However, although Etzioni recognises universal human characteristics in the form of certain human needs in this way, he maintains that his theory is communitarian rather than deontological in nature.<sup>268</sup> He claims that theories of universal individual rights under the deontic conception of the individual that

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<sup>259</sup> Etzioni (n.20), 157-158

<sup>260</sup> Ibid, 158-160

<sup>261</sup> Ibid, 157

<sup>262</sup> Ibid, 157-158

<sup>263</sup> Ibid, 157 & 161

<sup>264</sup> Etzioni (n.254), xxvi

<sup>265</sup> Ibid, xxvii and Etzioni (n.20), 161-162

<sup>266</sup> Etzioni (n.20), 166

<sup>267</sup> Ibid, 162 and Etzioni (n.254), xxxiii

<sup>268</sup> Etzioni (n.20), 163



‘assume that people are basically benign and rational’<sup>269</sup> are inconsistent with the communitarian position because such theories do not give account to the social element of human nature.<sup>270</sup>

Etzioni’s approach to human rights can be seen as an example of the attempt by the communitarian movement to create a theory in opposition to moral theories of liberal individualism.<sup>271</sup> This individualism, called atomism by Charles Taylor, encompasses moral theories which have their intellectual history in the concept of the autonomous individual that originates in 17<sup>th</sup> century social contract theory, such as Locke’s,<sup>272</sup> which give primacy and protection to individuals’ choices without giving moral force to independent conceptions of overarching communities, the ‘social dimension of human existence’,<sup>273</sup> as distinct from concern for the effects such actions may have on other singular individuals.<sup>274</sup> In this way communitarian theory differs from deontology generally, and specifically from the PGC, in that it looks beyond what is required by the characteristics of the individual, and takes account of the interests of the community defined separately from those of the individual. The PGC is derived from a concept of agency whose content of purposiveness and voluntariness is dialectically necessary, in a way that the existence of a community and its interests are not. Deontological conceptions of rights such as that propounded by Gewirth are thus distinct from those of communitarians who reject the possibility of an individual being deemed to possess inherent rights external to a conception of community.

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<sup>269</sup> Ibid, 164

<sup>270</sup> Ibid, 163-164

<sup>271</sup> Bell (n.248), 28, Tam (n.250), 2 & 7 and Shestack (n.19), 229

<sup>272</sup> J. Locke, *Two Treatises of Government* (J.M. Dent and Sons 1924), 118-119, 159, 166 & 174

<sup>273</sup> Etzioni (n.254), xxv

<sup>274</sup> Taylor (n.248), 29-30 & 32 and *ibid*, xxx

Although the generic rights are deontological, in that they are derived and enumerated by dialectical argument from the inherent characteristics of agency, rather than being recognised as product of communitarian societal dialogue or the community dwelling nature of individuals, they operate within society and its institutions have a role in their application. Agents are necessarily social creatures:<sup>275</sup> it makes no sense to speak of a right unless there are others upon whom duties are imposed, and this is implicit in the claim of rights against others to the generic needs of agency in second stage of the argument to the PGC. In light of this, it will be argued below that the practical balancing of competing and generic rights and interests, and the Convention rights interpreted using them, as distinct from their identification and the grounds of their possession, is open to the influence of the debates and views within a community. For although the generic rights are derived through dialectical reason, their application in society gives a role to societal debate.<sup>276</sup> Additionally, by virtue of the will conception nature of the generic rights to be argued for below,<sup>277</sup> in only prohibiting interference with the generic goods against an agent's will, the PGC allows for agents to come together in a community to agree a set of norms by which they are bound. However, the PGC does not allow for agents to be bound by norms to which they do not consent, unless they are protecting the generic rights of another and are thus an indirect manifestation of the PGC requirements.<sup>278</sup> In this way the community and its laws can be justified by purposive agency and its dialectical requirements, not as constructs independent of it as under the communitarian positions.

More broadly, it is clear that if the Convention rights are to effectively pursue the purposes for which they were created, their underlying basis cannot be a utilitarian or communitarian

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<sup>275</sup> K. Westphal, 'Norm Acquisition, Rational Judgement and Moral Particularism' (2012) 10(1) *T.R.E.* 3, 15

<sup>276</sup> *Ibid.*, 15 & 17-18

<sup>277</sup> Below p.297-299

<sup>278</sup> Gewirth (n.111), 1164, Gewirth (n.9), 273 & 276-277, below p.259-260

moral theory. As noted previously<sup>279</sup> the ECHR and other post-WWII rights documents were intended to protect individuals against the state inhumanities that characterised the Nazi regime. If the rights of the Convention are to receive protection against states there must be some circumstances when the substantive rights cannot be overridden in favour of a perception of the collective or communal good.<sup>280</sup>

Similarly, although the statement in the preamble of the ECHR, which sets out the basis upon which the Convention rights were agreed, that the protection of rights and freedoms is the foundations the achievement of ‘justice and peace in the world’ could be seen as utilitarian goal justifying the Convention rights, other terms mitigate against such an interpretation. The preamble of the UDHR,<sup>281</sup> which paragraph two of the ECHR preamble recognises as the basis for the agreement of the Convention, has a consistent focus on the rights of individuals and their protection. It emphasises the ‘inherent’ dignity and worth of individuals, the importance of freedom to them and the necessity of their protection, all of which indicate a basis of the Convention in deontological theory rather than a goal based theory.

Such an interpretation is also supported by the fact that, as noted previously, although provisions of the Convention allow the enforcement of most rights to be limited in favour of other interests in some cases, this cannot be done to all rights.<sup>282</sup> This is inconsistent with interpreting the Convention rights as having a basis in a goal theory. Additionally, as argued previously<sup>283</sup> and recognised by Dworkin,<sup>284</sup> the provisions that appear to allow rights to be

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<sup>279</sup> Above p.38-40

<sup>280</sup> Dworkin (n.53), 270

<sup>281</sup> Above p.168-170

<sup>282</sup> The non-derogable rights set out in Article 15 cannot be subject are not subject to such limitation, the possibility of the entering of reservations in relation all the Convention rights is a distinct question concerning the status of the Convention generally not that of the specific rights.

<sup>283</sup> Above 80-81 & 126

<sup>284</sup> Dworkin (n.53), 191- 195 & 200, where he argued rights could be restricted to protect the rights of others and to prevent a catastrophe which would destroy a society, although in the latter situation he argued that such an

overridden in the general interests can be convincingly interpreted as in fact weighing the rights of different people against each other in a non-goal based manner which looks at the importance of a right for each individual. It is thus clear that a basis which fits this feature of the Convention rights cannot be found in a communitarian or utilitarian theory.

In contrast, the generic rights are inherently connected to what it is to be a purposive agent, just as the possession of Convention rights is stated to be inherent to being human. They are likewise inalienable, for no being that claims to be a purposive agent can be such an agent without possessing the rights to freedom and wellbeing.<sup>285</sup>

### Rights Rather than Duties

As noted above, deontological theories which support and validate substantive norms, including declarations of specific human rights, can be conceptually categorised as either theories of rights or duties.<sup>286</sup> Consistency with the characteristics of the Convention on this question, the third fundamental feature of the ECHR, can be seen in the PGC's position as a rights theory.

It is an inherent consequence of the use of the characteristic of purposive agency as the basis of a moral theory, that the resulting deontological principle of the PGC is one of rights rather than duties. The features of purposive agency and the conclusions it entails conform to the characteristics of the rights deontology which the Convention can be interpreted as pre-supposing. The concept of a purposive agent as one who has purposes they have chosen for

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infringement of rights would have been violated rather than having their scope limited by the rights of others or the will of the majority.

<sup>285</sup> Gewirth (n.9),77

<sup>286</sup> Above p.172

themselves as worthy of pursuit<sup>287</sup> accords with the key concern of rights theories with independence and individual choice. As a consequence of this, the norms which form the substance of the PGC, the rights freedom and well-being, similarly further the core concern of rights theory by seeking to protect the inherent and underlying value of the capacity for individual choice.<sup>288</sup>

As described previously, the dialectically necessary argument operates from the perspective of the agent and thus necessarily focuses on what they need in order to pursue their chosen purposes, rather than upon what duties they owe. Under this perspective ‘[r]ights...are demands on the part of agents that the essential prerequisites of their actions at least not be interfered with’,<sup>289</sup> and these are consequently ‘logically prior to all other[...]’<sup>290</sup> entitlements because they are necessary for all action.<sup>291</sup> The dialectically necessary conclusions drawn from action thus dictate that only the rights to freedom and well-being are rationally necessary, for only these rights are necessarily connected in this way to agency.<sup>292</sup> Although agents may have different personal purposes they wish to act to pursue, only these rights are necessary to act for any purpose an agent might have.<sup>293</sup> Consistent with this perspective of the primacy of rights, duties are ‘a logical consequence of the fact that the objects of the generic rights are necessary goods’<sup>294</sup> and are thus subsequent to the generic rights. In this way the argument for the PGC emphasises the protection of individual choice that characterises rights theory, and the duties that do arise under it derive from respect for purposive agents’ choices rather than deference to a prior, separate, moral code.

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<sup>287</sup> Above p.1767-178

<sup>288</sup> Gewirth (n.9), 52-54, 60 & esp. 64

<sup>289</sup> Ibid, 77

<sup>290</sup> Ibid, 73

<sup>291</sup> Ibid

<sup>292</sup> Ibid, 78, see also 81

<sup>293</sup> Ibid, 78

<sup>294</sup> Ibid, 67

This role of the fundamental characteristics which form the bias of a deontic theory, in shaping the substantive nature of that theory, is clearly apparent when the PGC is contrasted with Kant's argument for the Categorical Imperatives as the constituent substantive requirements of morality. Deontological like the PGC, Kant similarly premises his theory on the possession of agency defined by the possession of a particular characteristic, a rational will. In common with Aristotle, Kant argues that the capacity of mankind for reason is what distinguishes him from all other things.<sup>295</sup> This reason is defined as the capacity of a person to determine how he should act, as a result of the understanding it enables, independent of the actions that may be suggested by their sensations, what they observe and feel.<sup>296</sup> However, from within this universal basis for morals controlling conduct,<sup>297</sup> is derived a system of duties rather than one of rights.<sup>298</sup>

Kant observes that we must have been given the capacity for reason by nature for a reason and he argues that this is the existence of 'a will that is good, not perhaps as a means to other purposes, but good in itself, for which reason was absolutely necessary.'<sup>299</sup> This capacity for reason is argued to be intrinsically good, and that beings with reason thus have absolute worth by virtue of their rationality, because it is not an instrumental good designed to enable them to achieve some other end<sup>300</sup> such as happiness.<sup>301</sup> This inherent freedom of the will is the capacity to rationally choose how to act, independent of causes other than our own reason which might seek to influence the choice of action, including the capacity to choose whether

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<sup>295</sup> Kant (n.6), 57 & 62

<sup>296</sup> Ibid, 57 & 61

<sup>297</sup> Ibid, 24

<sup>298</sup> R. Sullivan, *Immanuel Kant's Moral Theory* (Cambridge University Press 1989), 70

<sup>299</sup> Kant (n.6), 10 and Ross (n.197), 7

<sup>300</sup> Ibid, 37

<sup>301</sup> Ibid, 8-9

to act in accordance with laws of behaviour.<sup>302</sup> This negative sense of freedom from external forces and one's own desires<sup>303</sup> is complemented by a positive sense which takes the form of the freedom to act in accordance with laws which derive from the very nature of the will itself.<sup>304</sup> In his progressive argument, the transcendental deduction, Kant argues that this inherent freedom of the will, from which the Categorical Imperatives derive, must be presupposed as 'a property of the will of all rational beings.'<sup>305</sup> This presupposition, he argues, follows from the very concept of a rational being as such.<sup>306</sup> This is the case because a rational being, by definition, can act in accordance with reason, and thus has freedom from having their actions determined by their impulses.<sup>307</sup>

Although Kant argues that the possession of a rational will gives such a being the capacity to choose how to act, this choice is not free in the same way that purposive agents are free to choose their purposes under the PGC. It is because the rational will – what he subsequently describes as pure reason<sup>308</sup> – is for Kant the ultimate intrinsic good that he argues in his regressive<sup>309</sup> argument from this premise that it is the 'metaphysics of morals',<sup>310</sup> the basis upon which rests a supreme principle of morality which directs action.<sup>311</sup> It is because pure reason is 'altogether *a priori* free from anything empirical'<sup>312</sup> that it is able to form an impartial basis for deducing morals controlling action.<sup>313</sup> He adds that, given the pivotal position of rationality, if moral laws are to apply to 'every rational being as such' they must

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<sup>302</sup> Ibid, 24 & 52

<sup>303</sup> Ibid, xxvi

<sup>304</sup> Ibid, 52

<sup>305</sup> Ibid, 53

<sup>306</sup> Ibid, 54

<sup>307</sup> Ibid

<sup>308</sup> Ibid, 21

<sup>309</sup> K. Ameriks, *Interpreting Kant's Critiques* (OUP 2003), 59-61

<sup>310</sup> Ibid, 21

<sup>311</sup> Ibid

<sup>312</sup> Ibid, 22

<sup>313</sup> Ibid, 22-24

‘derive...from the universal concept of a rational being as such’.<sup>314</sup> Kant argues that without such a basis of absolute intrinsic worth, there can be no principle controlling all rational action,<sup>315</sup> for if there is no basis of absolute worth, then all imperatives governing action are conditional and contingent on the basis being of sufficient instrumental or relative worth to the person choosing how to act.<sup>316</sup>

From this, Kant argues that ‘to have moral worth’<sup>317</sup> a motive for action must derive from a sense of duty.<sup>318</sup> If the possession of reason is to be the basis of a morality it must be capable of generating a Categorical Imperative which dictates to a person that he ought to act in a particular way, regardless of an alternative he may wish to choose by exercise of his will as directed by inclinations or other motivations that are not of absolute value, and which thus generate merely hypothetical imperatives.<sup>319</sup> The need for such a duty arises because the free will possessed by rational beings makes it practically possible, although not permissible because it would be contrary to reason, for them to choose to act in a way that is inconsistent with the requirements of a morality derived from reason.<sup>320</sup>

Kant, in this way, argues that moral action must be governed by duties based in reason for if only reason is an absolute good then only a ‘law’ which determines what reason required of us, which states what duties of action reason imposes on us, can be a good we call moral.<sup>321</sup> In contrast with the dialectical establishment of the PGC, Kant thus derives a moral code from entirely within the reason possessed by rational persons.<sup>322</sup> Unlike the argument for the

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<sup>314</sup> Ibid, 23

<sup>315</sup> Ibid, 36

<sup>316</sup> Ibid, 37

<sup>317</sup> Ross (n.197), 18

<sup>318</sup> Ibid

<sup>319</sup> Kant (n.6), 27 & 47-48

<sup>320</sup> Ibid, 46

<sup>321</sup> Ibid, 13-14 & 37 and Ross (n.197), 19

<sup>322</sup> Beyleveld and Brownsword (n.21), 103



PGC, Kant has no regard to the dialectical consequences of being a rational agent that an agent must accept by virtue of having such a capacity for choosing how to act,<sup>323</sup> Gewirthian theory in contrast recognises the consequence of agency is the possession of the generic needs.<sup>324</sup> Consequently, Kant's rational beings perceive their reason alone as circumscribing and binding their actions, whereas Gewirthian purposive agents look beyond to what is further entailed by the possession of their inherent capacity for purposive action.

In *The Metaphysics of Morals* Kant makes explicit that his moral theory is one of duties rather than rights because of the basis, the fundamental characteristic, from which it is drawn.<sup>325</sup> The ontological basis in reason involves a moral concern for whether an individual complies with the dictates of that reason; for Kant, all rational beings have a duty to obey the Categorical Imperatives because to deny their force upon them is to contradict that they have the capacity for reason which characterises human beings.<sup>326</sup> The substantive law of morality derived by Kant from the basis of reason which is encapsulated within the various formulations of the Categorical Imperative<sup>327</sup> are thus, consistent with their position as the requirements of reason, explicitly formed in terms of duties. In contrast, the purposive agency that is the basis of the generic rights and ultimately the PGC, leads to a requirement that the capacity for purposive choices by agents be protected and furthered.

Kant's overarching Categorical Imperative of the 'Universal Law',<sup>328</sup> from which he argues 'all imperatives of duty can be derived',<sup>329</sup> requires rational beings with a will accept the duty

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<sup>323</sup> Ibid, 103-104

<sup>324</sup> Ibid, 104-105

<sup>325</sup> Kant (n.59), 31

<sup>326</sup> Beyleveld and Brownsword (n.21), 109 & 110

<sup>327</sup> Kant (n.6), 30

<sup>328</sup> Ibid, 14 & 30-31

<sup>329</sup> Ibid, 30

proposition<sup>330</sup> that ‘I ought never to act except in such a way that I could also will that my maxim should become a universal law.’<sup>331</sup> It is, for Kant, respect for the universal law that ‘constitutes duty’, with its force deriving from the status of reason as good in itself.<sup>332</sup> The more specific moral laws, the Categorical Imperatives of the Formula of Ends and the Kingdom of Ends, which flow from the duty imposed by the universal law, are likewise expressed as duties, and likewise flow from reason.<sup>333</sup> The Formula of Ends seeks to uphold reason as the only thing of universal inherent value<sup>334</sup> by requiring all rational beings<sup>335</sup> ‘act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never as a means.’<sup>336</sup> This essential precept of Kant’s practical morality, rather than being primarily concerned with protecting individual choice and independence in the way that a rights theory does, is formally stated to be the ‘supreme limiting condition of the freedom of action of every human being’<sup>337</sup> codifying and circumscribing what actions are permissible. The Categorical Imperative of the Kingdom of Ends involves the recognition that the duty imposed by the imperative of the Universal Law is binding on all rational beings, and thus requires that individuals recognise that as such they are subject to the Universal Law and the dictates of reason including the requirement to treat themselves and others as ends.<sup>338</sup> This likewise takes the form of a code binding on all rational beings in all their actions which is a characteristic of a duties theory.

The consequence of Kant’s basis for his philosophy is a duty based moral theory which involves the creation of a code for action and a focus the determination of whether

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<sup>330</sup> Kant (n.59), 31

<sup>331</sup> Kant (n.6), 15

<sup>332</sup> Ibid, 16 & 42

<sup>333</sup> Ibid, 36, 42 & 44

<sup>334</sup> Ibid, 37

<sup>335</sup> Ibid, 39

<sup>336</sup> Ibid, 37

<sup>337</sup> Ibid, 39

<sup>338</sup> Ibid, 41 & 42

individuals' actions comply with that code.<sup>339</sup> Under the Categorical Imperatives, beings 'experience morality as constraining...mandating what we ought (not) to do',<sup>340</sup> and only actions done from duties they state have moral worth.<sup>341</sup> This has led Roger Sullivan to observe that '[n]o moral philosopher before Kant had placed so much emphasis on the notion of duty, and few concepts have greater prominence in his theory.'<sup>342</sup>

Although a duties theory, Kant's theory is capable of forming a basis for rights norms<sup>343</sup> such as the Convention rights because, as mentioned above, and as recognised by Kant himself,<sup>344</sup> duties and rights are correlative connected spheres.<sup>345</sup> Following from the basis in the duty imposed by the Universal Law, a right under this theory is the capacity to put others under an obligation in accordance with a Categorical Imperative.<sup>346</sup> These rights are deontological because their basis in the possession of reason entails that they 'belongs to everyone by nature',<sup>347</sup> because reason is the defining characteristic of humanity.<sup>348</sup> The rights recognised under this approach are 'the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal Law of Freedom.'<sup>349</sup> In spite of this reference to choice and freedom, they remain rights under a duty conception because of the primary position held by duties within the basis in reason to which rights are merely correlative.

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<sup>339</sup> Above p.172

<sup>340</sup> Sullivan (n.298), 121

<sup>341</sup> Ibid, P. Stratton-Lake, *Kant, Duty and Moral Worth* (Routledge 2000), 11 and above p.214

<sup>342</sup> Sullivan (n.298), 121

<sup>343</sup> Beyleveld and Brownsword (n.21), 99

<sup>344</sup> Kant (n.59), 31-32

<sup>345</sup> Above p.171

<sup>346</sup> Kant (n.59), 31-32

<sup>347</sup> Ibid, 30

<sup>348</sup> Ibid

<sup>349</sup> Ibid, 24

As noted above<sup>350</sup> the ECHR can be seen to possess elements which support either a rights or duties deontological basis. That this is the case is consistent with drafter's desire to phrase the Convention in open textured terms which would maximise the acceptance of its substantive norms amongst nations which different political ideologies.<sup>351</sup> It is, however, submitted that whilst at a minimum a rights based deontology is not inconsistent with the substance of the ECHR, it is as claimed above<sup>352</sup> strongly arguable that the Convention itself shares more characteristics with a rights deontology than it does with a duty deontology.

### *The Mirror Principle and the Practical Application of the PGC*

In addition to fitting the fundamental characteristics of human rights protection generally, to be legally possible as well as intellectually legitimate, separate from the dialectical force of the above arguments, an interpretive approach to the five key questions based in the PGC must be consistent with the substantive jurisprudence of the ECtHR. This requirement within United Kingdom law is known as the 'mirror principle'. It is, however, submitted that this requirement of consistency does not and should not prevent the domestic courts from basing their interpretation of the Convention rights in the PGC.

### *The Content and Consequences of the Mirror Principle*

The term mirror principle was coined by Jonathon Lewis<sup>353</sup> to describe the attitude of the domestic courts to the jurisprudence of the ECtHR in cases where they are called upon to interpret and apply the rights incorporated by the HRA. The name of this principle derives from the statement by Lord Nicholls that, when the domestic court are adjudicating upon the

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<sup>350</sup> Above p.173-175

<sup>351</sup> Above p.25-27

<sup>352</sup> Above p.175

<sup>353</sup> J. Lewis, 'The European Ceiling on Human Rights' [2007] *P.L.* 720, 720

Convention rights, they must provide a ‘mirror’ within domestic law to requirements of the ECHR, as interpreted by relevant ECtHR decisions.<sup>354</sup>

The earliest expressions of the sentiment which has solidified into this principle are to be found in the decisions closely following the coming into force of the HRA.<sup>355</sup> In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* Lord Slynn planted the seeds of the principle<sup>356</sup> by stating that, ‘[i]n the absence of some special circumstances,...the court should follow any clear and consistent jurisprudence of the European Court of Human Rights.’<sup>357</sup> This decision was shortly thereafter endorsed by Lord Bingham’s claim that the domestic courts would ‘not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber’.<sup>358</sup>

These initial foundational statements of position have subsequently been re-enforced and developed by several House of Lords decisions. As the decisions in *Alconbury* and *Anderson* have evolved, the courts have arrived at the current conclusion that, not only must they keep in step with ECtHR interpretations of the Convention rights, but also that they must not outpace the protection that Strasbourg deems the rights to provide.<sup>359</sup> Thus, Lord Bingham argued two years after *Anderson*, that ‘[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.’<sup>360</sup> This

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<sup>354</sup> *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57, [34]

<sup>355</sup> J. Beatson and others, *Human Rights: Judicial Protection in the United Kingdom* (Sweet and Maxwell 2008), 41

<sup>356</sup> Lewis (n.353), 726

<sup>357</sup> *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [26]

<sup>358</sup> *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [18]

<sup>359</sup> Lewis (n.353), 727

<sup>360</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [20]

approach remains the orthodox position<sup>361</sup> and was reiterated and reinforced subsequently by Lord Brown, who suggested that the approach should be one of ‘no less, but certainly no more’.<sup>362</sup> However, in the recent decision of *Sugar v BBC*, Lord Walker in his leading opinion, recognising recent criticism,<sup>363</sup> stated *obiter* that the Supreme Court would welcome an opportunity to consider whether to depart from the no more than element of the mirror principle.<sup>364</sup>

The immediate consequence of the adoption of the mirror principle has been that the scope, the application and the balancing of the Convention rights, when given effect by the domestic courts, must match and not exceed that stated by the ECtHR.<sup>365</sup> In terms of scope, the facts and decision in *Anderson* on the scope of Article 6(1), whether the right to an independent tribunal covered the exercise of powers to determine the length of detention for prisoners convicted of murder possessed by the Home Secretary,<sup>366</sup> show the principle being applied in the determination of the substantive content of the Convention rights. In *Al-Skeini* it was held that the determination of the territorial applicability of the Convention rights, on the facts whether they applied to the actions of British forces in Iraq, was a matter for the ECtHR and the domestic courts should follow Strasbourg’s decision.<sup>367</sup> Where substantive rights must be subject to a proportionality exercise to determine what the Convention requires, as in the case of *R (Begum) v Governors of Denbigh High School* in the context of Article 9, the courts have tied themselves to the Strasbourg jurisprudence in assertion and enforcement of

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<sup>361</sup> R. Clayton, ‘Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law’ [2012] *P.L.* 639, 639

<sup>362</sup> *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [106]

<sup>363</sup> Lord Irvine, ‘A British Interpretation of the Convention Rights’ (2012) *P.L.* 237

<sup>364</sup> *BBC v Sugar* [2012] UKSC 4, [59] & Lord Mance [113] and R. Clayton, ‘Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law’ [2012] *P.L.* 639, 639

<sup>365</sup> Lewis (n.353), 720

<sup>366</sup> *Anderson* (n.358) [13], [15] & [17]-[18]

<sup>367</sup> *Al-Skeini* (n.362), [65], [90] & [105]: The ECtHR recently clarified its opinion on the jurisdictional applicability of the Convention Rights in *Al-Skeini v United Kingdom* (2011) 53 EHRR 18, [149]

Convention ‘rights and remedies.’<sup>368</sup> In this case, the Lords held that the approach they should take to resolving issues of proportionality was that advocated by the ECtHR, not the traditional, more procedural, type of scrutiny applied under domestic judicial review.<sup>369</sup> However, Lord Bingham has held that the ‘value judgement[s], an[d] evaluation[s]’ which are involved in deciding questions of proportionality are for the domestic courts to decide, and thus the potential influence of the PGC upon this will be unaffected.<sup>370</sup>

### Exceptions to the Mirror Principle

The breadth of the mirror principle in directing the United Kingdom courts’ decisions on the scope of rights, although apparently potentially wide-ranging, can only truly be determined by regard to the exceptions to it that the courts have recognised.<sup>371</sup> These exceptions consist of a mixture of practical and constitutional concerns which the courts feel justify them in departing from ECtHR jurisprudence.

In practical terms the courts have held that they will only follow ECtHR decisions which are ‘clear and consistent.’<sup>372</sup> Similarly, where an ECtHR decision on the point at issue appears to have been made under a misunderstanding of English law,<sup>373</sup> then the courts feel that it is legitimate for them to decline to follow the decision<sup>374</sup> and suggest to Strasbourg that it think again.<sup>375</sup> In *Ghaidan* the Court of Appeal argued that such a departure was legitimate because

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<sup>368</sup> *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, [29]

<sup>369</sup> *Ibid*

<sup>370</sup> *Ibid*

<sup>371</sup> Lewis (n.353), 730

<sup>372</sup> *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [37]

<sup>373</sup> *R v Lyons (No 3)* [2002] UKHL 447, [46], *Anderson* (n.358) [18], *R (Anderson) v Secretary of State for the Home Department* [2001] EWCA Civ 1698, [64]

<sup>374</sup> J. Wright ‘Interpreting Section 2 of the Human Rights Act 1998: Towards an Indigenous Jurisprudence of Human Rights’ [2009] *P.L.* 595, 601

<sup>375</sup> *Anderson* (n.358) [18]

the domestic court were not disagreeing with the ECtHR's interpretation of the scope of the Convention right, merely its application to a particular aspect of British law.<sup>376</sup>

In constitutional terms, the courts have attempted to fit the mirror principle within the various facets of the British constitution. Thus, in *Ullah* it was recognised that it is open to the sovereign Parliament to give greater protection via domestic legislation than the ECtHR interprets the scope of the Convention rights as requiring.<sup>377</sup> More broadly, the courts have held that if to follow an ECtHR judgement would lead to 'a conclusion fundamentally at odds with the distribution of powers under the British constitution'<sup>378</sup> then the courts should not follow it.<sup>379</sup> However, the courts are yet to come across a decision with such an effect.<sup>380</sup>

In recognition of the separation between the legislature enacted rights in the HRA and the common law, the courts have also held that it is open to them to develop the common law in a way which gives greater protections than that required by the Convention rights as interpreted by the ECtHR.<sup>381</sup> This occurred in *Campbell v MGN*<sup>382</sup> where the Law Lords gave protection from the journalistic publication of invasive photographs under the common law of confidence, prior to the ECtHR finding such protection was required under Article 8.<sup>383</sup> Lewis has argued, however, that had there been a contrary ECtHR decision allowing such publications, the courts would have been prevented from relying on Article 8 to develop the common law in this way.<sup>384</sup>

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<sup>376</sup> *Ghaidan* [2002] EWCA Civ 1698, [24]

<sup>377</sup> *Ullah* (n.360), [20], see also *Al-Skeini* (n.362), [90] and *ADI* (n.372), [53] and *Wright* (n.374), 599

<sup>378</sup> *Alconbury* (n.357), [76]

<sup>379</sup> *ADI* (n.372), [45]

<sup>380</sup> *Lewis* (n.353), 731

<sup>381</sup> *Al-Skeini* (n.362), [90], *ADI* (n.372), [53] and *Wright* (n.374), 599

<sup>382</sup> *Campbell v MGN* [2004] UKHL 22, [124], [152] & [160]

<sup>383</sup> *Von Hannover v Germany* (2005) 40 EHRR 1, [57]-[58], [76] & [80]

<sup>384</sup> *Lewis* (n.353), 742



Although these restrictions are several in number, in practice they do not operate frequently.<sup>385</sup> Of those that explicitly relieve the courts of their self-imposed<sup>386</sup> duty to mirror an ECtHR judgement, the courts have shown reluctance to find that the jurisprudence is not clear or that it is at odds with the separation of powers,<sup>387</sup> and cases where the ECtHR has misunderstood United Kingdom law are comparatively few.<sup>388</sup> The restrictiveness of the mirror principle as a result of the limited utility of its exceptions<sup>389</sup> is compounded by the domestic courts' approach to gaps in the ECtHR's case law. Where no consideration has been given to whether a particular circumstance falls within the scope of a right,<sup>390</sup> the domestic courts are 'unwilling to step into the vacuum and will await an answer from Strasbourg',<sup>391</sup> unless it is a circumstance in which perceive themselves to be granted a margin of appreciation.<sup>392</sup>

### *Reflecting the PGC*

The applicability of the mirror principle to the determination of the scope or application of the Convention rights, to the question of the persons and interests that benefit from the protected of the various Articles, presents a *prima facie* obstacle to an interpretation of the rights from the basis of the PGC. As Sir Andrew Morriot V-C implicitly recognised in his subsequently reversed Court of Appeal decision,<sup>393</sup> a 'blackletter lawyer'<sup>394</sup> regard to the

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<sup>385</sup> Ibid, 721

<sup>386</sup> Beatson (n.355), 40

<sup>387</sup> Lewis (n.353), 731

<sup>388</sup> Eg. *R v Spear* [2002] UKHL 31, recognised in *Anderson* (n.358), [66], and *Osman v United Kingdom* (2000) 29 EHRR 245

<sup>389</sup> Beatson (n.355), 41

<sup>390</sup> *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [49]

<sup>391</sup> Beatson (n.355), 41-42 and *ibid*, [28] & [49]

<sup>392</sup> Wright (n.374), 612, eg. *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, [22], [24], [26] & [31]

<sup>393</sup> *Aston Cantlow v Wallbank* [2001] EWCA Civ 713 and [2003] UKHL 37

<sup>394</sup> *Aston Cantlow v Wallbank* [2001] EWCA Civ 713, [44]

judgements of the ECtHR prevents the courts from basing their decisions upon ‘broad principles which animate the Convention.’<sup>395</sup>

In the next chapter it will be seen that, in practice, because of the nature of the ECtHR’s current jurisprudence, the mirror principle does not require that the domestic courts act other than in accordance with the PGC. The approach of the court to the five key questions of rights interpretation apparent in the ECtHR’s decisions is either consistent with the PGC, so vague as to fall within the uncertainty exception or else the subject of a margin of appreciation. However, the interpretation of specific rights on specific facts or a change in ECtHR jurisprudence may take an interpretative approach based on the PGC beyond the ECtHR approach and thus be prohibited by the Mirror Principle. Thus, despite substantial formal consistency that will be demonstrated below, if the PGC is recognised as the supreme principle of morality and used to guide the interpretation of the Convention rights, it is submitted that the ‘no-more than’ element of the mirror principle is inconsistent with such an approach and an unjustified restriction on the British courts ability to correctly interpret the Convention and should therefore be abandoned.

### Justification

At the heart of the creation<sup>396</sup> and application<sup>397</sup> of the mirror principle is s.2(1) HRA’s requirement that, in ‘determining a question which has arisen in connection with a Convention right[, the courts] must take into account any...judgement, decision, declaration or advisory opinion of the European Court of Human Rights’.<sup>398</sup> Whilst the courts have consistently recognised that this provision does not give ECtHR judgements the status of

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<sup>395</sup> Ibid

<sup>396</sup> *Anderson* (n.358) [73], *Alconbury* (n.357), [26] and *Lewis* (n.353), 728

<sup>397</sup> Eg. *Al-Skeini* (n.362), [66], *Ullah* (n.360), [20]

<sup>398</sup> s.2(1) HRA

binding precedent, always to be followed and not exceeded or departed from, they have held that only under the exceptions listed above would they do so.<sup>399</sup>

Although it is good legal practice for the domestic courts to treat ECtHR judgements as the floor of the protection the Convention rights recognise,<sup>400</sup> using it to restrain the courts from going beyond it has no such clear justification. As Roger Masterman recognises, were the courts to adopt an interpretation that recognised a right as giving less protection than in a pertinent ECtHR judgement, it would most likely be found to be in breach of the Convention on appeal to Strasbourg.<sup>401</sup> In contrast to this the legislative history of s.2(1) shows a clear rejection of the view that ECtHR decisions should be treated as precedents prohibiting the courts from recognising a greater scope for Convention rights.<sup>402</sup> An amendment to s.2(1) to make ECtHR judgements binding precedents was rejected,<sup>403</sup> the then Lord Chancellor Lord Irvine arguing in Parliament that ‘our courts must be free to try to give the lead to Europe as well as to be led.’<sup>404</sup> He has subsequently insisted that S.2(1) was not intended to tie the British courts to ECtHR jurisprudence, and instead requires them to take their own decisions on whether to follow an ECtHR judgement.<sup>405</sup> That the mirror principle has been adopted and applied in the face of these arguments leads Lewis to draw the reasonable conclusion that the courts have in-effect re-written s.2(1) to make ECtHR jurisprudence almost always restricting precedent, not merely persuasive guidance.<sup>406</sup>

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<sup>399</sup> *Anderson* (n.358) [73], *Alconbury* (n.357), [26], *ADI* (n.372), [37] & [44] and *Ullah* (n.360), [20]

<sup>400</sup> R. Masterman, ‘Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg?’ [2004] *P.L.* 725, 733

<sup>401</sup> *Ibid* and Beatson (n.355), 40

<sup>402</sup> Beatson (n.355), 43, Masterman (n.400), 728 and

<sup>403</sup> HL Deb 18 November 1997, vol.583, col.514

<sup>404</sup> *Ibid*

<sup>405</sup> Lord Irvine, ‘A British Interpretation of the Convention Rights’ (2012) *P.L.* 237, 239, 240, 241 & 252

<sup>406</sup> Lewis (n.353), 729

In response to the apparent inconsistency of the mirror principle with s.2(1), attempts have been made to rely on the underlying intention behind the HRA as a whole in order to justify its application. Jane Wright argues that the mirror principle interpretation of this section is entirely consistent with the HRA's purpose, which was not to create a freestanding bill of rights, but rather to allow for the protection guaranteed by the ECtHR in the domestic courts without the need to go to Strasbourg.<sup>407</sup> The courts in their justifications for the mirror principle have also invoked this intention.<sup>408</sup> Lord Bingham argued that the HRA was not meant to enlarge the scope or application of the rights found in the Convention, merely to allow their enforcement within the domestic law as they would be before the ECtHR.<sup>409</sup> Lord Nicholls found support for this view in the preamble of the Act's statement of its purpose to be one of giving 'further effect' to the rights guaranteed under the ECHR showed that the Act was only intended to allow for the enforcement of the rights available under the Convention.<sup>410</sup>

However, it is submitted that regard to this particular intent behind the HRA cannot alone justify the existence of the mirror principle. The practical desire to reduce the need for appeal to Strasbourg was not the sole intention behind the Act's creation,<sup>411</sup> other concerns which influenced the bringing into being of the HRA mitigate against the existence of the mirror principle.<sup>412</sup> The Act was intended to have a fundamental impact on the British legal system and held against this aim the mirror principle is incongruous.

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<sup>407</sup> Wright (n.374), 607-608

<sup>408</sup> Beatson (n.355), 42-43

<sup>409</sup> *Quark* (n.354), [25]

<sup>410</sup> *Ibid*, [33]-[34], approved by Lord Roger in *Al-Skeini* (n.362), [58]

<sup>411</sup> Clayton (n.361), 18 and Beatson (n.355), 43

<sup>412</sup> Lewis (n.353), 725-726

It is apparent from Jack Straw's statement in introducing the Bill that was to become the HRA, that it was designed to achieve 'a better balance between rights and responsibilities, between the powers of the state and the freedom of the individual',<sup>413</sup> that the incorporation of Convention rights was meant to be a substantial change in the British constitutional structure,<sup>414</sup> increasing the protection of rights.<sup>415</sup> It was hoped that that the HRA would create a culture of awareness about human rights.<sup>416</sup> Both these purposes can be seen to be consistent with an interpretation of s.2(1) where the courts' ability to protect fundamental human rights is not restrained to those recognised by the ECtHR. Such an approach finds further support in the 'Rights Brought Home' White Paper created by the Home Office under Straw's leadership.<sup>417</sup> Here it was specifically envisioned that incorporation would enable British judges to contribute 'to the development of the jurisprudence of human rights in Europe'<sup>418</sup> and provide the ECtHR with a 'useful source of information and reasoning for its own decisions',<sup>419</sup> in addition to reducing the delays caused by the former need to go to the ECtHR to gain redress for breach of Convention rights.<sup>420</sup> Although Wright correctly notes that no specific reference was made to creating a 'rights culture' in the White Paper<sup>421</sup> it is clear that there were higher hopes and aspirations for what the Act could achieve. The Lord Chancellor thus argued in the passage of the Bill that the HRA presented an opportunity for the British judges to contribute significantly to 'the development of human rights in Europe.'<sup>422</sup>

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<sup>413</sup> HC Deb 16 February 1998, vol.306, col.781

<sup>414</sup> Lewis (n.353), 722

<sup>415</sup> Beatson (n.355), 43

<sup>416</sup> HL Deb 3 November 1997, vol.582, col.1308, see also Beatson (n.355), 43, Lewis (n.353), 722 and F. Klug, 'The Human Rights Act 1998, *Pepper v. Hart* and all that' [1999] *P.L.* 246, 247

<sup>417</sup> Secretary of State for the Home Department, 'Rights Brought Home: The Human Rights Bill' (Cm 3782, 1997)

<sup>418</sup> *Ibid.*, 1.14

<sup>419</sup> *Ibid.*, 1.18

<sup>420</sup> *Ibid.*

<sup>421</sup> Wright (n.374), 568

<sup>422</sup> HL Deb 3 November 1997, vol.582, col.1227-1228

It is thus clear that, although the desire to provide a shortcut to the protection of rights which bypassed the long road to Strasbourg was an obvious intention behind the HRA, the drafters and Parliament meant it to have an effect which transcended this practical need. At the very least, it cannot be said that the intention behind the act is so narrow that it necessitates the adoption of the mirror principle and, on a more generous understanding of the HRA's legislative history, the courts can find encouragement to go beyond the ECtHR's case law in interpreting the Convention.

The courts have sought to bolster the above arguments for the mirror principle by arguing that the ECtHR is the only body capable of authoritatively determining the scope of the rights, and therefore it is right that the domestic courts should not depart from its case law. From the early case of *Anderson* the courts have argued that the ECtHR has a 'deeper appreciation of the true ambit and reach of'<sup>423</sup> the Convention rights, by virtue of its position as a court whose expertise is solely directed at the interpretation of the scope of the Convention.<sup>424</sup> Similarly, in their subsequent entrenchment of the mirror principle, it has also been argued that only Strasbourg can authoritatively define the application of the Convention rights, for that is its particular function.<sup>425</sup> In *Al-Skeini* Lord Brown also felt it necessary to uphold the no more than element of the mirror principle because, if the domestic courts were to arrive at an incorrect interpretation of the Convention rights which went against the government, the government would be unable to appeal the decision to the ECtHR,<sup>426</sup> and the interpretation would not be corrected.<sup>427</sup>

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<sup>423</sup> *Anderson* (n.373), [65]

<sup>424</sup> *Ibid*, [91] and *Kay v Lambeth LBC* [2006] UKHL 10, [28]

<sup>425</sup> *Ullah* (n.360), [20], *ADI* (n.372), [37] and *Al-Skeini* (n.362), [3], [65] & [105]

<sup>426</sup> Articles 33 and 34 ECHR

<sup>427</sup> *Al-Skeini* (n.362), [106]

In practical terms, these concerns to ensure the correct interpretation of the Convention's protection are not without foundation. Given the domestic court's lack of experience of rights adjudication prior to the enactment of the HRA,<sup>428</sup> it is understandable that they would be concerned to closely follow an institution with the experience of half a century. However, after a decade of the HRA adjudication, with human rights cases approaching one third of the House of Lords' case load by 2007 and unlikely to decline,<sup>429</sup> it is submitted that the judiciary have sufficient experience to no longer need to hold the hand of Strasbourg so tightly.

At a more principled level if, as argued previously, the PGC should be used by the courts to interpret the Convention because of the logical necessity of its position as the supreme principle of action and morality, restricting the interpretations of Convention rights to those already accepted by the ECtHR on the grounds that only Strasbourg can determine the correct interpretation is unjustified. As the Lord Chancellor noted in the passage of the Bill, it is the Convention itself, not the ECtHR's jurisprudence, that is the 'ultimate source of the relevant law.'<sup>430</sup> This realisation entails that an interpretation of the Convention guided by a basis of the rights in the PGC necessarily has a strong claim to be correct at a fundamental level. Thus, as the PGC can provide cogent guidance on the correct scope of the Convention rights, the courts' fears of adopting an incorrect interpretation of the Convention if they go beyond the ECtHR's jurisprudence can be allayed.

In *Ullah*, whilst claiming that only the ECtHR can authoritatively state the correct interpretation of the Convention, Lord Bingham also argued that a no less than and no more than approach should be applied because the Convention should have the same meaning in all

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<sup>428</sup> See generally M. Hunt, *Using Human Rights Law in English Courts* (Hart 1997)

<sup>429</sup> S. Shah and T. Pool, 'The Impact of the Human Rights Act on the House of Lords' [2009] *P.L.* 347, 355, 361-362 & 370

<sup>430</sup> HL Deb 18 November 1997, vol.583, col.514

states.<sup>431</sup> Similarly, early in the mirror principle's development, Buxton LJ. stated that, because the ECHR applied to lots of different countries, 'fairness between the citizens of those different countries requires that its terms have a uniform and accessible meaning throughout the member countries.'<sup>432</sup> Subsequently, the courts have continued this argument, claiming that the ECHR's effectiveness would be reduced if different interpretations of the Convention rights, other than those stated authoritatively by the ECtHR,<sup>433</sup> were adopted in different states.<sup>434</sup>

As noted previously, it is necessary that the ECtHR's interpretation of the Convention rights be at least treated as a minimum level of protection; failure to follow ECtHR decisions is likely to result in a successful application to that court against the judgment.<sup>435</sup> However, it is neither practically nor theoretically problematic for different states to differ in the extent to which they interpret the Convention rights in ways which exceeds the universal minimum. Indeed, s.11 HRA protect the possibility that domestic law, albeit outside of the Convention rights, may provide greater protection for an individual. Although this section is backward looking, in that it protects rights existing before the creation of the HRA,<sup>436</sup> it appears inconsistent with such intentional maximisation of rights protection for the courts to restrict themselves to the limits of the protection recognised by the ECtHR.

In *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* Lord Scott, differing from Lord Bingham's strongly mirror principle approach,<sup>437</sup> suggested that the way the HRA incorporated the Convention into domestic law made it possible for the

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<sup>431</sup> *Ullah* (n.360), [20], approved in *Al-Skeini* (n.362), [105]

<sup>432</sup> *Anderson* (n.373), [89]

<sup>433</sup> *Kay* (n.423), [44]

<sup>434</sup> *Ibid*, [28]

<sup>435</sup> Above p.225

<sup>436</sup> *Lewis* (n.353), 738-739

<sup>437</sup> *ADI* (n.372), [37]



United Kingdom courts to adopt a different interpretation of its provisions from the ECtHR.<sup>438</sup> He felt that this was implicit in the fact that, in bringing the Convention rights into the HRA, the rights were made part of United Kingdom law separate from the ECHR which Strasbourg interprets.<sup>439</sup> The Convention was not in a strict sense incorporated and given direct effect,<sup>440</sup> rather, what the HRA does is to ‘create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention.’<sup>441</sup> On this basis, Lewis argues that it is possible for the domestic courts to adopt a more expansive interpretation of the *domestic* Convention rights without effecting the uniformity of the ECtHR’s interpretation which will remain applicable and binding on all states.<sup>442</sup> Even if, the HRA is seen as incorporating certain of the Convention rights directly, their open textured nature, and the presence of jurisprudential uncertainty and margins of appreciation on the fundamental question of rights interpretation, would still give need for the domestic courts to reach their own interpretations of them. Additionally the dialectical force of the PGC is unaffected, as the supreme principle of action it has force over the interpretative application of the Convention rights whether in Strasbourg, or at the domestic level with which this thesis is primarily concerned.

That Convention rights may be interpreted by different national courts to be of different scope is not a position that is alien to the ECtHR’s jurisprudence, such differing application is a necessary consequence of the margin of appreciation. As noted previously, the ECtHR has applied the margin of appreciation doctrine to the question of the scope of Article 2 on the question of whether fetuses have rights under the Convention.<sup>443</sup> This adds to Lewis’s

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<sup>438</sup> Ibid, [44]

<sup>439</sup> Ibid

<sup>440</sup> Beatson (n.355), 34

<sup>441</sup> *Re McKerr’s Application for Judicial Review* [2004] UKHL 12, [63]

<sup>442</sup> Lewis (n.353), 736

<sup>443</sup> Above p.66-67

semantic contention that there is no distinction between the ‘application’ of Convention rights to which the margin of appreciation has traditionally been applied by the ECtHR and the ‘interpretation’ of the Convention rights to which the domestic courts have applied the mirror principle;<sup>444</sup> though Strasbourg previously only applied the margin of appreciation to questions of where the balance between rights and competing interests should be drawn, it is now apparent that it can also apply to the interpretation of the scope of a right.

At a more practical level, it has been argued by several commentators that, as the ECtHR itself has not stated a doctrine of precedent,<sup>445</sup> the domestic courts should not consider themselves as tightly bound as they are under the mirror principle. The ECtHR has held that in the interests of ‘legal certainty, foreseeability and equality before the law’<sup>446</sup> it will not without good reason depart from its previous decisions.<sup>447</sup> However, Strasbourg’s adjudicative approach has been influenced by civil traditions of other states.<sup>448</sup> In civil law systems, judicial decision making operates through the application of general principles by judges to specific facts<sup>449</sup> rather than through close regard to the detailed precedents of previous decisions.<sup>450</sup> This reasoning is one explanation<sup>451</sup> of why the courts of other members of the Council of Europe do not treat Strasbourg judgements as binding in the way the United Kingdom courts do.<sup>452</sup> As with the use of any judgement from another legal system, the viability and appropriateness of doing so depends on a proper understanding of the context within which the original norm developed,<sup>453</sup> including the defences between civil

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<sup>444</sup> Lewis (n.353), 737-738

<sup>445</sup> Wright (n.374), 601

<sup>446</sup> *Chapman v United Kingdom* (2001) 33 EHRR 18, [70]

<sup>447</sup> Ibid

<sup>448</sup> Wright (n.374), 601

<sup>449</sup> Wright (n.374), 596, see also *Pretty v United Kingdom* (2002) 35 EHRR 1, [75]

<sup>450</sup> Clayton (n.361), 18

<sup>451</sup> See also R. Clayton, ‘Smoke and Mirrors: The Human Rights Act and the Impact of Strasbourg Case Law’ [2012] *P.L.* 639, 655

<sup>452</sup> Clayton (n.361), 18-19 and Lewis (n.353), 732

<sup>453</sup> C. Montesquieu, *The Spirit of Laws* (first published 1748, Prometheus Books 2002), vol.2, 163-164

and common law traditions.<sup>454</sup> It is thus unwise for the domestic courts to treat judgements of the ECtHR as precedents of a superior domestic court, when in fact they are made within a different system<sup>455</sup> which is influenced by the civil law tradition of adjudication.

Given the differences between the domestic courts and Strasbourg, rather than restricting the scope of the Convention rights under domestic law to that already declared by the ECtHR, to apply the ECtHR's jurisprudence in a manner more consistent with Strasbourg's own approach to the Convention, it would be better if the domestic courts had regard to broad underlying principles.<sup>456</sup> Such an approach would facilitate the courts in using the fundamental PGC to determine the further scope of the rights.

Similarly, although the judgements of the ECtHR are binding upon the member states that are party to a case,<sup>457</sup> the Convention itself gives little support to the 'no more than' element of the mirror principle. Its preamble does include the recognition that human rights and fundamental freedoms are best maintained their 'common understanding and observance'. However, although this was given as a justification for the creation of the Convention it does not show an intention to limit the rights protection that member states could give. Article 53, although concerned to safeguard existing human rights protection within states, shows that the signatories to the Convention were aware of the potential for greater rights protection than that stated in the Convention. This potential is also explicitly recognised in the preambular acknowledgement that only some of the UDHR rights were included in the Convention, and is implicitly recognised by the protocols stating further rights that have since been added to the Convention. Thus it is submitted that the Convention itself gives little support to the

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<sup>454</sup> D. Ullrich 'Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany' (2003) 3 *Global Jurist Frontiers* 1, 3

<sup>455</sup> O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *M.L.R.* 1, 12

<sup>456</sup> Above p.44-51

<sup>457</sup> Article 46 ECHR

continued application of the mirror principle to restrain the domestic courts from giving greater protection than that stated by the ECtHR.

### *Conclusion*

It has been argued that, in light of the open textured nature of the Convention rights, the Principle of Generic Consistency can be used as a moral basis from which to interpret the Convention, and that dialectically it should be so used. The answers that this approach gives to the substantive and distributive questions of moral philosophy also give answers to the five key general questions of interpretation raised by the Convention. The PGC itself, and thus its interpretative use, is rationally justified by a dialectically necessary argument from agency or alternately can be justified using common moral assumptions. The interpretive use of this theory is supported by its consistent fit with the three fundamental features of the Convention as a scheme of rights protection.

The British courts have held, on questions of the interpretation of the scope, applicability and the process of the balancing of the Convention rights, their case law must mirror that of the ECtHR. However, the mirror principle should not in practice prevent the courts from following the guidance of the PGC in most cases. In those cases where it may present an obstacle to the greater protection of rights it is submitted that there is a strong case, supported by the guidance of the PGC in the interpretation of rights, for the courts to abandon their self-imposed constraints. Thus, the PGC philosophically and legally can and should be used by the courts to resolve the questions of interpretation of the Convention rights.

## CHAPTER VII: GEWIRTHIAN CONVENTION RIGHTS

### *Introduction*

As argued previously, the case law of both the ECtHR and the United Kingdom courts concerning who possess the rights protected by the Convention, suffuses uncertainty. The lack of a clearly conceptualised theoretical basis of the Convention permeates the substantive rights and consequently the courts' answers, to the questions of which beings can possess them, and which of the rights they possess, are similarly opaque. However, by accepting a basis of a conception of rights directed by the PGC, the approach of the United Kingdom courts can be given structure and coherence.

### *Who Has Human Rights*

#### *Introduction*

A conception of moral agency<sup>1</sup> determines the possession of rights under the PGC, the above defined concept of purposive agency.<sup>2</sup> From this definition it is claimed that moral rights and the Convention rights can be derived, and the possessors of those rights can be known.<sup>3</sup>

#### *Agency in Action*

Under the above arguments to the PGC, an agent is being 'who is able to control his behaviour by his unforced choice with a view to achieving his purposes'<sup>4</sup> through action and can grasp what is entailed by being such a person.<sup>5</sup> This action of which an agent is capable, and which is the concern of morality,<sup>6</sup> is characterised by the inter-related generic features of

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<sup>1</sup> A. Gewirth, *Reason and Morality* (University of Chicago Press 1978), 30 & 171

<sup>2</sup> Above p.176-178

<sup>3</sup> Gewirth (n.1), 22

<sup>4</sup> Ibid, 46

<sup>5</sup> Ibid

<sup>6</sup> Ibid, 26

‘voluntary and purposive behaviour’<sup>7</sup> described above<sup>8</sup> which seeks to achieve a freely chosen end.<sup>9</sup>

As shown in the previous chapter, correlative to these generic features of action, and therefore of agency, are the generic needs of freedom and well-being which all agents necessarily require if they are to successfully exercise their agency through action, and which, ultimately, all agents must consequently consider they have rights to, by virtue of their agency being characterised by purposive action.<sup>10</sup> This necessary derivation and connection of freedom and well-being from the inherent possession of the capacity for voluntariness and purposiveness action, which constitute the generic features of agency, is thus pivotal to a Gewirthian explanation of the basis of Convention rights.

### *Rights in Agency*

#### Generic Rights in Agency

It is the basis in agency, combined with the application of reason, that allows for Gewirth’s use of the dialectically necessary method to determine what must be accepted as entailed by agency.<sup>11</sup> As discussed in detail previously, as purposive agents, all agents must accept that they and all other agents have rights to the generic features of agency or else contradict their agency.

With agency characterised by action in the manner described above, it follows logically that, ‘all rational agents logically must hold or claim, at least implicitly, that they have rights to...

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<sup>7</sup> Ibid, 22 & 27

<sup>8</sup> Above p.177-178

<sup>9</sup> D. Beyleveld, *The Dialectical Necessity of Morality* (Chicago University Press 1991), 17

<sup>10</sup> Gewirth (n.1), 44

<sup>11</sup> Ibid

[freedom and well-being].<sup>12</sup> Only the rights to freedom and well-being are rationally necessary, because only these rights are necessarily connected with the claimant of the right being an agent.<sup>13</sup> From this, the dialectically necessary argument from agency leads to the conclusion that all agents must recognise that rights to freedom and well-being, the generic rights, are possessed by themselves and all agents by virtue of the mere fact that they are agents,<sup>14</sup> on pain of contradicting that their own agency is necessary and sufficient for the possession of the rights.<sup>15</sup> This conclusion Gewirth encapsulates within the Principle of Generic Consistency.<sup>16</sup> Thus, within Gewirth's theory, purposive agency, which is composed of the generic features of action, is the pivotal characteristic to which moral rights attach and the justification for their existence.<sup>17</sup>

#### Generic Rights to Human Rights

Just as agency is the justifying characteristic, the *ratio cognoscendi* and the *ratio essendi*, for the possession of the generic rights, so too does it provide a justifying basis, a *ratio essendi*, for the rights found in documents stating human rights.<sup>18</sup> To be more than merely positivist norms which are contingent on the whim of society as to what protection for humans is agreed to be desirable,<sup>19</sup> human rights must have a basis which sets out in a non-contingent manner why law and society ought to respect and recognise these rights.<sup>20</sup> Gewirth argues that dialectically necessary consequences of the capacity for purposive action 'provide[s] the

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<sup>12</sup> A. Gewirth, 'The Basis and Content of Human Rights' (1979) 13 *Ga.L.Rev* 1143, 1148 and *ibid*, 64

<sup>13</sup> Gewirth (n.1), 78

<sup>14</sup> *Ibid*, 112 & 134

<sup>15</sup> *Ibid*, 105

<sup>16</sup> *Ibid*, 135, 140 & 156

<sup>17</sup> *Ibid*, 104

<sup>18</sup> *Ibid*, 102

<sup>19</sup> J. Bentham, *An Introduction to the Principles of Morals and Legislation* (Collected Works of Jeremy Bentham, University of London: Athlone Press 1970), 206, A. Gewirth, 'Human Dignity as the Basis of Rights' in M. Meyer and W. Parent (eds) *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992), 13, *Ibid*, 103 and Gewirth (n.12), 1150, *Cf.* 1158

<sup>20</sup> Gewirth (n.12), 1144

basis and content of all human rights'<sup>21</sup> by giving such a basis for the recognition of humans as having rights.<sup>22</sup>

The generic rights to freedom and well-being derived from agency can themselves be seen to be 'human rights' insofar as they are rights possessed by all humans who are agents.<sup>23</sup> However, they are not possessed by humans merely by virtue of their humanity; it is agency to which the generic rights attach.<sup>24</sup> The consequence of this is that although all normal human adults will possess the generic rights<sup>25</sup> there will be some members of the human species who cannot be said to possess them<sup>26</sup> because they appear to be incapable of agency.

Beings or humans who are not agents cannot possess the generic rights because, although there are degrees of approach to being an agent, there are not degrees of the status of agent which is necessary for the possession of the generic rights.<sup>27</sup> Gewirth attempts, by using the principle of proportionality, to argue that such non-agent humans can be said to have the rights to freedom and well-being in proportion to the degree to which they approach being an agent.<sup>28</sup> He argues that because it is owing to the value that they give to their purposiveness<sup>29</sup> that agents must think that they have the generic rights,<sup>30</sup> agents must similarly logically recognise that other beings or humans who approach having this purposiveness must have a degree of rights to freedom and well-being which protect the extent to which they are purposive, the extent to which they approach the attainment of agency.<sup>31</sup> The rights

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<sup>21</sup> Ibid, 1170

<sup>22</sup> Gewirth (n.1), 104

<sup>23</sup> Ibid, 64

<sup>24</sup> Gewirth (n.12), 1158 and Beyleveld (n.9), 447

<sup>25</sup> Gewirth (n.12), 1157

<sup>26</sup> Beyleveld (n.9), 447

<sup>27</sup> Gewirth (n.1), 121

<sup>28</sup> Ibid, 121-122 and Beyleveld (n.9), 446

<sup>29</sup> I.e. having purposes that they regard as good (see Gewirth (n.1), 124)

<sup>30</sup> Gewirth (n.1), 123-124

<sup>31</sup> Ibid, 123 & 141 and Gewirth (n.12), 1157



approaching the generic rights possessed by non-agents are argued by Gewirth to be the ‘fullest degree of the generic rights of which they are capable, so long as this does not result in harm to themselves or others’,<sup>32</sup> for this would harm the purposiveness upon which their recognition is based.<sup>33</sup>

Whilst on its face Gewirth’s development of his dialectically necessary argument for the possession of proportionate generic rights by non-agents appears to be logically attractive, it is submitted that there is at its base an inconsistency with his original argument for the rights of agents which undermines his proportionality argument. As Beyleveld, Brownsword and Pattinson note, Gewirth’s proportionality argument relies on the fundamental premise that it is possible for generic rights to be possessed by beings that are not agents;<sup>34</sup> that although such beings do not possess all the characteristics of agency they should be recognised as having a proportionate quantity of the rights that attach to agency.<sup>35</sup> It is Gewirth’s attempt to use the argument from fundamental agency to justify this that logically invalidates his argument for proportionate generic rights. At the core of Gewirth’s moral argument is that it is from agency that the possession of the generic rights dialectically necessarily derive.<sup>36</sup> This being the case, contrary to what Gewirth claims,<sup>37</sup> it is logically impossible for any generic rights to be held by a being that does not possess the generic features of voluntariness and purposiveness that characterise an agent, because such a being will not have the features that

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<sup>32</sup> Gewirth (n.12), 1158

<sup>33</sup> Gewirth (n.1), 122 & 141

<sup>34</sup> D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001), 118

<sup>35</sup> D. Beyleveld and S. Pattinson, ‘Precautionary Reasoning as a Link to Moral Action’ in M. Boylan (ed) *Medical Ethics* (Prentice-Hall 2000), 51

<sup>36</sup> Above p.184-188

<sup>37</sup> Gewirth (n.1), 141

constitute the perspective from which the generic rights can be derived and claimed in a dialectically necessary manner.<sup>38</sup>

Thus, Gewirth's proportionality reasoning 'works apart from the very basis that Gewirth finds for anything to be a rights-holder.'<sup>39</sup> In attempting to justify the possession of some generic rights by non-agents Gewirth, in his principle of proportionality, moves from his position that under the PGC agents must be recognised as possessing the generic rights, to claiming that the generic rights must be granted to all beings in proportion to the extent that they approach being agents.<sup>40</sup> In doing so, he thus departs from his premise that the possession of rights derives from, and hence attaches to, the possession of agency.<sup>41</sup>

In addition to the logical inconsistency of his proportionality argument with the basis of the generic rights, Beyleveld and Brownsword also note that it is substantively impossible for those rights to be held by a being that is not an agent because of their nature as rights under the will conception.<sup>42</sup> As explained previously, and as applied in detail below, agents claim the generic rights because they are an instrumental good in the achievement their purposes, and consequently they are free to waive the benefit of the generic rights as their purposes dictate.<sup>43</sup> It follows from this that as only agents, not mere partial agents, have the capacities of voluntariness and purposiveness necessary to choose to waive the benefits of rights, only such agents can possess the generic rights guaranteed by the PGC.<sup>44</sup>

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<sup>38</sup> Beyleveld and Brownsword (n.34), 112 & 118, Beyleveld and Pattinson (n.35), 46-47 and S. Holm and J. Coggon, 'A Cautionary Note Against "Precautionary Reasoning" in Action Guiding Morality' (2009) 22(2) *Ratio Juris* 295, 298

<sup>39</sup> Holm and Coggon (n.38), 298

<sup>40</sup> Beyleveld and Pattinson (n.35), 51 and Beyleveld and Brownsword (n.34), 119

<sup>41</sup> Beyleveld and Pattinson (n.35), 51-52

<sup>42</sup> Beyleveld and Brownsword (n.34), 118

<sup>43</sup> *Ibid*, 119

<sup>44</sup> *Ibid* and Beyleveld and Pattinson (n.35), 47

Although beings that are not agents are neither theoretically nor practically capable of possessing the generic rights, this does not necessarily leave such beings with no protection under the PGC. Beyleveld, Brownsword and Pattinson cogently advocate an approach of precautionary reasoning as an alternate response to the question of what protection the PGC gives to non-agents. This argument is built around the empirical impossibility of any agent knowing for certain whether any being other than himself is or is not an agent, because of the impossibility of knowing with certainty the mental capacity of another being and thus whether they have the generic features of agency.<sup>45</sup>

As a categorically binding principle, if an agent acts contrary to the PGC he acts in contradiction of his own agency.<sup>46</sup> In recognition of this, these three critics of Gewirth's proportionality approach argue that when this obligation is combined with the impossibility of knowing other minds, the PGC must be taken as imposing a duty on agents to take precautions against committing actions which would infringe the generic rights of other beings if they were agents and whom it is impossible to know are not agents.<sup>47</sup>

Under the precautionary reasoning that the PGC logically requires, agents must treat beings who ostensibly appear by their characteristics and behaviour to be agents as agents,<sup>48</sup> even though it is not possible to be certain they are an agent and not, for example, a mindless automaton.<sup>49</sup> An agent has such an obligation because, under the PGC it is better to err in treating a being that is not an agent as an agent than fall into logical inconsistency by failing

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<sup>45</sup> Beyleveld and Pattinson (n.35), 40, Beyleveld and Brownsword (n.34), 113 & 120 and D. Beyleveld and S. Pattinson, 'Defending Moral Precaution as a Solution to the Problem of Other Minds: A Reply to Holm and Coggon' (2010) 23(2) *Ratio Juris* 258, 260

<sup>46</sup> Above p.189

<sup>47</sup> Beyleveld and Brownsword (n.34), 113, Holm and Coggon (n.38), 295 & 300 and Beyleveld and Pattinson (n.45), 258

<sup>48</sup> Beyleveld and Brownsword (n.34), 113 & 120

<sup>49</sup> *Ibid*, 120

to treat an agent with respect for their generic rights under the PGC for which there can be no justification.<sup>50</sup>

In relation to beings who are not ostensibly agents or who only partially display the characteristics associated with being an agent, because they lack these characteristics it is not possible and meaningful to treat them as agents with the generic rights.<sup>51</sup> Although as apparently non-ostensible agents precaution does not require that they be treated as agents with rights, an agent cannot know for certain that such a being – an ostensible non-agent – is in fact not an agent who has the generic features of agency but is incapable of displaying the characteristics associated with them.<sup>52</sup> Consequently, the precautionary reasoning necessary to ensure compliance with the PGC requires that agents ‘accept duties to apparent partial agents in proportion to the degree of evidence that they might be agents’<sup>53</sup> in case they are in fact agents.<sup>54</sup>

Thus, this alternate approach does involve an element of proportionality, but unlike Gewirth’s approach it is not the proportionate extent to which a being approaches the characteristics of agency that is the source of the obligations. Rather, under precautionary reasoning the obligations upon agents derive from the duties they owe as agents under the PGC, because of the possibility that the non-ostensible agent is in fact an agent, it is not a duty to partial agents as partial agents.<sup>55</sup> Consequently, the proportionate extent to which a being approaches

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<sup>50</sup> Beyleveld and Pattinson (n.35), 42-43, *ibid*, 121 and Beyleveld and Pattinson (n.45), 260

<sup>51</sup> Beyleveld and Pattinson (n.45), 260

<sup>52</sup> Beyleveld and Pattinson (n.35), 42, Beyleveld and Brownsword (n.34), 113, 122 & 125-126 and Beyleveld and Pattinson (n.45), 261

<sup>53</sup> Beyleveld and Brownsword (n.34), 113

<sup>54</sup> Beyleveld and Pattinson (n.35), 43 and *ibid*, 125

<sup>55</sup> Beyleveld and Pattinson (n.35), 43, Beyleveld and Brownsword (n.34), 123 and Beyleveld and Pattinson (n.45), 258

agency is merely relevant to determining the interests, as opposed to rights, which the non-ostensible agents possess which it is practically possible for agents to have duties to respect.<sup>56</sup>

In terms of assessing whether a being is an ostensible or non-ostensible agent, four types of indicative behaviour closely influenced by the generic features of agency provide a coherent guide in this assessment.

- 1) ‘Patterned behaviour of the kind produced by all living organisms.’
- 2) ‘Behaviour that evinces purposivity (motivation by feeling or desire).’
- 3) ‘Behaviour that displays intelligence (capacity to learn by experience).’
- 4) ‘Behaviour that exhibits rationality (value-guided behaviour, which is characteristic of agency).’<sup>57</sup>

Under this approach, beings which show rationality should be deemed to be ostensible agents.<sup>58</sup> Beyond this, the duties imposed by PGC<sup>59</sup> require non-ostensible agents should have increasing respect shown to their interests commensurate with the extent to which they display the various other characteristics.<sup>60</sup>

Although Gewirth’s theory of proportionate partial generic rights for partial agents differs fundamentally and logically illegitimately from the precautionary approach in its application of the PGC, Beyleveld and Pattinson argue that in practice the implications for the treatment of beings should not be markedly different.<sup>61</sup> Both approaches focus on the extent to which a being proportionately approaches agency but give different justifications and explanations for

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<sup>56</sup> Beyleveld and Pattinson (n.45), 262-263

<sup>57</sup> Beyleveld and Brownsword (n.34), 124

<sup>58</sup> Ibid

<sup>59</sup> Beyleveld and Pattinson (n.45), 267

<sup>60</sup> Beyleveld and Brownsword (n.34), 124 and Beyleveld and Pattinson (n.45), 263-264 & 266-267

<sup>61</sup> Beyleveld and Pattinson (n.35), 52

the protection under the PGC of beings who are not clearly agents.<sup>62</sup> The overlap in outcomes can be seen in relation to the protection required for foetuses under the PGC discussed below in relation to the decision in *Evans v Amicus Healthcare Ltd and Others*.<sup>63</sup>

In spite of the practical overlap, one important implication of the difference in approach between Gewirth's theory and the precautionary argument is upon the extent to which the generic rights can be said to be 'human rights.' Under Gewirth's approach to the possession of the generic rights, the rights can be said to be human rights in that all humans either have the generic rights or have rights which approach the generic rights in proportion to the extent to which the approach being a purposive agent.<sup>64</sup> Under his proportionally theory, rights to freedom and well-being are possessed universally by all humans; the degree to which they are possessed, however, is relative and proportionate to the type of human that they are. Thus, he claims his conception of generic rights is consistent with the universality and inalienability of rights,<sup>65</sup> prominently stated by human rights treaties as a key characteristic of the rights they contain.

However, owing to the rejection of the idea that non-ostensible agents can be said to have any 'generic rights' Gewirth's argument that the generic rights are 'human rights' cannot work in the form he makes it if the precautionary approach is accepted. In spite of this, although human non-ostensible agents cannot be said to have generic rights and therefore they are not universal human rights in this sense, the precautionary approach to the PGC nonetheless can still be seen to support the possession of legal human rights by all humans. By protecting the generic *rights* of human ostensible agents and the *interests* of human non-ostensible agents,

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<sup>62</sup> Ibid

<sup>63</sup> *Evans v Amicus Healthcare Ltd and Others (Secretary of State for Health and Another intervening)* [2004] EWCA Civ 727, below p.248-249

<sup>64</sup> Beyleveld (n.9), 446

<sup>65</sup> Gewirth (n.12), 1144 -1148 & 1158

the PGC does provide universal and inalienable protection to all members of the human species relative to their agency status, although this focus on agency means that the protection given by the PGC is not specific and isolated to humans as a species.

### *Convention Rights through Generic Rights*

Gewirth argues that it is from the position of the generic rights to freedom and well-being as the ‘necessary goods of action that the ascription and contents of human rights follow.’<sup>66</sup> The dialectical derivation of these rights – and also of the precautionary generic interests – enables them to provide a basis for the Convention rights by showing why all humans must accept that they and other humans as humans are owed the duties which must be respected.<sup>67</sup>

As the generic rights deriving from the concept of action must be accepted as imposing logically compelled obligations on agents which guide their actions, it follows that in order for other rights which seek to guide action to be morally valid they must conform to the requirements of the generic rights.<sup>68</sup> The dialectical necessity of Gewirth’s argument from agency to the generic rights, and the alternate dialectically contingent arguments, provide an answer to distributive question of moral rights<sup>69</sup> to which other rights claims must conform. A justification for rights necessarily contains within it a ‘description or descriptive characteristic of the person for whom the right is claimed’<sup>70</sup> and thus, if the Convention rights are to be valid under the PGC, then they must be held by those recognised by that theory as having the generic rights or generic interests.<sup>71</sup>

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<sup>66</sup> Ibid, 1150

<sup>67</sup> Ibid, 1144 & 1148

<sup>68</sup> Gewirth (n.1), 64 and *ibid*, 1170

<sup>69</sup> Gewirth (n.1), 150

<sup>70</sup> *Ibid*, 104

<sup>71</sup> *Ibid*, 121

It follows from the foregoing argument that Convention rights which further the generic features of agency, purposiveness or voluntariness, protected by the generic rights and interests of freedom and well-being, must be recognised as being possessed by each human being in accordance with the extent to which they have the characteristics of purposive agency,<sup>72</sup> as ostensible or non-ostensible agents, with which to benefit from them.<sup>73</sup> Under this approach it is apparent that the fundamental minimum characteristic to which the United Kingdom courts attach the possibility of being a Convention rights holder under the HRA is currently inconsistent with a basis of rights in the generic features of action. However, beyond this, the approach of the courts to the questions of which particular rights can be possessed by which persons is consistent with a Gewirthian approach. The adoption by the courts of an approach based in the PGC, with its focus upon purposive agency, would give to the judgements a clear and coherent theoretical basis. If applied by the courts, this would create a consistency in their substantive approach to the question of who can possess the Convention rights and which rights they possess.

Under the decision in *Bland*,<sup>74</sup> subsequently approved post-HRA in *NHS Trust A v M*,<sup>75</sup> and in the context of case law on the rights of fetuses,<sup>76</sup> the possibility of the possession of Convention rights is held to hinge upon being a born living human. However, *Bland*, who was in a permanent vegetative state, could not be said to approach behaviour displaying the characteristics of an agent, or even of a prospective purposive agency.<sup>77</sup> Consequently, the birth-centric approach of the British courts in countenancing the possession of rights merely

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<sup>72</sup> *Ibid*, 124 and *Beyleveld and Brownsword* (n.34), 123

<sup>73</sup> *Gewirth* (n.1), 122 and *Beyleveld and Pattinson* (n.45), 264

<sup>74</sup> *Airedale NHS Trust v Bland* [1993] AC 789, 858-859, 864, 881 & 889

<sup>75</sup> *NHS Trust A v M* [2001] Fam 348, 356

<sup>76</sup> *Evans* (n.63), [106]-[107]

<sup>77</sup> See above p.178



by beings who are living humans, even with no capacity for voluntariness or purposiveness, is on its face unsupportable by a basis of the generic rights of ostensible agents.<sup>78</sup>

However, under the precautionary approach, the finding that Bland was a being whose ('best')<sup>79</sup> interests had to be considered, through the application principle of the sanctity of life and Article 2 ECHR,<sup>80</sup> is justified and required by the PGC. Although in a PVS, it is empirically impossible to be certain that he is not an agent. However, based on the agency interests that he displayed, the Court was justified under the PGC in its decision to remove life-sustaining treatment. There was no indication that Bland's body supported his continued agency, if indeed he remained an agent, and thus the end of Bland's life could not have reduced his level of voluntariness and purposiveness to which his life was an instrumental good.<sup>81</sup> Therefore, the continued provision of treatment should not be deemed to be required by a positive obligation under the right to life based upon the protection of the generic features and goods.<sup>82</sup>

Although the ascription of rights in *Bland* can be justified under a precautionary application of the PGC, the court's refusal in *Evans* to countenance fetuses as the possessors of any Convention rights is inconsistent with a basis in purposive agency as understood under the precautionary approach. The domestic court's decision that fetuses have no Convention rights<sup>83</sup> as they are not persons<sup>84</sup> appears arbitrary once the basis of human rights is taken to be purposive action viewed in a precautionary manner. Although apparently lacking in

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<sup>78</sup> Beyleveld (n.9), 447

<sup>79</sup> *Bland* (n.74), 867 & 884

<sup>80</sup> *Ibid*, 858-859 & 863-864

<sup>81</sup> *Ibid*, 859 & 869

<sup>82</sup> *Below*, p.253-255 & 275

<sup>83</sup> Contrary to the view of the ECtHR in *Paton v United Kingdom* (1981) 3 EHRR 408, [23] where the Court argues that the Abortion Act 1967 had implicitly recognised a right to life for the foetus by regulating abortions.

<sup>84</sup> *Evans* (n.63), [106]-[107]

purposiveness and therefore not ostensible agents with the generic rights,<sup>85</sup> Gewirth argues that fetuses do have some rights as a result of the application on the principle of proportionality. According to Gewirth, a fetus can have no right to freedom because they have no capacity for voluntary action due to their connectedness to their mother.<sup>86</sup> However, Gewirth argues they can have rights to ‘well-being as [it] is required for developing potentialities for growth towards purpose fulfilment’<sup>87</sup> because, although not actually purposive agents, they unlike Bland proportionately approach being a purposive agent<sup>88</sup> as they grow.

This context is one in which the theoretically different proportionality and precautionary approaches to the rights of non-ostensible agents yield the same substantive results.<sup>89</sup> The latter approach similarly regards fetuses as non-ostensible agents.<sup>90</sup> However, unlike Gewirth’s approach, under the precautionary thesis the potentiality of a fetus to become an agent does not entail recognition of the fetus as possessing rights<sup>91</sup> approaching the generic rights. Instead, the fetuses’ potential to have the generic rights is given precautionary weight as evidence that the human fetus may *already* be an agent, and thus in order to avoid the risk of violating the PGC agents have duties to show greater respect for its interests than fetuses of species that do not normally develop into agents.<sup>92</sup>

The substantive implication of the application of this precautionary reasoning to the Convention rights is that as a member of the human species with the potential to be an

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<sup>85</sup> Gewirth (n.1), 121-145

<sup>86</sup> Ibid, 142

<sup>87</sup> Ibid

<sup>88</sup> Ibid

<sup>89</sup> Beyleveld and Brownsword (n.34), 130

<sup>90</sup> Beyleveld and Pattinson (n.35), 49

<sup>91</sup> Ibid

<sup>92</sup> Beyleveld and Pattinson (n.35), 49-50, Beyleveld and Brownsword (n.34), 125 and Beyleveld and Pattinson (n.45), 265

ostensible agent, fetuses should receive a commensurable measure of recognition and protection under the appropriate Convention rights. At a minimum, to guard against the danger of contradicting the PGC if the foetus is an agent, fetuses should be said to have an interest in life as part of an interest in continued development towards displaying the full characteristics of an agent which they may or may not already be.<sup>93</sup> Thus, the interests a foetus should be recognised as having should be accorded increased moral weight as it develops and the proportionate likelihood of it being an agent increases,<sup>94</sup> this is of particular relevance in the balancing of its interests against the generic rights and interests of other beings which will be discussed below.<sup>95</sup>

The birth centric approach of the British courts has the advantages of clarity and simplicity, but without a dialectically valid basis it lacks the philosophical and intellectual coherence of an approach based in the PGC. The current position which *Evans* continues, first described by Coke in the 17<sup>th</sup> Century, has its roots in pre-enlightenment thinking preceding the idea of inherent and inalienable human rights.<sup>96</sup> However, an approach based in the PGC, which fits with the modern concept of universal human rights, protects in a non-speciesist manner the rights and interests of all humans, not just those who are born, and its interpretive use gives a more principled, consistent and coherent basis to the ascription of Convention rights under the Act.

In *Evans* the question was whether human embryos, created for the purposes of IVF treatment and kept in storage, had a qualified right to life contingent on the wishes of the

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<sup>93</sup> Beyleveld and Pattinson (n.35), 50 and Beyleveld and Pattinson (n.45), 263

<sup>94</sup> Beyleveld and Pattinson (n.35), 47 and Beyleveld and Brownsword (n.34), 125

<sup>95</sup> Below p.290-298, for fetuses superficially see Beyleveld and Pattinson (n.35), 48

<sup>96</sup> See above p.113

mother.<sup>97</sup> Arden LJ. rejected this application of Article 2, finding that there was a large margin of appreciation on this question and upholding the domestic legislation which denied the possession of rights by embryos or foetuses.<sup>98</sup> It is submitted that were the PGC to have been applied to this question, the court would in fact have been required to recognise a qualified right to life for the embryo, similar to the extent that Anthony Bland was recognised as having such a right, although as in that case,<sup>99</sup> this right would not have required the continued preservation or possibility for development of the embryo, but for different reasons.

As an entity which is known to develop into an agent, under the precautionary approach to agency, like a foetus, an embryo should be seen to have an interest in continuing to exist and in its continued development.<sup>100</sup> Correlative to this is a duty upon agents not to impede that development of the characteristics of ostensible agency, and also to facilitate it.<sup>101</sup> Under this approach a comparison can be drawn with Bland in that both are genetically human and, although Bland physically resembles an agent, both only showed the minimal ‘patterned behaviour’ of the fourfold criteria for assessing agency.<sup>102</sup> There is little to choose between them under the precautionary assessment of whether they are currently agents, one naturally develops into an ostensible agent, whereas the other once was an ostensible agent but shows no other sign of continuing to be one. Thus, it is submitted that under the precautionary approach to agency, as Bland can be said to be at least covered by Article 2,<sup>103</sup> so too should embryos and foetuses.

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<sup>97</sup> *Evans* (n.63), [106]

<sup>98</sup> *Evans* (n.63), [107]

<sup>99</sup> Above, p.247

<sup>100</sup> See above p.247-249

<sup>101</sup> Above p.249, Beyleveld and Pattinson (n.35), 50 and Beyleveld and Pattinson (n.45), 263

<sup>102</sup> Above, p.243

<sup>103</sup> See also above, p.247

The embryo can be said to have an interest in continuing to exist, however this interest is only of minimal force because, in showing no signs of purposiveness and voluntariness, there is very little indication that it is actually an agent deserving of protection under the precautionary approach, and so their moral status is lower.<sup>104</sup> Their consequentially minimally weighted generic interest in life under the PGC must also be balanced against the competing rights of others. This will be discussed in detail below,<sup>105</sup> however the embryo's low moral status entails that any generic interests it has protected by Article 2, a positive obligation to protect the life and development of the embryo, would be easily be outweighed by the generic rights of other agents; the parents' right to control their own reproduction or rights of members of wider society to the resources that would be necessary to preserve the embryos. This lower moral status of an embryo, and the consequent implications for the balancing of interests, was noted by Arden LJ. in her judgement, where she held that 'embryo has no right to life which trumps the right to choose of a person whose ongoing consent to its use or storage is required under the 1990 Act.'<sup>106</sup> Thus, although the PGC and purposive agency requires that the scope of the protection of the HRA and the Convention rights be extended to encompass fetuses and embryos, this would not require a different substantive outcome on the facts of *Evans*. However, although the final decision would remain the same, the application of the PGC by the courts would create principled consistency and coherence between the judgements *Bland* and *Evans*, rather than the more arbitrary distinction based on birth.

Contrary to the claims of Soren Holm and John Coggon, this precautionary application of the PGC is not speciesist in nature.<sup>107</sup> It is not a foetus's or PVS patient's genetically human

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<sup>104</sup> Beyleveld and Pattinson (n.35), 50-52, and below p.284 & 287-289

<sup>105</sup> Below p.281-290

<sup>106</sup> *Evans* (n.63), [107]

<sup>107</sup> Holm and Coggon (n.38), 301

nature that gives rise to a precautionary duty of increased respect for their interests, it is the increased possibility that they are agents that their humanity carries with it an increased likelihood that does not apply to the foetuses of species that do not normally develop into ostensible agents.<sup>108</sup> That the precautionary approach is not speciesist, will also be demonstrated below by arguing that, as Holm and Coggon themselves contend should be the case,<sup>109</sup> the PGC entails that respect should be given to the generic interests of animals to the extent that they approach the capacities of agency, although it will be shown that this does not mean that they can be given protection under the Convention.<sup>110</sup>

The ability of the precautionary approach, to generate theoretical consistency and coherence in the judicial determination of the application of Convention rights generally and of particular rights, as well as its non-speciesist nature, can be seen in its application to the varying capacities of the members of the human species. It is particularly apparent in the case law flowing from the decision in *Gillick v West Norfolk and Wisbech AHA*.<sup>111</sup> Here the court held that the decision making capacity of a child should be assessed on a case by case basis, and with increased capacity there was therefore a correspondingly increased duty upon others to respect an individual's choices as to the treatment they are given.<sup>112</sup> This decision recognises that although a child under 16 is not generally deemed to have the capacity for autonomy of an adult, the voluntariness and purposiveness of an ostensible-agent, respect should given to a child's interests, insofar as they show characteristics of such agency, to guard against the possibility that the have already in fact attained early the capacity that characterises the status of adult. The fact that children are not allowed to refuse treatment

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<sup>108</sup> Beyleveld and Pattinson (n.45), 264-265 Cf. *ibid*, 302-303

<sup>109</sup> Holm and Coggon (n.38), 303

<sup>110</sup> Below p.255-257

<sup>111</sup> *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112

<sup>112</sup> *Ibid*, 169-170 & 189

under the *Gillick* rule<sup>113</sup> can also be justified under the precautionary approach. It would be to act inconsistently with the PGC to give unwarranted respect to an individual's perceived voluntariness, where to do so runs the risk of in fact undermining their ability to ultimately attain the generic goods which characterise agency, whose possession the PGC protects. Lord Donaldson seemed to recognise this in holding that '...good parenting involves giving minors as much rope as they can handle without an unacceptable risk that they will hang themselves.'<sup>114</sup>

At the other end of life's brief candle,<sup>115</sup> just as we cannot know whether a potential agent is already an agent we cannot know with certainty that a deceased agent is no longer an agent.<sup>116</sup> Thus, under the precautionary thesis there is a basis for the domestic courts to give protection to the interests of dead persons as ex-ostensible agents under the Convention where an interference with their interests can be identified. The ECtHR's decision in *McCann v United Kingdom*<sup>117</sup> that Article 2 gives a deceased person a right to have their death investigated can be justified from the precautionary perspective of redressing any violation of their generic rights that may have played a part in their death.<sup>118</sup> It can, however, also be justified as protecting living agents rather than dead agents, as protecting the well-being of agents generally against deprivation of their lives.

The fact that 'ought' logically implies 'can' – that stating that a person has a duty to act in a particular manner implies that they have the capacity to do so – entails that it must be possible to identify the interests of another in order to be able to act in accordance with them

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<sup>113</sup> *Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, 24

<sup>114</sup> *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, 81

<sup>115</sup> W. Shakespeare, *The Tragedy of Macbeth* (London 1711), Act 5, scene 5, line 23

<sup>116</sup> D. Beyleveld and R. Brownsword, *Consent in the Law* (Hart 2007), 121

<sup>117</sup> *McCann v United Kingdom* (1996) 21 EHRR 97

<sup>118</sup> Below p.269

under the PGC.<sup>119</sup> The practically limited means for interaction with the dead, given that they display none of the four types of behaviour described above as relevant to the assessment of the extent to which a being displays the features of agency,<sup>120</sup> means that as with other inanimate entities it is impossible to know what actions would be consistent with their interests in their current state.<sup>121</sup> Consequently, only nominal duties can generally be owed to them under the PGC,<sup>122</sup> a recognition that they might be agents but also that there is no more that this possibility can entail by way of required actions. Thus, similarly, as it is impossible to conceptualise what interests of purposiveness and voluntariness a rock may have, it is impossible to determine what action would respect its interests. Therefore, contrary to Holm and Coggon's critical interpretation of the precautionary thesis, that is so broad that it futilely 'requires us to treat anything as if it were an agent so long as it is logically possible that it might be an agent' and is therefore meaningless,<sup>123</sup> an agent need not treat a rock as an agent under the PGC,<sup>124</sup> for cannot implies no ought and the possibility that it might be an agent cannot be acted upon.

However, the fact that the dead were once ostensible agents is a precautionary reason for considering that they may still be agents which is not present with rocks. It follows that if agents can, they ought to consider that they have precautionary duties to respect the exercise of the deceased's generic rights made whilst he was a living ostensible agent. For although we can discover or conjecture little as to any new generic interests of a dead person, it is an practicable precaution to presume that if they maintain their agency after death, one thing that they would voluntarily and purposively wish is that the excesses of their generic features of

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<sup>119</sup> Beyleveld and Pattinson (n.45), 261 & 263

<sup>120</sup> Above p.243

<sup>121</sup> Beyleveld and Pattinson (n.45), 264

<sup>122</sup> Ibid, 263

<sup>123</sup> Holm and Coggon (n.38), 305

<sup>124</sup> Beyleveld and Pattinson (n.45), 261-264



agency made whilst alive, such as wills, continue to be honoured after their death. In light of this, the court in *R (Rudewicz) v Secretary of State for Justice* arguably failed to act constantly with the PGC in not giving weight to the views of the deceased, in deciding whether to allow his remains to be moved from a chapel he explicitly wished to be buried in.<sup>125</sup>

As noted previously, in a case submitted to the ECtHR the question is one of whether a Chimpanzee called Matthew is a person for the purposes of the Convention rights.<sup>126</sup> Under the PGC such animals are recognised as having generic interests – for as long as evidence shows them only to possess the characteristics of non-ostensible agents<sup>127</sup> they cannot have generic rights<sup>128</sup> – as a precaution against the possibility that they are in fact agents.<sup>129</sup> Without, as yet, an ECtHR ruling on the matter, the main obstacle to the recognition of the possession of Convention rights by such beings is the specific description of the Convention and the Act which incorporates it into British law as documents of ‘Human Rights.’ This is not an insuperable obstacle, however. If it is recognised that what makes humans worthy of protection under the Convention is the possession of the generic features of agency, and ‘human’ is thus defined in these terms rather than in speciesist terms, then the extension of the Convention rights to beings who are not of the human species can have a basis in moral philosophy.<sup>130</sup>

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<sup>125</sup> *R (Rudewicz) v Secretary of State for Justice* [2012] EWCA Civ 499

<sup>126</sup> M. Balluch and E. Theuer ‘Personhood Trial for Chimpanzee Matthew Pan’ (Verein Gegen Tierfabriken Website 2008) <<http://www.vgt.at/publikationen/texte/artikel/20080118Hiasl.htm>> accessed 2<sup>nd</sup> January 2012

<sup>127</sup> Beyleveld and Pattinson (n.45), 271 and Gewirth (n.1), 120

<sup>128</sup> Cf. Gewirth (n.1), 144

<sup>129</sup> Above p.242-243

<sup>130</sup> Beyleveld and Brownsword (n.34), 126

The United States District Court of the 9<sup>th</sup> Circuit was confronted with a similar question in a case concerning Orcas.<sup>131</sup> An animal rights organisation argued on behalf of the whales that keeping them in sea life centres violated the 13<sup>th</sup> Amendment to the US constitution, the prohibition on slavery and involuntary servitude. Although attempts were made by the claimants to argue that the constitutional prohibition should apply to the whales because they displayed characteristics and capacities approaching those of humans,<sup>132</sup> Judge Miller gave no consideration to this. The judge applied a speciesist interpretation of the scope of the 13<sup>th</sup> Amendment, holding that the provision ‘only applies to “humans” and therefore affords no redress for Plaintiffs’ grievances.’<sup>133</sup>

Having regard to the historical context surrounding the creation of the prohibition on slavery and its wording, the judge found that it was clear that it was intended only to apply to human persons,<sup>134</sup> and gave no possibility of enlarging its scope to cover whales.<sup>135</sup> It is likely that a similar approach will be taken by the European Court in relation to Matthew the chimpanzee; the creation of the Convention arose out of an intention to address and prevent the wrongs committed against humans that had occurred in the Second World War and the Convention title talks clearly of ‘human rights.’

However, if an interpretive approach based in the fundamental characteristics to which rights attach were applied in the manner suggested above, the American case could have been decided differently by broadening the meaning of ‘persons’<sup>136</sup> to all encompass moral agents, not only humans. Whether such an approach is taken is likely to be influenced by political

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<sup>131</sup> *Tilikum, Katina, Corky, Kasatka, and Ulises (Five Orcas) v Sea World Parks and Entertainment, Inc. and Sea World, LLC*. 842 F.Supp.2d 1259 (9<sup>th</sup> Cir. 2012)

<sup>132</sup> *Ibid*, 1260-1261

<sup>133</sup> *Ibid*, 1262

<sup>134</sup> *Ibid*, 1262-1263

<sup>135</sup> *Ibid*, 1264

<sup>136</sup> *Ibid*, 1263

concerns of over-broadening the applicability of the Convention, given that separate legal protection for animals does exist, something noted to be the case for the whales.<sup>137</sup> The existence of other protections, however, raises its own questions of whether such protection gives sufficient respect to the possibility that other animals are in fact agents, given that the PGC and the precautionary argument requires agents recognise their interests, more protection may be required.

The conception of dignity as the basis of rights which currently predominates in the UK courts, and which is also present in the ECtHR's jurisprudence, described above and engaged with in detail below,<sup>138</sup> suggests that at present the domestic courts and the ECtHR would be resistant to such a broadening of the scope of the Convention rights. The neo-classical conception of dignity they have applied, which views dignity as something humans possess because of the special value of being a human,<sup>139</sup> if taken as the basis of rights, limits those rights to humans in a speciesist manner. Although it will be argued that such a conception of dignity is neither satisfactory nor required by the Convention, and that therefore the rights need not be limited in this way, the above practical and political issues raised by extending the Convention to animals mean that such an interpretation of the Convention is unlikely to be adopted.

Thus, generally, it is apparent that the case law of the United Kingdom courts on the nature of beings who can possess Convention rights is in need of some modification. Such change in the law to reflect a basis of Convention rights in the purposive agency is within the courts' powers and is not barred by ECtHR jurisprudence by virtue of the mirror principle.<sup>140</sup> As

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<sup>137</sup> Ibid, 1264

<sup>138</sup> Above p.44-48 and below p.331-339

<sup>139</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, [52] and *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [132]

<sup>140</sup> Above p.218-220

noted previously, the ECHR contains no specific description of who can hold the rights it contains other than the use of the term ‘human’ in its title, and ‘men and women’ in Article 12. The use of open textured terms such as ‘no one’ and ‘everyone’ in describing who has rights has been shown to have been a deliberate decision by the drafters. The lack of specificity of the text has been continued in the jurisprudence of the ECtHR which has declined to definitively answer the question of the nature of the beings who can pose the Convention rights, and instead given a margin of appreciation to member states on this issue.<sup>141</sup> The use of the concept of dignity by the ECtHR in its discussion of this issue in *Vo*, as the label for characteristics of humans worthy of protection,<sup>142</sup> even if not by substantive Convention rights, will later be shown to be significant as a means by which the United Kingdom courts can legitimately bring consideration of Gewirthian theory into their determinations upon this issue left to their determination by the ECtHR.

Reassuringly, however, in terms of the ascription of particular Convention rights to persons, the domestic approach is consistent with an approach based in the generic features of agency. As mentioned earlier, Gewirth argues that the generic rights or rights approaching the generic rights are possessed in proportion to the extent to which a person has the ability to utilise them in order to engage in purposive action without endangering the purposiveness of themselves or others.<sup>143</sup> A similar approach operates under the more logically valid precautionary approach in relation to the generic interests. The greater the characteristics of agency a being has and thus the closer to ostensible agency a being is, the proportionately greater the duties agents owe them under the PGC to respect its generic interests.<sup>144</sup>

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<sup>141</sup> Above p.66-67

<sup>142</sup> *Vo v France* (2005) 40 EHRR 12, [84]

<sup>143</sup> Gewirth (n.1), 122 & 141 and Gewirth (n.12), 1157-1158

<sup>144</sup> Beyleveld and Pattinson (n.45), 262 & 267 and Beyleveld and Pattinson (n.35), 45

The consistency of the United Kingdom courts approach with this theory can be seen as implicit in *Bland* decision. Here Lord Mustill recognised that if a Bland had possessed more of the awareness which forms human personality he would have received more rights protection.<sup>145</sup> This logic was followed though in *NHS Trust A v M* where the court relied on the limited agency of a person in a permanent vegetative state to hold that as they were incapable of possessing the capacity for sensation which can be seen to be part of the well-being necessary for purposive action<sup>146</sup> they could have no rights under Article 3.<sup>147</sup> Conversely, in *W v M*, a person in a minimally contagious state was held to have Article 3's protection because she had higher levels of consciousness.<sup>148</sup> A mirroring of a PGC approach is also clear in the courts' decision that a tetraplegic, although like Bland unable to move or act, nonetheless, because of her mental capacity for choice, had a right to choose how she was treated.<sup>149</sup> She possessed the purposiveness and voluntariness that Bland did not, and thus more rights.

### *Conclusion*

It can be seen that the domestic courts' approach is in need of change in respect of who has Convention rights to be consistent with a basis of rights in the defining characteristics of what it is to be an agent subject to moral obligations. However, on the question of the extent of the rights a person can possess, the case law of the United Kingdom courts is consistent with a Gewirthian approach and its intellectual coherence and clarity can only be aided by being informed by Gewirth's ideas of the basis of rights. The recognition of the dialectical implications of a basis of human rights in agency would give guidance to the courts on questions of the rights possessed by children and the mentally disabled, as well as giving an

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<sup>145</sup> *Bland* (n.74), 889

<sup>146</sup> Gewirth (n.1), 53-54 and Gewirth (n.12), 1149

<sup>147</sup> *NHS Trust A* (n.75), 363

<sup>148</sup> *W v M* [2011] EWHC 2443 (Fam), [92]

<sup>149</sup> *B v An NHS Trust* [2002] EWHC 429 (Fam), [20], [27] & [96] and Gewirth (n.12), 1157

insight on question of the extension of human rights to the higher primates currently before the ECtHR.

### ***The Substantive Nature of Convention Rights***

#### *Foundations of Interpretation*

Fundamentally, under the PGC agents must on pain of contradiction recognise that they and other agents have the generic rights to freedom and well-being. Within the features of these generic rights a coherent guide can be found for the judicial interpretation of the nature of the open textured Convention rights, particularly the extent of their positive and negative obligations. The dialectical derivation of the PGC means that it provides a fundamental normative criteria against which the validity of other moral rights can be measured. A consequence of this is that the generic rights as primary goods can be seen to provide a foundation for other rights,<sup>150</sup> and those which accord with the generic rights can be deemed more specific manifestations and enumerations of the two rights.<sup>151</sup> In the light of this recognition, and the fit between the generic rights and the Convention rights described above,<sup>152</sup> it is morally appropriate to use the generic rights as a tool with which to read the Convention, so as to achieve a substantive interpretation of those rights which is valid under the PGC.<sup>153</sup>

#### *Convention Rights in the Light of Generic Rights*

As generic needs of agency, agents necessarily claim rights to freedom and well-being.<sup>154</sup> The corollary of this claim is that agents must recognise that they have negative duties not to coerce or harm the freedom and well-being of the recipients of their action, and positively

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<sup>150</sup> Gewirth (n.12), 1154 and Gewirth (n.1), 73, 102 & 150

<sup>151</sup> Gewirth (n.1), 64 & 150

<sup>152</sup> Above p.201-208

<sup>153</sup> Gewirth (n.1), 64

<sup>154</sup> Gewirth (n.12), 1152

ought to give other agents assistance to have freedom and well-being where they would otherwise lack these necessary goods.<sup>155</sup>

### Negative Obligations

In its negative sense the generic need for freedom constitutes a right to non-interference with an agent's particular chosen actions and with their capacity for choice generally.<sup>156</sup> In practical terms, the generic right to freedom requires that an agent's ability to make unforced choices to act or be acted upon be respected and free from interference, so that their actions are within their voluntary control.<sup>157</sup> This thus protects the capacity for action which characterises agency.<sup>158</sup>

As a theoretical basis for the Convention, the negative aspect of the right to freedom can be seen to underlie, and therefore be able to inform the interpretation of, several of the Convention rights. With its primary focus on protecting an agent's choices as to action 'a person's right to freedom is violated if he is subjected to violence, coercion, deception, or any other procedures which attack or remove his informed control of his behaviour by his own unforced choice.'<sup>159</sup> Given that the Convention's full title proclaims protection for 'fundamental freedoms' it is unsurprising that Gewirth claims that this generic right protects the expression, assembly and religious practice that are protected as freedoms by the Convention.<sup>160</sup> Similarly, the broad protection under the right of freedom for an individual's choice as to the conduct of his life, what Gewirth terms autonomy and privacy,<sup>161</sup> can be seen

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<sup>155</sup> Gewirth (n.1), 67, 135 & 218 and above p.188-189

<sup>156</sup> Ibid, 52 & 249

<sup>157</sup> Ibid, 64, 67 & 250

<sup>158</sup> Ibid, 31 & 249

<sup>159</sup> Gewirth (n.12), 1159

<sup>160</sup> Gewirth (n.1), 256

<sup>161</sup> Ibid and Gewirth (n.12), 1159

to be mirrored in the breadth of Article 8.<sup>162</sup> Indeed, the ECtHR has recognised that that the principle of autonomy is an important underlying principle to be used in the interpretation of Article 8 and, in a manner very similar to the content of the generic right to freedom, argued that this right protects ‘the ability to conduct one's life in a manner of one's own choosing’.<sup>163</sup> Thus, there appears a ready possibility for the generic right to freedom to be used to interpret the extent of the protection these rights give.

Given their shared basis in purposive action, a practical overlap in what is protected by the two generic rights to freedom and well-being is unsurprising as both protect the same ultimate state of being.<sup>164</sup> As a result actions that freedom protects against, such as killing and physically maiming, will often coincide with what is protected against by well-being.<sup>165</sup> Gewirth thus goes so far as to argue that freedom can be seen as a part of what it is for an agent to have well-being.<sup>166</sup>

However, in spite of their overlapping spectrum, freedom’s procedural protection of agents’ capacity to choose is, as noted above,<sup>167</sup> conceptually different from the substantive demands of the right to well-being.<sup>168</sup> This distinction is due to the underlying difference between the generic features of purposiveness and voluntariness, from which the rights derive.<sup>169</sup> To interfere with freedom is to restrict a being’s ability to voluntarily control their behaviour,<sup>170</sup> however, to interfere with a being’s well-being is to impede his attainment of what he regards

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<sup>162</sup> *Pretty* (n.139), [61]

<sup>163</sup> *Ibid*, [61]-[62] and above p.43 & 48-48

<sup>164</sup> Gewirth (n.1), 249

<sup>165</sup> *Ibid*, 252 & 256

<sup>166</sup> *Ibid*, 255

<sup>167</sup> Above p.183

<sup>168</sup> Gewirth (n.1), 256

<sup>169</sup> *Ibid*, 251

<sup>170</sup> *Ibid*



as good, to restrict his purposiveness.<sup>171</sup> Thus, although the infliction of harm upon an agent to which they do not consent will interfere with both generic rights, a restriction of choice between alternatives by coercion or deception<sup>172</sup> will infringe freedom, without in itself depriving an agent of the practical abilities and attributes necessary to pursue his purposes that constitute their well-being. The consequences of such an interference with voluntariness, for example the coercion of a highwayman's limiting of options to 'your money or your life', may be a loss of generic goods, objects or purposes of voluntary action,<sup>173</sup> but the coercive act itself constitutes a conceptually prior interference with voluntariness.

As noted above,<sup>174</sup> at its most basic the well-being necessary for purposive action is composed of life, and physical and mental integrity.<sup>175</sup> These basic goods, and the correlative basic rights,<sup>176</sup> guaranteeing safety from interference with them,<sup>177</sup> are the necessary preconditions for any and all actions by an agent.<sup>178</sup>

The second category of generically necessary goods for well-being are the non-subtractive goods, 'the abilities and conditions'<sup>179</sup> an agent generically needs to maintain his capabilities for any actions in pursuit of his particular purposes, and his level of purpose fulfilment generally.<sup>180</sup> There is some overlap between these and the basic goods because agents, in necessarily claiming negative rights not to be deprived of the basic goods, perceive them as non-subtractive goods. However, there are some non-subtractive goods that are not basic

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<sup>171</sup> Ibid, 53 & 251

<sup>172</sup> Ibid, 252

<sup>173</sup> Ibid, 251

<sup>174</sup> Above p.181

<sup>175</sup> Gewirth (n.12), 1158

<sup>176</sup> Gewirth (n.1), 212

<sup>177</sup> Gewirth (n.12), 1158 argues that being 'killed, starved, physically incapacitated, terrorised, or subject to mentally deranging drugs' would interfere with the basic goods.

<sup>178</sup> Gewirth (n.1), 53-54

<sup>179</sup> Ibid, 58

<sup>180</sup> Gewirth (n.12), 1158-1159 and Gewirth (n.1), 54, 230 & 233

goods because the former more broadly encompasses ‘whatever else, before acting, the agent has and regards as good.’<sup>181</sup> As examples of interferences with negative rights to the non-subtractive goods required for action, Gewirth lists ‘being lied to, cheated, stolen from, defamed, insulted, suffering broken promises, and having one's privacy violated.’<sup>182</sup>

The non-subtractive generic goods share with the additive goods the characteristic that the nature of the specific goods they protect in a given set of circumstances, is determined in relation to the quantum of goods necessary for the action in question that an agent possesses, together with the particular nature of the purposes he seeks to achieve.<sup>183</sup> However, whereas the content of non-subtractive goods is the maintenance of an agent’s capacities for action, additive goods are the abilities and conditions an agent requires in order to increase the likelihood of achieving his particular purposes by increasing his capacity for action.<sup>184</sup> Although the term ‘additive’ describes the positive accrual to an agent of further goods, the PGC can give rise to negative as well as positive duties on the part of agents in relation to these goods,<sup>185</sup> requiring non-interference with another’s attainment of these goods necessary for their purposive action, just as it will be shown below that the vindication of ‘non-subtractive goods’ can involve the imposition of positive obligations.<sup>186</sup>

Thus, the negative conception of the right to the additive goods is a right to develop these abilities and capacities for purpose fulfilment.<sup>187</sup> On this basis, this right is infringed where an agent is ‘denied education to the limits of his capacities,...discriminated against on grounds

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<sup>181</sup> Gewirth (n.1), 55 & 230

<sup>182</sup> Ibid, 233, see also Gewirth (n.12), 1159

<sup>183</sup> Gewirth (n.1), 55

<sup>184</sup> Ibid, 58, 240 & 249 and Gewirth (n.12), 1159

<sup>185</sup> Gewirth (n.1), 241 & 248

<sup>186</sup> Below p.274

<sup>187</sup> Gewirth (n.1), 244 & 248

of race, religion, or nationality<sup>188</sup> or otherwise obstructed from developing his capacity to pursue purposes.<sup>189</sup> Central amongst the additive goods is ‘self-esteem.’<sup>190</sup> Following from the fact that all the generic rights are a dialectical consequence of the necessity that an agent regards his purposes as good, and his generic rights as instrumental to those goods, an agent sees his purposes as good because of his own sense of self-worth which leads him to pursue them.<sup>191</sup> On this basis an agent’s self-worth must be seen as an instrumental good to the pursuit of any purpose and purposiveness generally as a generic feature of agency.<sup>192</sup> In practical terms, the protection of this particular additive good requires that an agent not be treated as an inferior being or subject to discrimination in comparison with other agents,<sup>193</sup> because this would be to unjustifiably treat the agent as of less worth.

This hierarchical stratification of the elements of well-being, which was described above,<sup>194</sup> can be seen to be mirrored in the positioning of the rights recognised within the Convention. At a basic textual level, it is submitted that the prominent protection of the rights to life and freedom from torture<sup>195</sup> is consistent with the pivotal position of life, and physical and mental integrity as basic goods necessary for action pursuing any purposes.<sup>196</sup> This prominence accords with the distinction between the basic harms which deny basic goods, and which will prevent the pursuit of any purpose, and specific harms against non-subtractive and additive goods which will instead reduce an agent’s capacity to pursue their purposes.<sup>197</sup>

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<sup>188</sup> Gewirth (n.12), 1159

<sup>189</sup> Gewirth (n.1), 248

<sup>190</sup> Ibid, 242

<sup>191</sup> Ibid, 241

<sup>192</sup> Ibid, 242

<sup>193</sup> Ibid and Gewirth (n.12), 1159

<sup>194</sup> Above p.182-183

<sup>195</sup> Article 2 and Article 3

<sup>196</sup> Gewirth (n.1), 211

<sup>197</sup> Ibid, 63, 212, 217, 230 & 241

Of the non-subtractive rights, not all the conduct that Gewirth explicitly states as being protected against has a clear partner in the text of the Convention, however, the ECHR can be seen to show a general concern for those goods that fall within the protection of these generic rights. Privacy, when a non-subtractive good required by an agent for the pursuit of his particular purposes,<sup>198</sup> is explicitly stated amongst the rights protected under Article 8. Although not defined in detail by Gewirth, the content of the privacy protection under the PGC can be deduced from its purpose of the protection of the purposiveness from which it is drawn. As an element of the generic good of freedom, it requires respect for a person's capacity to choose how to live their life with freedom from coercion and other duress,<sup>199</sup> as a non-subtractive right, privacy can therefore be seen to require respect for an agent's substantive choices as to the form of life they wish to live. The fact that Article 8 states a protection for 'private and family *life*' (emphasis added) suggests a similar focus which is consistent with an aim of the protection of a person's chosen form of life. In concordance with this interpretation of a right to privacy as the protection of the form of life that follows agents' personal purposes, the courts have interpreted the Convention's protection for privacy to require respect for a person's choice as to the way they live their life.<sup>200</sup>

Similarly, the non-subtractive good of not being a victim of theft<sup>201</sup> can be seen to support the protection given to property rights within the Convention,<sup>202</sup> and the maintenance of the underlying ability to pursue purposes generally is protected in a negative sense by the Convention's prohibitions on the deprivation of liberty in Articles 4 and 5. However, these liberty rights also clearly protect the generic interest in freedom and the underlying generic

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<sup>198</sup> Ibid, 233

<sup>199</sup> Ibid, 233 & 256 and Gewirth (n.12), 1159

<sup>200</sup> *R (Purdy) v DPP* [2009] UKHL 45, [35]-[36], [38], [60]-[62],[71] & [95], *Pretty* (n.139) [61]-[62], [64] & [67], *Pretty v DPP* [2001] UKHL 61, [61] & [100] and *Mosely v NGN* [2008] EWHC 1777 (QB), [125]

<sup>201</sup> Gewirth (n.1), 233

<sup>202</sup> Article 1, Protocol 1

feature of voluntariness described above, illustrating the overlap between the generic rights described previously.<sup>203</sup> Although not explicitly protected in the Convention, a specific non-subtractive right or interest in the public perception of one's character, including not being subject to defamation or insult, mentioned by Gewirth<sup>204</sup> can be seen to be protected in the Convention by the way in which the courts have interpreted Article 10(2); applying it to define the scope of the speech rights of others under Article 10(1) in order to protect the good of the reputation of another.<sup>205</sup>

In relation to the additive rights, some of those explicitly argued for by Gewirth are similarly explicitly found within the Convention. The prohibition on interference with a person's education in Article 2 of Protocol 1 clearly protects a person's capacity to develop their abilities and so increase their ability to achieve their purposes. The Convention's prohibition on discrimination, although explicit, is not a generally applicable free standing right; it prohibits discrimination only in the extent to which a person can exercise the other Convention rights.<sup>206</sup> This contingency is, however, shared with the requirement of non-discrimination which is conceptually entwined with the PGC. By 'requiring every agent ...act in accord with the generic rights of his recipients as well as of himself, the PGC proscribes...an equality of generic rights.'<sup>207</sup> This manifestation of the PGC in practical terms requires individuals respect the generic rights of the recipients of his actions,<sup>208</sup> and that the rules of society which govern interactions between individuals and the actions of individuals working for state institutions ensure that the equality of the generic rights to freedom and

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<sup>203</sup> Above p.183

<sup>204</sup> Gewirth (n.1), 233

<sup>205</sup> *Campbell v MGN* [2005] UKHL 61, [20] and *Lingens v Austria* (1986) 8 EHRR 407, [41]-[42]

<sup>206</sup> Article 14

<sup>207</sup> Gewirth (n.1), 206

<sup>208</sup> *Ibid*, 200 & 206

well-being is 'provided, restored, or reinforced'.<sup>209</sup> Thus, in the same way as Article 14 requires non-discrimination in relation to the respect for others enjoyment of their generic rights, the PGC through the equality of generic rights (EGR) can be seen to require non-discrimination in respect for the generic rights of others.

The protection of self-esteem as an additive good under the Convention can be seen in the protection from discrimination just described. For, as noted by Gewirth, non-discrimination prevents an agent from being treated as less worthy of respect for his purposiveness than other agents.<sup>210</sup> Article 3's prohibition on degrading treatment gives similar protection, the ECtHR in *Ireland v United Kingdom* holding that it prohibited conduct which caused persons to feel 'inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.'<sup>211</sup>

From the forgoing illumination of the Convention and the judgements of the ECtHR, and the domestic courts using the primary colours of the generic rights, it is clear that the law can be seen to further these underlying moral norms and so capable of being interpreted in a way which gives effect to them. The protection given by the negative obligations contained in the Convention can be seen to be necessary to protect the fundamental generic features of those identified previously as demanding or precautionary deserving of concern.

### Positive Obligations

In addition to the negative duties that the PGC imposes upon agents to govern their actions affecting other beings, it imposes positive obligations because the general duty act in

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<sup>209</sup> Ibid

<sup>210</sup> Ibid, 242

<sup>211</sup> *Ireland v United Kingdom* (1979-80) 2 EHRR 25, [167], applied in *NHS Trust A* (n.75), 62

accordance with the generic rights of others<sup>212</sup> also involves a ‘positive concern for their having the objects of’<sup>213</sup> the generic rights. Agents have this positive duty to further other agents’ generic features of action because, under the above described arguments to the PGC,<sup>214</sup> in claiming for themselves positive rights to the generic goods necessary for their agency, they must recognise the possession of these rights by other agents and their own corresponding duties in relation to them.<sup>215</sup> The vindication of these rights can be achieved between individuals directly, or indirectly by the creation of appropriate institutional arrangements.<sup>216</sup>

The EGR manifestation of the PGC requires that agents must actively seek to ensure that all other agents achieve fulfilment of their generic needs for freedom and well-being to which they have rights.<sup>217</sup> The obligations flowing from this element of the PGC entail that, where an agent does not have the full generic goods of freedom and well-being necessary for purposive action, agents cannot claim to have discharged their duties simply by the fact that they did not cause the agent’s predicament.<sup>218</sup> The equality of respect for the generic rights of all agents, the EGR, is not achieved if other agents are deficient in the attainment of the freedom and well-being to which they have rights and agents thus have corresponding duties to vindicate.<sup>219</sup>

Whereas the negative obligations imposed by many of the Convention rights are clearly stated in the text, the ECtHR has used three different justifications in its decisions on whether

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<sup>212</sup> Gewirth (n.1), 135 & 217

<sup>213</sup> Ibid, 137

<sup>214</sup> Above p.179-180, 184-189 & 194-196

<sup>215</sup> Gewirth (n.1), 210

<sup>216</sup> Ibid, 136

<sup>217</sup> Ibid, 208 & 210

<sup>218</sup> Ibid, 208-209

<sup>219</sup> Ibid

a Convention right stated in negative terms also implicitly imposes a positive obligation. However, the court has not yet stated a general theory of positive obligations. The need for the rights to give effective protection is the common factor amongst the three justifications the ECtHR invokes to give a legal basis to its recognition of positive obligations. However, the court decides on the specific content of the obligations imposed by Convention articles on a right-by-right basis without regard to a deeper shared underlying theoretical basis.

In finding positive obligations under the rights incorporated by the HRA the domestic courts have, understandably, been heavily influenced by the judgements of the ECtHR. As a consequence of their close regard to Strasbourg jurisprudence on this matter they have often similarly given effectiveness centred justifications for their finding of positive obligations, or have simply invoked the Court's judgements as precedents. Similarly, the domestic courts have also failed to provide any deeper theoretical justification to systematise the recognition of positive obligations.

A justification for the recognition of positive obligations, based ultimately on ensuring the protection of the capacity to act in a voluntary purposive manner, can be seen to be similar in approach to the ECtHR's effectiveness argument under Article 13<sup>220</sup> also applied by the United Kingdom courts in some cases.<sup>221</sup> Both the perspectives of the PGC and the courts regard positive obligations as necessary to ensure the effectiveness of an underlying norm, in Strasbourg's case the specific Convention rights, in the Principle's case the more fundamental concept of agency.

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<sup>220</sup> Above p.72

<sup>221</sup> Above p.119



When compared to the argument for positive obligations as necessarily entailed by the EGR manifestation of the PGC, the domestic and Strasbourg courts' use of the similarly contingent Article 14 right to non-discrimination to recognise particular positive obligations<sup>222</sup> can be seen to follow a logic similar to that applied by Gewirth. Thus, rights which under the PGC or the Convention are equally held by all agents but by accident of fate may be practically possessed only by some, must actively be sought to be provided to all by agents.<sup>223</sup> Gewirth, however, goes further than this by arguing that this equality entails positive obligations in relation to all the rights, not only when rights of one particular group are protected. Thus, in the example case of *Ghaidan*<sup>224</sup> the PGC via the EGR might be interpreted as entailing an obligation to recognise a positive right to succeed to a tenancy for all relevant persons because of their fundamental agency, not merely because the state had unjustifiably protected it for one group but not others.<sup>225</sup> However, for Article 14 to be applied in such a way the court would have to change its long held interpretation of this right from a focus on whether a state action 'engages' a right in a discriminatory matter,<sup>226</sup> to the view that its requirement that '[the] Convention rights shall be secured'<sup>227</sup> requires all the rights to be positively 'secured' without discrimination; shifting the emphasis of the Article from protecting against discrimination to the protecting of Convention rights generally.<sup>228</sup>

When the substantive Gewirthian positive obligations with a foundation in the PGC are contrasted with those that have been recognised by the domestic and Strasbourg courts, it is

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<sup>222</sup> Above p.72-73 & 121-122

<sup>223</sup> Gewirth (n.1), 200 & 206

<sup>224</sup> *Ghaidan* (n.139) and above p.121

<sup>225</sup> *Ibid*, [10] & [24]

<sup>226</sup> *Petrovic v Austria* (2001) 33 EHRR 14, [28]

<sup>227</sup> Article 14(1)

<sup>228</sup> *Cf.* the refusal to recognise the possibility of the positive right to a parental leave allowance separate from the redress of discrimination in *Petrovic* (n.226), [26]

apparent that the Convention does give protection to ensuring these positive needs for action are met. However it is apparent that it could go further in doing so.

Although, etymologically, freedom is understood as being concerned with being free from the control of another in choice of action, particularly in the context of slavery,<sup>229</sup> under the PGC the generic right to freedom can impose positive obligations on agents to act to ensure that others have this generic necessary good.<sup>230</sup> Thus, the capacity of an agent to exercise the choice which is protected in a negative form by the PGC also requires that an agent ‘must have knowledge of relevant circumstances’,<sup>231</sup> in order to decide whether to choose to be subject to the action of another. This right and correlative positive obligation of imparting information was recognised under the Convention in *Guerra v Italy* as protected by Article 8,<sup>232</sup> a right which has already been shown to be capable of giving strong protection to the generic right to freedom in choice.<sup>233</sup> Here, the court held that information should have been provided because it was necessary for the claimants to properly decide whether they wanted to live near a polluting factory.<sup>234</sup>

More substantively, the capacity for voluntary choice supporting many Convention rights which explicitly state negative obligations of non-interference, can also be seen to impose positive obligations on the state to ensure that the negative requirements are respected and that the capacity for choice is maintained and protected against the actions of others.<sup>235</sup> This obligation supports the previously discussed decisions in *Van Colle* and *Osman v United*

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<sup>229</sup> Oxford English Dictionary  
<<http://www.oed.com/view/Entry/74395?rskey=eVsY4y&result=1&isAdvanced=false>> accessed 24th September 2012

<sup>230</sup> Gewirth (n.1), 67 and Gewirth (n.12), 1167

<sup>231</sup> Gewirth (n.1), 258

<sup>232</sup> *Guerra v Italy* (1998) 26 EHRR 357, [58] & [60]

<sup>233</sup> Above p.261-262

<sup>234</sup> *Guerra* (n.232), [60]

<sup>235</sup> Gewirth (n.1), 52 & 208

*Kingdom* which required the state to protect individuals from threats to their life – protected by their negatively stated right to freedom from interference – posed by others.<sup>236</sup> Similarly, this theoretical basis would support the positive obligation states have been held to have to protect, from interference by others, individuals’ choice of how they exercise their freedom of expression.<sup>237</sup>

The generic right to well-being, like that of freedom, entails that agents may have to recognise that they owe positive obligations to act in order to protect and maintain the basic well-being of other agents.<sup>238</sup> When the PGC is applied indirectly to the state, as opposed to directly between individuals, to assess the compliance of the actions of state actors with the PGC the basic rights can be seen to impose positive obligations to provide particular protections for the basic rights.<sup>239</sup> In positive terms, the state must provide a basic criminal law which protects well-being<sup>240</sup> and also that ‘only persons who have violated the rights should be punished, there must be equality before the law, trials must be fair [and] habeas corpus must be guaranteed’.<sup>241</sup> The Convention text can be seen to require these basic goods be provided by states. Article 2’s requirement that the law protect life imposes a positive obligation to legislate against interference with the most basic good<sup>242</sup> and Article 5 and 6’s procedural requirement make positive demands of legal systems.

Beyond these more procedurally natured – what Gewirth calls ‘static’<sup>243</sup> – positive obligations, the PGC can also be interpreted as requiring more proactive, dynamic<sup>244</sup> action

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<sup>236</sup> Above p.118-119

<sup>237</sup> *Redmond-Bate v DPP* [2000] HRLR 249, [18]-[20]

<sup>238</sup> Gewirth (n.1), 217

<sup>239</sup> Gewirth (n.12), 1164-1165 and *ibid*, 273 & 277, see also below p.309

<sup>240</sup> Gewirth (n.12), 1164

<sup>241</sup> *Ibid*, 1165

<sup>242</sup> Recognised for example in *Vo* (n.142), [74]

<sup>243</sup> Gewirth (n.12), 1164-1165

<sup>244</sup> *Ibid*

which impose duties upon agents and the state to take positive steps to ensure that beings possess all three elements of well-being.<sup>245</sup> As people are unequal in their possession of, or ability to attain, the generic goods that form the three elements of well-being,<sup>246</sup> the EGR entails that agents and indirectly the state can have duties to provide for basic needs such as housing and food, additive goods such as employment possibilities, access to education and a safe environment, as well as non-subtractive goods such as privacy by support for family life.<sup>247</sup>

### The Limits of Positive Obligations

Gewirth recognises that these positive obligations cannot be unlimited in nature. Similarly, the domestic courts and the ECtHR have in some cases refused to find that the Article at issue gives rise to this type of obligation. However, whereas the courts' reticence is formally based in constitutional concerns, Gewirth's is primarily based in the PGC's protection of freedom and well-being.<sup>248</sup> An approach proceeding from the generic goods and rights can thus provide a more clearly morally principled basis which could inform domestic courts' decisions. However, similarities in the questions asked by the courts in deciding this issue means that often they may reach similar results.

Consistent with the recognition of the practicalities of life, the positive obligations imposed by the PGC do not require agents act to prevent every diminution of other's generic needs; they need only act where they are in a position to do so.<sup>249</sup> Where action to maintain another's generic rights is impossible for an agent, or where he has no knowledge of the harm to another and it is not reasonable to expect him to have that knowledge, he does not have a

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<sup>245</sup> Ibid, 1165

<sup>246</sup> Gewirth (n.1), 219 and ibid

<sup>247</sup> Gewirth (n.12), 1165 and Gewirth (n.1), 218, 237 & 246

<sup>248</sup> Gewirth (n.1), 225-227

<sup>249</sup> Ibid, 225 and S. Pattinson, 'Consent and Informational Responsibility' (2009) 39 *J Med Ethics* 176, 177

duty to attempt the impossible. The general principle that ‘ought’ implies ‘can’, presupposes that for a person to be placed under a duty to act they must be capable of fulfilling that duty. Thus, where an agent has not the knowledge or ability to aid another’s generic rights or interests, he has no positive obligation under the PGC to so act and thus does not contradict the dialectical consequences of his agency by failing to so act.<sup>250</sup>

However, even where these practical considerations do not prevent the bearing of a positive obligation, the PGC in stating that an agent must act in accordance with *his own* and other’s generic rights, will not impose an obligation upon an agent to maintain the freedom or well-being of another where this would unjustifiably impinge upon the agent’s own generic needs.<sup>251</sup> To hold otherwise would be inconsistent with EGR, contradicting the PGC, for it would be to require an agent to give insufficient regard to his own generic rights.<sup>252</sup> Thus, for the PGC to impose a positive obligation, the generic interest or right of the being in favour of whom the obligation exists must be sufficiently important in order to justify the limitation of the freedom of choice of action of the agent subject to the duty.<sup>253</sup> This requirement that the limitation of an agent’s freedom be justified also entails that, for the PGC to impose a positive duty upon an agent, the one to whom the duty is owed must be unable to realise their generic goods without the assistance of another. If this were not the case, the limitation of the duty bearer’s freedom could not be justified.

In a related manner, the final condition required for a positive obligation to arise under the PGC is directly concerned with the balancing of all the relevant generic rights and interests of both parties. The concern for a potential duty bearer’s rights entails that the PGC only

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<sup>250</sup> Pattinson (n.249), 177 and A. Gewirth, *The Community of Rights* (University of Chicago Press 1996), 56

<sup>251</sup> Gewirth (n.1), 189 & 226-227

<sup>252</sup> Ibid, 189, 191 & 218-219 and above p.192 & 195

<sup>253</sup> Pattinson (n.249), 177 and Gewirth (n.250), 44-45

requires that an agent to act positively to maintain another's generic rights or interests where the agent can do so without being subject to an excessive interference with his own generic rights, judged in relation to the relative importance for action of the rights or interests of the one to whom the duty is owed.<sup>254</sup> An agent might, therefore, not be required to risk his own basic goods to preserve another's, depending on their weight,<sup>255</sup> although, it would not necessarily be contrary to the PGC for them to choose freely to do so as an exercise of their own purposive agency.<sup>256</sup>

To some extent the domestic courts and ECtHR can be seen to apply a similar, though more pragmatic, approach.<sup>257</sup> In their decisions on whether a positive obligation is imposed by a Convention right, they balance the interests of the individual in need of proactive protection against the wider interests of society in a manner consistent with the approach required by the PGC, balancing the competing rights of the claimant and of those who will bear the burden of the positive obligation embodied within the general interest to determine what is an unacceptable comparable cost. The ECtHR's balancing of the interests of the community and the individual in deciding whether to interpret an Article as imposing a positive obligation,<sup>258</sup> and the domestic courts proportionality test of whether a positive obligation has been fulfilled,<sup>259</sup> both follow this reasoning without regard to Gewirth's principled fundamental basis for rights. Additionally, in the deference shown both by the ECtHR to the states in its margin of appreciation<sup>260</sup> and in the domestic courts to the other branches of government under the separation of powers,<sup>261</sup> the courts can still be seen to be focusing on achieving at

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<sup>254</sup> Gewirth (n.1), 191, 218 & 228, Gewirth (n.250), 45-46 and Pattinson (n.249), 177

<sup>255</sup> Gewirth (n.1), 218

<sup>256</sup> Ibid, 189

<sup>257</sup> Above p.77-78 & 120-123

<sup>258</sup> Above p.77

<sup>259</sup> Above p.122

<sup>260</sup> Above p.77-78

<sup>261</sup> Above p.120-121

the appropriate balance, however in these cases the courts feel that it is the member states or legislature that is best placed to determine what the balance is.<sup>262</sup> As argued above,<sup>263</sup> this deference can itself be interpreted as involving consideration of whether the right at issue is of sufficient weight to justify the their overriding potential polycentric implications for others' rights and interests.

In light of this it is arguable that not only cases where the ECtHR and domestic courts have recognised implicit positive obligations, such as the requirement of legal aid<sup>264</sup> and the protection of family life in *Marckx v Belgium*,<sup>265</sup> are consistent with the PGC. Cases such as *Anufrijeva v Southwark LBC*<sup>266</sup> where the courts refused to recognise a positive obligation because of the cost to society, or *Ghaidan*<sup>267</sup> where they deferred the decision on the provision of assistance to another branch of government, can also be seen to respect the PGC in so far as the reluctance to recognise the right was at its basis because of the competing rights and interests of others.

The implications of interpretation based in the PGC for the British courts' approach to this question of rights interpretation, in increasing the clarity of the law and providing a coherent principled basis for their judgments, can be seen when the judicial response to S.55(1) of the Nationality, Immigration and Asylum Act 2002 is analysed in light of it. The leading decision of *Limbuela*, as noted above, rejected the existence of a general positive obligation under Article 3 on the state to provide assistance for the destitute.<sup>268</sup> It is however submitted that, had the House of Lords interpreted the Convention using the PGC they would have been

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<sup>262</sup> Above p.78 and p.122-123

<sup>263</sup> Above p.123-124

<sup>264</sup> *Airey v Ireland* (1979-80) 2 EHRR 305, [25]-[28]

<sup>265</sup> *Marckx v Belgium* (1979-80) 2 EHRR 330, [31] & [36]

<sup>266</sup> *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [115] & [153]

<sup>267</sup> *Ghaidan* (n.139), [6]

<sup>268</sup> Above p.120

compelled to uphold this positive obligation, and that such an approach would have produced a clearer and more coherent decision than the circuitous analysis the court adopted.

In contrast to the domestic and Strasburg jurisprudence, the PGC through the EGR has been shown to state a general principle of positive obligations.<sup>269</sup> From this can be derived a duty to act to ensure that others are not in a state of destitution. Food and a place of shelter, after life, can be seen to be the basic of goods needed for humans to exercise purposive agency, and without them the most basic good, life, is itself in danger.<sup>270</sup> Roosevelt recognised this in stating ‘freedom from want’ amongst the four most basic freedoms necessary for a world where human rights were protected.<sup>271</sup>

As noted above, the positive obligations under the PGC are not unlimited; the duty to ensure that others have the generic goods necessary for their purposive agency only exists to the extent that agents, or indirectly the state on their behalf, can fulfil it without an unjustifiable impingement upon the generic rights of agents.<sup>272</sup> In a similar way, under the domestic and European approach to positive obligations under the Convention, including those found under unqualified rights, a proportionality analysis is applied to determining whether such an obligation should be implied into the right.<sup>273</sup>

In declining to find a freestanding positive obligation in *Limbuela*, the Lords however recognised that Britain was a comparatively rich country and that, except for late applicants covered by s.55, s.95 of the Immigration and Asylum Act 1999 combined with our system of

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<sup>269</sup> Above p.269-270

<sup>270</sup> A. Gewirth, *Reason and Morality* (University of Chicago Press 1978), 212 & 217

<sup>271</sup> F. Roosevelt, *State of the Union Address to the Congress 6 January 1941*, in M. Ishay, *The Human Rights Reader* (2<sup>nd</sup> edn., Routledge 2007), 481

<sup>272</sup> Above p.275-276

<sup>273</sup> Above p.77-78 & 122-124



social security showed a commitment and ability to ensure that no-one within this society was reduced to destitution.<sup>274</sup> In light of this, when combined with the obligation under the PGC in the form of the EGR used as a basis to interpret the Convention rights, and the importance of the basic goods in question, it is submitted that it was unjustified for the court to decline to hold that there was a general positive obligation under the incorporated Convention rights to prevent destitution as it is within the power of British society, through the state, to prevent it. This could have been practically achieved, either by reinterpreting ‘treatment’ under Article 3 more broadly as covering the consequences of an omission to provide basic necessities,<sup>275</sup> or implied into Article 8 right respect for private life.<sup>276</sup> As Lord Brown argued, ‘[t]he real issue ...is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim;’<sup>277</sup> under the PGC it is responsible for destitution it can remedy.

The courts deferential concerns were understandable; upholding this positive obligation would have immediate resource implications.<sup>278</sup> However, the vital importance of the generic need in question and the fact that such support would have been available but for S.55 empowers the court to find the positive obligation, in spite of the polycentric implications of the decision and because of the moral principled nature of the obligation. When analysed from the perspective of the EGR and the factors that the courts currently consider in determining whether to show deference in finding a positive obligation, it is submitted that, under the proportionality test applied by the courts to determine the extent of positive obligations under the Convention, the importance of the right and the extent of the interference requires and allows the courts to uphold the freestanding positive obligation in

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<sup>274</sup> *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66, [56] & [99]

<sup>275</sup> *Limbuella* (n.274), [46]-[47], [54], [66] & [93] and *Pretty* (n.139), [52] & [54]-[56]

<sup>276</sup> *Cf. Chapman v United Kingdom* (2001) 33 EHRR 18, [99]

<sup>277</sup> *Limbuella* (n.274), [92]

<sup>278</sup> *Limbuella* (n.274), [13], [66] & [99]

spite of the resource allocation implications.<sup>279</sup> The approach argued for here does go beyond the ECtHR's position that the provision of a minimum standard of social support is not required by the Convention, but is instead left to each member state's legislature.<sup>280</sup> However, this margin of appreciation and the Supreme Court's recent sounding of the retreat from the 'no more than' element of the Mirror Principle, when combined with the force of the obligation under the PGC, places such an approach within the domestic courts' power.

In this way, by using the PGC as a basis for the interpretation of the Convention, a principled approach to whether the courts should interpret rights as imposing positive obligations can be found, and coherence can be brought to an area of interpretation which has thus far lacked any broad principled approach in either ECtHR or domestic jurisprudence.<sup>281</sup> Had the courts been prepared to find such an obligation, the long and complicated case law surrounding S.55,<sup>282</sup> which had resulted in a backlog of 100 cases at the time *Limbuella*,<sup>283</sup> could have been avoided. This would have brought clarity to the law, and also increased coherence. Rather than having to find a positive obligation as a remedy to an infringement of a negative right in order to show an unjustified deference to parliament, the courts should have directly found the positive obligation to protect persons from a position of destitution, a conclusion which is clearer and the reasoning behind which coheres with the importance of the Convention right (and the underlying generic need) at issue.

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<sup>279</sup> Above p.122-124 & 131-132

<sup>280</sup> *Chapman* (n.276), [99]

<sup>281</sup> Above p.269-270

<sup>282</sup> *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, *R (T) v Secretary of State for the Home Department* [2003] EWCA Civ 1285 and *R (Q and 7 others) v Secretary of State for the Home Department* [2003] EWHC 2507, esp. [11] & [14]

<sup>283</sup> *Limbuella* (n.274), [15]& [81]

## *Conclusion*

The substantive positive and negative requirements of the generic rights to freedom and well-being can thus be seen to find protection in the various Convention rights. That the ECHR gives this textual protection to the generic rights shows it to be practical for them to be used to interpret the scope of the Convention rights on this question. That the recognition and respect for the generic rights is dialectically necessary gives the theoretical impetus to do so.

## ***The Balancing and Weighing of the Convention Rights***

### *Conflicts Between Rights*

The potential for rights to conflict with other rights is explicitly recognised and provided for within the Convention.<sup>284</sup> Gewirth, too, recognises this as a necessary consequence of the possession by all agents of rights to freedom and well-being under the principle of universalisability.<sup>285</sup> Consistent with this the PGC, in stating that agents must act in accordance with their own and other's genetic rights, can be seen to implicitly recognise that an agent's pursuit of his purposes can interfere with the protected purposive action of other agents.

Most directly, the choice of one agent as to how to act under his generic right to freedom may conflict with the rights of another agent to the goods protected by his right to well-being.<sup>286</sup> Similarly, an agent can also infringe another's generic right to freedom by actions which control or limit their capacity for choice in a way to which they do not consent.<sup>287</sup> Outside of these direct transactional relationships between agents and those they intend to be affected by

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<sup>284</sup> Above p.78-79, 87 & 124

<sup>285</sup> Above p.187

<sup>286</sup> Gewirth (n.12), 1160 and Gewirth (n.1), 271

<sup>287</sup> Gewirth (n.1), 271

their choices,<sup>288</sup> there is also the potential that an action may indirectly affect the generic rights or interests of others. For instance, in the case of the conjoined twins Mary and Jodie, not only were they and their parents' generic rights or interests directly affected by the court's decision, but it could also have implications for other agents in society generally, by for example conveying a message about the reduced value of life which may be the start of a slippery slope of less respect for the value of agency.<sup>289</sup> Similarly, in *Pretty* Lord Bingham stated *obiter* that even if refusal of assistance in suicide were a breach of *Pretty*'s Convention rights it would be justified by the need to protect the vulnerable from being persuaded to commit suicide.<sup>290</sup>

The inevitability that the rights of agents will conflict, and also therefore that the interests of non-ostensible agents will do so too, entails that generic rights are not and cannot be absolute.<sup>291</sup> This must be the case in order to avoid creating an inherent contradiction within the PGC by both requiring that an agent act in pursuance both of his own generic needs, whilst at the same time not infringing upon those of other agents. However, consistent with the categorical necessity of the supreme principle of action, agents must also accept that the balancing of rights where they come into conflict is itself set by the elements of the PGC.<sup>292</sup> With this basis for balancing of the generic rights in the PGC, agents must on pain of contradiction rationally accept the balance the principle dictates.<sup>293</sup>

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<sup>288</sup> *Ibid*, 270 and above p.189

<sup>289</sup> Beyleveld and Brownsword (n.34), 257

<sup>290</sup> *R (Pretty) v DPP* [2001] UKHL 61, [28]-[30]

<sup>291</sup> Gewirth (n.12), 1160 and Gewirth (n.1), 259

<sup>292</sup> Gewirth (n.1), 259

<sup>293</sup> *Ibid*, 250-254

### *Weight and Balance*

As noted previously, the approach of ECtHR and the United Kingdom courts to the issue of balancing the Convention rights in cases where they come into conflict with other rights and general interests involves several elements. These are questions that the courts ask, when applying a proportionality analysis, to determine the weight of competing rights by seeking to gauge the relative position of the rights at issue along different spectrums. The courts consider the relative weight or importance of the rights in the circumstances of the case<sup>294</sup> and the extent to which that would be interfered with,<sup>295</sup> the strata within a hierarchy of Convention rights on which respective rights reside<sup>296</sup> and the extent to which an action impinges upon the core or essence of a right.<sup>297</sup>

However, within these interpretive approaches there is no consistent principled guidance to assist the courts in arriving at decisions under these considerations. As noted above,<sup>298</sup> the courts vary in the amount of detail they give in justifying their decisions, advancing very much on a case by case basis, tailoring their decisions closely to the facts of the case before them. Consequently, the judicial adjudicative licence that exists under the factors the courts do consider contains scope for the use of the guidance which can be derived from the PGC. As a justification for why humans should be recognised as having rights or interests protected by the Convention, it follows that the generic features of agency should also be used in determining the scope of that protection in cases of conflict between the rights and interests of different persons. The regard in the Court of Appeal to the principle of the sanctity of life in *Re A* to attempt to resolve the conflict of the rights of the twins<sup>299</sup> demonstrates some

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<sup>294</sup> Above p.88, 132 & 134

<sup>295</sup> Above p.134

<sup>296</sup> Above p.132

<sup>297</sup> Above p.86-87 & 90

<sup>298</sup> Above p.82 & 128-130

<sup>299</sup> *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 203

acceptance by the judiciary of the role underlying principles can play in determining the relative weight of rights.

### Gewirthian Weight

From the perspective of a basis for the Convention rights in the agency protected by the PGC, two factors are relevant to the resolution of conflicts of rights; the weight of the generic rights or interests, and the weight of the moral status of the individual.<sup>300</sup> As noted above, that the generic rights or interests can be of different weight is a consequence of the recognition that some attributes are more crucial than others to the ability to act for purposes that characterises agency.<sup>301</sup> Regard to the moral status of beings in cases of conflicting rights or interests, follows logically from the basis of the generic rights in agency and the above described impossibility of knowing with certainty whether any being other than oneself is an agent.<sup>302</sup> In straightforward situations where both parties are ostensibly agents, the relative weight of their generic rights will determine whose rights should be vindicated. However, where there is a conflict with the generic interests of a non-ostensible agent then the relative moral status of parties to the conflict, as well as the relative weight of their rights or interests, must be taken into account to determine whose rights or interests should be upheld.

The varying needfulness of the different generic needs for the purposive action attributes relative value to the generic rights.<sup>303</sup> As noted above, amongst the three sub-classifications of the generic good of well-being there is an inherent hierarchy<sup>304</sup> under which an interference with an agent's well-being is more morally wrongful the more it interferes with

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<sup>300</sup> Beyleveld and Pattinson (n.45), 268 and Gewirth (n.1), 143

<sup>301</sup> Gewirth (n.12), 1162 and above p.183

<sup>302</sup> Above p.240-243

<sup>303</sup> Beyleveld and Pattinson (n.45), 268

<sup>304</sup> Gewirth (n.1), 62

an agent's abilities to achieve its purposes.<sup>305</sup> It is thus the case that the basic goods are of the greatest weight, and of these some are more indispensable for purposive action than others.<sup>306</sup> Life must necessarily be foremost<sup>307</sup> given that, although we cannot be certain,<sup>308</sup> death appears to stop all purposive action. This is then followed by the need for physical and mental integrity.<sup>309</sup> The rights to subtractive and non-subtractive goods are of lesser relative moral weight,<sup>310</sup> and of these it has been argued that the non-subtractive rights and interests should be deemed to have the greater weight.<sup>311</sup>

Of the two, 'non-subtractive rights rank higher than the additive because to be able to retain the goods one has is usually a necessary condition of being able to increase one's stock of goods.'<sup>312</sup> Although both non-subtractive goods and additive goods increase the likelihood of successful purposive action, to lose the capacity for action one already has necessarily causes a greater reduction in the capacity for purposive action than a failure to increase one's ability to act.

The right or interest of freedom, to voluntarily choose whether to act or be acted upon, as a generic right, cannot be curtailed, unless the restriction is justified under the PGC by the need to protect another's generic rights or interests in well-being.<sup>313</sup> The substantive content of the generic features of a being's purposive pursuit of particular purposes, protected through the various elements of well-being, thus set the limits of another agent's procedural right to – or

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<sup>305</sup> Ibid, 236 and above p.182

<sup>306</sup> Ibid, 63 and above p.182

<sup>307</sup> Ibid

<sup>308</sup> Above p.253-255

<sup>309</sup> Gewirth (n.1), 63

<sup>310</sup> Ibid, 236-267

<sup>311</sup> Above p.182-183

<sup>312</sup> Ibid, 63

<sup>313</sup> Ibid, 250, 255 & 259

non-ostensible agent's interest in – freedom, protecting his capacity for voluntary choice.<sup>314</sup> Additionally, where the rights or interests in freedom of two beings conflict and appear equally matched, balancing the freedom of one against the well-being of the other, which, as noted above, can sometimes overlap with the protection given by their right to freedom,<sup>315</sup> can determine whose freedom should be upheld.<sup>316</sup>

Against the well-being of another, the manner and extent of interference and also 'the degree of importance of the objects or purposes to which the behaviours interfered with are directed' is also relevant to determining whether a constraint of freedom is justified by the generic needs.<sup>317</sup> This degree of importance is judged in terms of the generic good that purpose furthers, Gewirth gives the example of the position that being prevented from eating one's favourite cake is less serious an interference with one's generic needs than being prevented from eating anything at all.<sup>318</sup> Where an agent's actions do not involve another in a transaction to which they do not consent or inflicts harm to their well-being by reducing their capacity for action, a form of general liberty is recognised under the PGC and their exercise of their generic freedom of action should not be restricted.<sup>319</sup>

This manner of attributing weight to the generic rights and interests, of assessing their relative weight within a hierarchy, is by its nature not generally able to give precise cardinal value to them.<sup>320</sup> An exception to this is the basic right or interest in life, as the most apparently fundamental characteristic necessary for the achievement of any purpose, it must be assigned the highest value, although this does not entail that it must always be vindicated

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<sup>314</sup> Ibid

<sup>315</sup> Above p.183

<sup>316</sup> Gewirth (n.1), 270-171

<sup>317</sup> Ibid, 254 & 255

<sup>318</sup> Ibid, 255

<sup>319</sup> Ibid, 271

<sup>320</sup> Beyleveld and Pattinson (n.45), 268



over a competing right or interest. The relative weight of the generic rights and interests is not the sole determinant of their balancing, to enumerate their content the PGC first specifies what beings have the necessary status to be deemed to have these moral rights and interests. With beings of identical status, such as two ostensible agents, their moral status will give no guidance to this one variable conflict. However, in situations where the rights of an agent conflict with the interests of a non-ostensible agent, or those of two non-ostensible clash, the relative moral status of the beings must also be considered in determining the weight to be attributed to their respective claims to generic rights and interests.<sup>321</sup>

As shown previously, the impossibility of knowing with absolute certainty whether any being other than oneself is an agent requires precautions be taken against the possibility that other beings are agents so that the PGC is not violated, in proportion to the likelihood that the other being may be an agent.<sup>322</sup> It follows from this that, in balancing the generic rights and interests of different beings, greater moral status should be attributed to beings that are more probably agents, and consequently greater weight given to their generic rights or interest than to beings that are less probably agents and their interests.<sup>323</sup> The probability that a being is an agent is thus ascribed on precautionary grounds in proportion to the extent to which a being displays the characteristics of agency.<sup>324</sup> Four forms of behaviour were argued above to indicate the capabilities of purposiveness and voluntariness a being possess, and their consequent moral status.<sup>325</sup>

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<sup>321</sup> Beyleveld and Pattinson (n.45), 268

<sup>322</sup> Above p.241-242

<sup>323</sup> Beyleveld and Pattinson (n.35), 44-45 and see generally Beyleveld and Pattinson (n.45), 268-269

<sup>324</sup> Above p.242-243

<sup>325</sup> Above p.243

The PGC, as a non-speciesist theory, accords moral status with generic rights or interests to non-humans who display characteristics of agency.<sup>326</sup> However, even if the courts decline to adopt the PGC's non-speciesist approach and thereby depart from their birth-centric interpretation of the Convention on the question of who can possess the rights it protects,<sup>327</sup> the moral status consideration remains relevant to the balancing of Convention rights of humans, as members of the human species vary in the extent to which they display the characteristics of agency.

As the basis for the generic rights, the status of agent is the highest moral status possible.<sup>328</sup> However, the moral statuses of non-ostensible agents, although necessarily of lesser values, cannot be assigned such a cardinal pre-determined value, because their relativity to agency is not capable of similarly precise quantification in terms of value.<sup>329</sup> In lieu of a precise mathematical formula, judgements of relative weight must instead be made in each case, based on the extent to which a being displays characteristics of ostensible agency.<sup>330</sup> The greater those characteristics, the more it is possible to treat the being in accordance with the interests of agency and thus the greater moral status it is possible to attribute to it.<sup>331</sup>

The lower moral status of non-ostensible agents, contrary to the claim of Holm and Coggon,<sup>332</sup> does not necessarily entail that their generic interests are necessarily always of lesser weight than a conflicting generic right of an ostensible agent. Although this will be the case where the same generic right and interest is at issue, where the rights and interests claimed, as well as the moral status of the parties, is different, the nature of the rights and

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<sup>326</sup> Beyleveld and Pattinson (n.45), 270

<sup>327</sup> Above p.257-258

<sup>328</sup> Above p.176 & 243

<sup>329</sup> Beyleveld and Brownsword (n.34), 256

<sup>330</sup> Beyleveld and Pattinson (n.45), 268-269

<sup>331</sup> Beyleveld and Pattinson (n.35), 44

<sup>332</sup> Holm and Coggon (n.38), 296 & 305-306

interests at issue, as well as the moral status of the bearers, must be considered and the interests of non-ostensible agents will not always be defeated by those of an ostensible agent.<sup>333</sup>

The guidance which the PGC and the precautionary approach to agency can give to the resolution of these multi-variable conflicts, between the different generic rights or interests of beings who have differing moral status, is, however, not mathematical in its precision.<sup>334</sup> As argued above, upon a scale of importance for action of the characteristics of agency and generic rights and interests, only the status of agent and the right or interest in life can be attributed a cardinal value as of the highest status. The proximity to the moral status of ostensible agency is capable of being ranked at one of three levels by looking at the characteristics of agency they display.<sup>335</sup> Similarly, the categories of basic, non-subtractive and additive give a hierarchy of generic goods, and the extent of an interference with generic freedom can be measured in relative terms. By the summation of these two factors, relative weight can be attributed to the rights and interest claimed by the parties and precedence given to the greater over the lesser.<sup>336</sup>

The categories of non-ostensible agency are sufficiently broad that there will sometimes be room for arguments on the facts of a particular case as to which party's rights or interests should be vindicated; owing to factual uncertainty as to the moral status of the beings or the particular nature, and the consequent relative precedence, of the generic goods at issue. However, compared to one variable conflicts of either generic goods or moral status, the scope for argument is greater where differing generic rights or interests belonging to beings

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<sup>333</sup> Beyleveld and Pattinson (n.45), 268 and Beyleveld and Brownsword (n.34), 124

<sup>334</sup> Beyleveld and Pattinson (n.45), 268-269

<sup>335</sup> Above p.243

<sup>336</sup> Beyleveld and Pattinson (n.45), 268

of different moral status are in conflict.<sup>337</sup> The general lack of cardinal values, and scope for factual disagreement, means that in the balancing of the multiple variables no precise mathematical formula is readily applicable, and the resolution of these conflicts must be left to the judiciary to resolve on a case-by-case basis.<sup>338</sup>

As alluded to previously,<sup>339</sup> the resolution of these questions of balance through judicial debate and the societal dialogue that accompanies it does not undermine the dialectical necessity of the recognition of generic rights and interests. As Kenneth Westphal observes, not all questions can be neatly classified and determined by deductive reasoning, some are a matter of judgement.<sup>340</sup> The application of moral principles and thus the practical implementation of the PGC involves detailed consideration of factual questions.<sup>341</sup> What is important is that these decisions are properly reasoned. This will include the consideration of the views on the question that exist within the community, although the ultimate decision may not necessarily be one with which the majority of the community agree.<sup>342</sup> The domestic adversarial judicial system, with the opportunity for interested parties to make representations to the court, ably facilitates this debate.

### The Generic Weighting of Convention Rights

From the fundamental status of the generic rights under the PGC as capable of justifying the existence, possession and respect of human rights, it follows that they can also provide philosophically cogent guidance to determine when one party's Convention right should take

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<sup>337</sup> Ibid

<sup>338</sup> Ibid, 268-269

<sup>339</sup> Above p.207-208

<sup>340</sup> K. Westphal, 'Norm Acquisition, Rational Judgement and Moral Particularism' (2012) 10(1) *T.R.E.* 3, 8

<sup>341</sup> Ibid, 5-7, 10

<sup>342</sup> Ibid, 14 & 17

precedence over those of others.<sup>343</sup> Although largely without mathematically definable cardinal values, the consideration of the moral status of beings and the generic rights to freedom and well-being can nevertheless help to guide the resolution of conflicts between Convention rights. Already, the domestic courts and Strasbourg attempt to allocate relative weight to Convention rights where they are called upon to make decisions on the proportionality of the infringement of a right in favour of competing rights or general interests.<sup>344</sup> By virtue of the PGC's dialectical necessity and intellectual coherence the generic rights, and their basis in the generic features of action, can provide principled justification and guidance to the courts in this practical application of the Convention.

The hierarchy of rights that the courts have recognised in the context of the Convention can be seen in several respects to already mirror that of the generic rights. The basic goods of life and physical integrity are most strongly protected under Article's 2 and 3. The courts credit these rights with fundamental status or sanctity, recognising their unqualified status under the Convention, with their protection generally incapable of being outweighed by other rights.<sup>345</sup> This primacy is a consequence of the argued severity of the consequences of the infringement of either for an individual's physical and mental integrity,<sup>346</sup> the equivalent of the ability to live a voluntary and purposive life as an agent protected by PGC.

Alongside the rights to which the courts give the highest protection, the courts' use of proportionality to resolve conflicts between these rights is open to principled direction by the

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<sup>343</sup> Gewirth (n.12), 1160-1161

<sup>344</sup> Above p.88 & 132

<sup>345</sup> *Tyrer v United Kingdom* (1979-80) 2 EHRR 1, [30], *Ireland* (n.211), [163], *Chahal v United Kingdom* (1997) 23 EHRR 413, [79], *Pretty* (n.290), [5], [13] & [59] and *Re E (Medical treatment: Anorexia)* [2012] EWHC 1639 (COP), [119]

<sup>346</sup> *Tyrer* (n.331), [30], *Ireland* (n.211), [162] & [167], *Pretty* (n.290), [13] and *R (Limbuella)* (n.274), [76]

generic rights of freedom and well-being. In *Campbell*<sup>347</sup> the court sought to balance Convention rights which concerned interferences with non-subtractive rights<sup>348</sup> of privacy and the maintenance of the self-esteem<sup>349</sup> against the right of the public not to be deceived and the right to freedom of the newspaper to communicate information.<sup>350</sup> In attempting to balance these, the courts could have taken a coherently principled approach – in their consideration under the proportionality test of the question of interference with which right would be the greater – by consideration of the extent of the interference with the generic characteristic of purposive voluntary action. In its judgement, the House of Lords did, in fact, approach the case from a perspective that fits well with the rights protected by the PGC. The Lords’ focused upon the extent to which publication would detract from Miss Campbell’s freedom to pursue her purpose of receiving treatment,<sup>351</sup> and the degree of importance of protection of the freedom of the paper to publish the type of information in question<sup>352</sup> in light of the need to prevent the deception of the public, whose generic rights can also be seen to be relevant.<sup>353</sup> The proportionality test can thus be seen to be susceptible to the influence of a basis in the PGC, and the courts already appear to consider elements that are consistent with the substantive rights for which it requires respect.

In relation to additive rights, that their Convention equivalent are given lower weight is apparent from the fact that rights which the courts deem to outweigh other rights, when given content analogues to that of the basic goods, are treated with lesser weight when the positive obligations they impose are considered, open to being outweighed under a proportionality

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<sup>347</sup> *Campbell v MGN* [2004] UKHL 22

<sup>348</sup> Above p.263-264

<sup>349</sup> As opposed to the further development of it which is an additive right.

<sup>350</sup> *Campbell* (n.347), [12], [55], [105]

<sup>351</sup> *Ibid*, [81], [83], [121], [145] & [147]

<sup>352</sup> *Ibid*, [117] & [148]-[149]

<sup>353</sup> *Ibid*, [82]-[83], [117] & [151]

analysis.<sup>354</sup> In *Limbuella* Article 3 was held not to impose a positive duty for the provision of food and accommodation,<sup>355</sup> however, the court did not explain the limited scope of this positive obligation by explicitly balancing it against other rights. Lord Scott, rather, argued that such provision was a matter for social legislation and a failure to provide it could never breach Article 3.<sup>356</sup> Whether under the PGC this limitation of a positive obligation was correct depends on whether to create such an obligation would impose too great a comparable cost on the generic rights of others.<sup>357</sup> Such an approach can, however, be seen in Lord Bingham's argument in *Pretty* that the scope of a positive obligation depended on the balance that should be struck between the interests of the individual and the interests of the community.<sup>358</sup> The acceptability under the PGC of the court in *Limbuella* deferring this decision to the state was discussed above,<sup>359</sup> and the substantive decision appears susceptible to explanation under the PGC.

As noted previously, for the limitation of rights in favour of some general interests, such as national security, under the proportionality tests of the qualified Convention rights,<sup>360</sup> to be consistent with the anti-majoritarian aim and a deontological consequentialist rights basis for the Convention,<sup>361</sup> such limitations in the general interest should be read as categories implicitly protecting individual rights and requiring the correct balance to be achieved between them.<sup>362</sup> When the domestic decision on the indefinite detention of un-deportable foreign terrorist suspects<sup>363</sup> is viewed in this way, the court can be seen to be required to balance the individual's right to liberty against the positive duty of a state to protect against

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<sup>354</sup> *Pretty* (n.290), [15] and *Limbuella* (n.274), [46] & [48]

<sup>355</sup> *Limbuella* (n.274), [7], [66] & [79]

<sup>356</sup> *Ibid.*, [66]

<sup>357</sup> Above p.274-277

<sup>358</sup> *Pretty* (n.290), [15], see [28]-[30] for its application.

<sup>359</sup> Above p.279-280

<sup>360</sup> Eg. Article 8(2)

<sup>361</sup> A Gewirth (n.1), 216

<sup>362</sup> Gewirth (n.1), 216 and above p.56-57, 80-81 & 126

<sup>363</sup> *A v Secretary of State for the Home Department (Belmarsh)* [2004] UKHL 56

threats to the right to life which underlies the general interest of a threat to the life of the nation.<sup>364</sup> In the case, several of the Lords did explicitly view the balance they were required to strike in this way.<sup>365</sup> For this decision to be in accordance with the PGC, the courts would have to conclude that the threat to generic rights to freedom and the relevant basic and non-subtractive goods of well-being of detained individuals outweighed the risks to the basic rights of others. That the court considered the importance of the competing interests or rights,<sup>366</sup> whose weight can be determined by underlying generic rights, in assessing the necessity element of the proportionality<sup>367</sup> analysis, shows a concern consistent with the PGC. That the courts require greater justification for a state action which interferes with a more important Convention right<sup>368</sup> is also supported, and could be guided by, more explicit use of the reasoning and principles of PGC and its hierarchisation of the generic rights.

In a similar manner, the approach sometimes utilised by the ECtHR, of giving greater weight to actions that are at the core of what a right protects, can be guided by the PGC.<sup>369</sup> To determine what actions should be deemed to be covered by the core of a right, and hence be of greatest weight in balancing against other rights, the court could be directed by the extent to which one action is more important for freedom or well-being than another. For example, political speech, deemed in *Lingens* to be at the core of what Article 10 was intended to protect,<sup>370</sup> could be argued to be of more importance to an agent's voluntary purposiveness by enabling him to influence the way he is governed than commercial advertising which may increase his additive goods, but have less impact on the a person's general capacity to act.

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<sup>364</sup> Article 15(1) ECHR, see above p.126 & 128 for the author's interpretation of this case.

<sup>365</sup> *A (Belmarsh)* (n.363), Lord Bingham [28] & [33] Lord Hope [99], [111], [118]-[119], Lord Walker (dissenting) [191], although Lord Hoffman (dissenting) [86], Lord Scott [140], Baroness Hale [219] and Lord Carswell [240] did accept Lord Bingham's statement of the issues in the case.

<sup>366</sup> *A (Belmarsh)* (n.363), [36], [43] [100] [124], [129] & [192]

<sup>367</sup> *Ibid*, [43] & [107]-[108]

<sup>368</sup> *Ibid*, [74], [76] [80] & [192]

<sup>369</sup> Above p.86-87

<sup>370</sup> *Lingens* (n.205), [42]



Such guidance would give a more cogent and fundamental basis to the assessment of what deserves most protection under the Convention rights than regard to principles such as ‘the concept of a democratic society’<sup>371</sup> relied on in *Lingens* and which is used in the Convention in justifying qualifying the scope of some of the rights.<sup>372</sup>

The current approach of the courts, to who and what can be deemed to be capable of possessing the Convention rights, limits the scope for regard to the moral status of beings in assigning weight in conflicts between the rights. Were it extended to cover foetuses and non-human animals, it would be of much greater importance in balancing Convention rights.<sup>373</sup> If a foetus were covered by the Convention it would necessarily be of less moral status than its mother because it would be a non-ostensible agent,<sup>374</sup> albeit one whose probability of being an agent and moral status increased in proportion to its development.<sup>375</sup> However, the mother’s rights would not necessarily prevail because the weight of the rights in conflict is effected not only by the higher moral status but also by the nature of the generic rights that are at issue.<sup>376</sup> Thus, a foetus’s basic rights may outweigh the non-subtractive rights of the mother.

The consequences of the current basis for rights in the context of balancing conflicting rights can be seen in the judgements of Ward and Walker LLJ. in the conjoined twins case. In line with the basis for position of legal rights in being born and alive, the judges saw the sanctity of life as an absolute fundamental principle<sup>377</sup> which could therefore not be subject to a

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<sup>371</sup> Ibid, *Cf. Dudgeon v United Kingdom* (1982) 4 EHRR 149, [52] where no reason was given for requiring higher protection for sexuality as part of private life under Article 8.

<sup>372</sup> Articles 6, 8, 9, 10 and 11

<sup>373</sup> Beyleveld and Pattinson (n.35), 50-51

<sup>374</sup> Beyleveld and Brownsword (n.34), 125

<sup>375</sup> Beyleveld and Pattinson (n.35), 50

<sup>376</sup> Beyleveld and Pattinson (n.45), 268

<sup>377</sup> *Re A* (n.299), 188

balancing exercise, for all human lives were held to be valued and weighted equally, and thus both twins had an equal right to life.<sup>378</sup> The judges were thus required to consider the other factors described previously to determine whether the operation would be lawful, Ward LJ. relied on an analysis of the best interests of the twins and self-defence backed up by the principle of the sanctity of life,<sup>379</sup> Brooke LJ. applied the principle of necessity to find the separation justified as a lesser evil<sup>380</sup> and Walker LJ. applying the principle of necessity guided by the aim of maximising the bodily integrity of both twins.<sup>381</sup>

Were the possession of rights to be held to be based on agency under the PGC, a different, clearer and more coherent approach would have been open to the courts to address the conflicting rights in this case. Under stage one of the argument to the PGC, life is the most important of basic goods, and thus also the most important generic right or interest.<sup>382</sup> However, as argued above, the basis in agency entails that moral status of the agent or non-ostensible agent, in addition to the pantheonic position of the generic right or interest, must be considered in determining the balance to be struck between competing rights.<sup>383</sup>

This approach would similarly have led the court to find in favour of separating the twins, however it would have done so through a clear and direct balancing of rights claims, which the Court of Appeal's approach circumvented. Although the Court of Appeal was correct to attribute the highest weight to life, it was wrong to hold this prevented the twin's rights from being balanced against each other.<sup>384</sup> The PGC requires that they should have balanced the rights and determined whose should be given priority; Jodie's potential to become an

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<sup>378</sup> Ibid, 188-189, 196-7, 203, 243 & 255

<sup>379</sup> Ibid, 197 & 203-204

<sup>380</sup> Ibid, 240

<sup>381</sup> Ibid, 255 and generally above p.136-137

<sup>382</sup> Above p.182 & 286-287

<sup>383</sup> Above p.284-290

<sup>384</sup> *Re A* (n.299), 196, 203, 238

ostensible agent, and that fact that Mary could live at most a few months un-separated, together with her impaired brain function, lead to the conclusion that under the precautionary approach to agency she had less moral status.<sup>385</sup> '[T]he probability that Jodie is an agent is greater than the probability that Mary is an agent.'<sup>386</sup>

At the fundamental level of generic rights and interests under the PGC, in this case Mary is claiming a positive right against Jodie that she be kept alive, and Jodie has a negative claim against Mary not to be killed by her attachment. At the legal level of rights claims under the Convention, when viewed from the PGC perspective of the protection of their generic needs, both can be viewed as indirect claims of positive obligations upon the state to live as long as possible; Jodie by being separated from Mary, Mary by remaining attached to or by being provided with some other form of life support. Contrary to the view of the Ward LJ,<sup>387</sup> the primary duty to Mary must be to keep her alive, at present her life is not under threat and her interest is in continuing it, as Brooke LJ. argued, '[t]he doctor's purpose in performing the operation was to save life, even if the extinction of another life was a virtual certainty,'<sup>388</sup> as Walker LJ. argued 'the doctors do have duties to their two patients.'<sup>389</sup> The significance of this is that as positive obligations, under the case law described previously, they are not absolute.<sup>390</sup> Consequentially, in this way it would have been open to the court, whilst recognising the competing Article 2 claims, to uphold the balance between the rights required by the consideration of the children's moral status and allow the operation.

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<sup>385</sup> Above p.241-243 and Beyleveld and Brownsword (n.34), 255

<sup>386</sup> Beyleveld and Brownsword (n.34), 255

<sup>387</sup> *Re A* (n.299), 201

<sup>388</sup> *Ibid*, 238

<sup>389</sup> *Ibid*, 254

<sup>390</sup> Above p.122-123

Under this PGC based approach the courts would engage directly in the balancing of rights claims at issue, which their monolithic attribution of rights on the simple speciesist basis being born and alive prevented. This would have provided a clear means for resolving this conflict of rights rather than the various means by which the members of the court of appeal struggled to resolve what they refused to admit, was fundamentally a question of the balancing of rights. As an incredibly difficult moral decision, it is understandable that the judges wanted to send a clear message that all life is valuable. It is submitted that the PGC based approach provides a coherent means by which to recognise the cardinal importance of the basic good of life, whilst at the same time recognising, through its basis of the value of agency, that in this ‘unique’<sup>391</sup> case of the conflict of these most important interests, it is clearly morally justified to take the only possible step that will preserve the child with the potential for ostensible agency at the expense of the life of the one that does not.

It was noted above that the weight of the different levels of the various generic rights or interests, except life, and the various levels of moral status, except that of ostensible agency, cannot be given a mathematical pre-determined cardinal value. Rather, their weight, where rights and interests conflict, is relative between the various beings involved. This was also recognised in the description of the balancing process in the Convention context required in *Re E* as ‘not mechanistic but intuitive.’<sup>392</sup> In spite of this, the dialectical necessity of the PGC as a moral principle and the coherence and consistency of basis that it can provide for the balancing of the Convention rights supports its use by the courts to help create thoroughly reasoned, transparent and accountable judgements.<sup>393</sup>

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<sup>391</sup> *Re A* (n.299), 155

<sup>392</sup> *Re E* (n.345), [129]

<sup>393</sup> Beyleveld and Pattinson (n.45), 269

That the weight rights or interests should be recognised to have on the facts of a given situation is not inherently clear,<sup>394</sup> can be seen to be reflected in the ECtHR's margin of appreciation and the deference shown by domestic courts. Their recognition that bodies other than the courts may be better positioned to determine the weight of rights<sup>395</sup> does not undermine the argument that the assessment of that weight is best done through the lens of the generic features and needs embodied within the PGC. Rather, deference and the margin of appreciation can be seen as recognition of the fact that the generic rights and interests do not generally have a clear cardinal value, and an attempt to ensure that the correct weight is given.

The courts' reservation to themselves of the ultimate power to decide when to defer or give a margin of appreciation on the balancing of rights,<sup>396</sup> if combined with a regard by the courts to the generic rights and interest, could provide a standard against which the courts could hold differing allocations of weighting and withdraw the margin or deference if the other bodies' weighting was clearly inconsistent with the PGC. That the courts are less willing to give a defence or a margin of appreciation where an unqualified right or the core of a right is at issue<sup>397</sup> could be further informed by the weight given to generic rights and interests under the PGC.

### *Conclusion*

It is apparent that the Gewirthian approach to the balancing of rights and interests can provide the courts with a coherent principled basis for their decision. That this is possible can be seen

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<sup>394</sup> Above p.286-288

<sup>395</sup> Above p.84, 129 & 139

<sup>396</sup> *Handyside v United Kingdom* (1979-80) 1 EHRR 737, [49] and *Ireland* (n.211), [207] and *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [31], *R v DPP ex p Kebilene* [2000] 2 AC 326, 387 and *International Transport Roth GmbH and others v Secretary of State for the Home Department* [2002] EWCA Civ 158, [27] & [81]

<sup>397</sup> *Wingrove v United Kingdom* (1997) 24 EHRR 1, [58] and *Roth* (n.396), [84]

for the approaches the courts already take and the factors they consider in assigning weight to rights. With the addition of the application of the PGC the courts can be provided with a dialectically justified moral framework within which to do this.

### ***Will Conception of Generic Rights***

#### *The Nature of Gewirth's Rights*

Under the dichotomy between will and interest conceptions of rights, concerning whether the recognition of the capacity of an agent to waive the benefit that his rights protect is essential to the identity of a norm as a right, Gewirth argues for a conception of the generic rights that falls within the interest conception. He claims that because, as noted previously,<sup>398</sup> the rights to freedom and well-being 'necessary to all action, no agent could waive them or be deprived of them and still remain an agent.'<sup>399</sup> As a consequence of this necessity for action,<sup>400</sup> Gewirth argues that an agent could not alienate these rights by allowing others to interfere with them without contradicting or diluting his view of this necessity.<sup>401</sup> From this, Gewirth claims that it is dialectically necessary that, consequentially, a purposive agent must necessarily be 'opposed to whatever interferes'<sup>402</sup> with his having the freedom and well-being that is necessary for any purposive action.<sup>403</sup>

In contrast to the interference with his generic rights by others, Gewirth concedes that it is not inconsistent with his own purposive agency for an agent to commit an action which reduces his own generic goods. Although the PGC requires agents act in accordance with their own

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<sup>398</sup> Above p.179-180 & 184

<sup>399</sup> Gewirth (n.1), 77

<sup>400</sup> Ibid, 64-65

<sup>401</sup> Ibid, 78

<sup>402</sup> Ibid, 79

<sup>403</sup> Ibid

rights to freedom and well-being as necessary to achieve their purposes,<sup>404</sup> this duty is specific to the purposes that agents pursue.<sup>405</sup> Gewirth thus argues that the PGC does not generally prohibit suicide or other self-harming actions such as drug taking,<sup>406</sup> provided that these are the agent's freely chosen purposes.<sup>407</sup> Similarly, as noted above, although the PGC does not impose a positive obligation on an agent to sacrifice his own freedom or well-being,<sup>408</sup> it does not generally prohibit an agent from freely choosing to do so.<sup>409</sup>

That under the PGC an agent can engage in action that would be objectively seen to interfere with his freedom and well-being, is justified by Gewirth on the grounds that the generic needs are contingent and instrumental to an agent's achievement of his purposes.<sup>410</sup> The instrumental nature of these goods entails that even in committing an action, such as suicide, which extinguishes at least ostensible agency, is an exercise of the agent's generic rights and thus cannot be inconsistent with them.<sup>411</sup> Rather, it would be an interference with the generic right to freedom to obstruct an agent's voluntary decision to inflict harm upon himself.<sup>412</sup>

Gewirth distinguishes the permissibility of an agent reducing his own ability to engage in voluntary purposive action from the self-contradiction of allowing such actions by others, on the grounds that the former is an exercise of his generic rights,<sup>413</sup> whereas the latter is an interference with them which deprives him of the capacity to act.<sup>414</sup> That an agent must

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<sup>404</sup> Ibid, 136

<sup>405</sup> Ibid

<sup>406</sup> Ibid, 136 & 264

<sup>407</sup> Ibid, 266

<sup>408</sup> Above p.275-276

<sup>409</sup> Gewirth (n.1), 189 & 218

<sup>410</sup> Ibid, 266

<sup>411</sup> Ibid

<sup>412</sup> Ibid, 265

<sup>413</sup> Ibid, 136

<sup>414</sup> Ibid, 78-79

dialectically necessarily hold that the generic rights are good for him,<sup>415</sup> means that the agent must see them as worth protecting, and Gewirth argues it is inconsistent with this fundamental position for an agent to allow interference with them.<sup>416</sup>

Similarly, although Gewirth argues that agents can consent to rights transactions whereby another's actions are allowed to affect their capacity for action,<sup>417</sup> he argues that this is an exercise of the agent's generic right to freedom which is distinct from requiring or allowing another to disregard their generic rights.<sup>418</sup> Gewirth again argues that the former is an exercise of the generic right to freedom,<sup>419</sup> whereas the latter is logically inconsistent with agency because an agent seeks to deny his own agency by declaiming the protection of his generic rights,<sup>420</sup> and the fact that an agent wishes another to act towards them in a particular way is, as noted previously,<sup>421</sup> insufficient to impose an obligation on another to act in that way.<sup>422</sup>

### *The Necessary Nature of the Generic Rights*

Although, as with the substance of the generic rights, Gewirth claims the means of their operation can be derived by the dialectically necessary method, in reaching an interest based conception of the generic rights Gewirth can be seen to have incorrectly departed from the proper application of his own method. If the premise of the PGC in purposive agency is followed to its logical extent, then Gewirth's insistence that the benefit of the generic rights cannot be waived by agents, whilst at the same time claiming these rights are based in and

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<sup>415</sup> Ibid, 76

<sup>416</sup> Ibid, 78

<sup>417</sup> Ibid, 132 & 256

<sup>418</sup> Ibid, 78-79, 134 & 256

<sup>419</sup> Ibid, 256

<sup>420</sup> Ibid, 266

<sup>421</sup> Above p.184

<sup>422</sup> Gewirth (n.1), 267



protect the capacity for purposive action, can be seen to be contradictory. Additionally, that for Gewirth the PGC allows an agent to commit suicide and engage in other activities which appear objectively harmful to the freedom and well-being that make up the capacity for action, and permit others to do actions which effect the scope of their freedom of action, and yet not allow the waiving of the protection the rights give, is similarly incoherent.

Instead, as Beyleveld and Brownsword argue, the basis of the generic rights in fact necessitates that they be recognised to be rights which are, by nature, of the will conception.<sup>423</sup> As noted previously, the will conception is sometimes known as the choice conception of rights because it argues that at the basis of moral rights is the protection of the freedom of individual choice as to how to act and whether to be acted upon.<sup>424</sup> The derivation of generic rights from purposive agency, the capacity to choose to act to achieve one's chosen purposes,<sup>425</sup> thus entails that the generic needs to which an agent has rights are only instrumental goods which enable agents to pursue their choices.<sup>426</sup> Therefore, the rights are only of value to an agent insofar as they enable him to pursue his purposes.<sup>427</sup>

The consequence of this nature of the rights is that, logically, if an agent's purpose is that another treat him in a way that would otherwise be in disregard of his generic rights, then an agent is at liberty under the PGC to allow such treatment. By allowing such action, the agent does not contradict his own agency or generic rights because the agent's choice pursues his purposes. Similarly if an agent no longer wishes the protection of his generic goods, they are

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<sup>423</sup> Beyleveld and Brownsword (n.34), 118

<sup>424</sup> Above p.91-92, see also Holm and Coggon (n.38), 297

<sup>425</sup> Gewirth (n.1), 46

<sup>426</sup> Beyleveld and Brownsword (n.34), 70 & 118-119

<sup>427</sup> Beyleveld and Pattinson (n.35), 47

no longer of value to him and he does not contradict his agency by allowing others to deprive him of freedom or well-being.<sup>428</sup>

From this reading and the logical application of Gewirth's own theory, it is clear that it is contradictory for him to maintain that an agent can give up his own agency through suicide,<sup>429</sup> and yet not recognise that the instrumental goodness of the generic needs and rights of agency means the benefits of these must also be capable of being waived. Similarly, if it is possible for an agent to choose to consent to the limitation of the scope of his rights in a transaction instigated by another, then it is inconsistent to hold that he cannot equally choose to waive the benefit of his rights and allow others to act in ways that would otherwise infringe his generic rights. The fact that an agent cannot always, under the PGC, compel another to act positively in a particular way in relation to him, does not logically entail that an agent cannot himself choose to give up the benefits of his rights.

In addition to the Gewirth's inconsistent conclusion that the generic rights follow the interest conception, his view that allowing for the waiving of the benefits of the generic rights would contradict the inalienable nature of these rights is inconsistent with the concept of inalienability as used within international human rights documents, described above.<sup>430</sup> Under the UDHR, the ECHR, the French Declaration of the Rights of Man and the Citizen and the American Declaration of Independence, the inalienability of rights entails that rights are incapable of separation from the inherent characteristic of the individual which is of value, their dignity.<sup>431</sup> The recognition that an agent can choose to allow actions which from an objective standpoint infringe his generic needs protected by his generic rights to freedom and

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<sup>428</sup> Beyleveld and Brownsword (n.34), 74 at note 14

<sup>429</sup> Gewirth (n.1), 26

<sup>430</sup> Above p.168-169

<sup>431</sup> Above p.41 & 44-45

well-being, waiving the benefit of the protection of those rights does not alter the fact that those rights derive from, and are thus inalienably connected to, the value of his purposive agency.

### *Will Conception Convention Rights*

If the generic rights are used as a basis from which to interpret the rights of the Convention, which make no explicit statement as to the nature of the conception of rights it contains, it is apparent that the uncertainty of the domestic case law must be clarified in favour of applying a will conception and that support for this can be found in the ECtHR's case law. The Strasbourg court already appears in some cases to apply a will conception,<sup>432</sup> and at the very least there is no 'clear and consistent'<sup>433</sup> jurisprudence in favour of either conception. This entails that under the self-imposed mirror principle<sup>434</sup> ECtHR case law supports, or at least does not prohibit, the application of a will conception of the Convention rights by the United Kingdom courts.

To be consistent with the will conception the courts must depart from the elements of the interest approach in *Brown*,<sup>435</sup> and recognise a general capacity to control what is done to one's own body. Although the nature of the acts, which would otherwise interfere with rights based on freedom and well-being, to which persons can consent to cannot be unlimited,<sup>436</sup> the courts must recognise a different starting premise from which to approach such questions, one that reflects a generic capacity for choice. Such a shift in the courts' general thinking finds support in *R v Dica (Mohammed)*, a case which raised the question of whether it was

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<sup>432</sup> Above p.98-99

<sup>433</sup> *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15, [37] and above p.98 & 103

<sup>434</sup> Above p.218-220

<sup>435</sup> *R v Brown* [1994] 1 AC 212, 235

<sup>436</sup> Below p.306

possible to consent to the risk of contracting HIV through sex, where the court put emphasis upon the recognition of the individual as having autonomy which justifies the capacity to consent to the possibility of the infliction of some harm by others.<sup>437</sup> This need only be made the rule rather than the exception.

Altering the domestic approach to apply a will conception of Convention rights will not necessarily mean that previous cases, in which an interest conception of rights influenced the judgement, will now fall to be decided differently. Under the will conception, an agent does not have unlimited freedom to waive the benefits of his generic rights for, even if he wishes to waive the benefit of his own rights, he is bound by the PGC to respect the generic rights and interests of others,<sup>438</sup> something Gewirth himself recognised as the case in relation to agent's self-harming actions.<sup>439</sup> The ECtHR's statement that the waiving of rights will not be permitted where to do so would 'run counter to any important public interest',<sup>440</sup> and the regard in *Brown* and *Mosely* to the danger to society of allowing the protection for personal integrity at issue to be waived,<sup>441</sup> can be interpreted as considering the rights of others in this way.<sup>442</sup> Thus, the balancing conducted by the courts under this approach enables the capacity and freedom of agents' to waive the benefits of their rights to be balanced against the generic rights and interests of others in a manner consistent with a will conception of rights.<sup>443</sup> The substantive consequence of this is that, even if an agent is not prevented by that same agency from waiving the benefits of his rights, the refusal to allow waiving might still be upheld depending on the balance the PGC requires to be found<sup>444</sup> between the conflicting rights.

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<sup>437</sup> *R v Dica (Mohammed)* [2004] EWCA Crim 1103, [52]

<sup>438</sup> Beyleveld and Brownsword (n.34), 118

<sup>439</sup> Gewirth (n.1), 265

<sup>440</sup> *Håkansson and Sturesson v Sweden* (1991) 13 EHRR 1, [66-67]

<sup>441</sup> *Brown* (n.412), 245-246, 253 & 255 and *Mosely* (n.200), [116]-[117]

<sup>442</sup> Above p.80-81 & 126

<sup>443</sup> Above p.94

<sup>444</sup> Above p.290-299

In light of this were, the above discussed case of *R v Brown*<sup>445</sup> to fall to be decided today, with Convention claims interpreted and resolved in accordance with the requirements of the PGC it is submitted that the substantive judgement, that consent to the actual bodily harm at issue is not possible in law, would remain the same. However, an approach which openly recognised a will conception basis for the Convention rights would have the advantage of engaging clearly with the question and implications of the nature of the rights, creating clear coherence with the basis upon which the rights are held.

As noted above, the justifications for the decisions in this case were ambiguous, capable of being interpreted as propounding either will or interest conceptions.<sup>446</sup> If the British courts instead base their approach in the underlying aim of furthering purposive agency when interpreting Article 8's requirements,<sup>447</sup> directly addressing the underlying question of whether an agent can waive the benefit of the indirect generic duty upon the state to protect them from harm and the horizontal generic right not to be harmed by others,<sup>448</sup> this ambiguity of rights conception would be resolved by giving a single coherent basis for the decision.

If the concern for the impact on 'society' and the 'public interest' of allowing consent to such harm<sup>449</sup> is, as has previously been argued to be possible,<sup>450</sup> interpreted as concern for the rights of others within society, including the generic rights of other agents, not just the immediate effect on the subjects of the masochistic acts in this case, or an amorphous impact on an abstract conception of society generally, then the decision is justified from the

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<sup>445</sup> Above, p.143-145

<sup>446</sup> Above, p.99-100 & 143-145

<sup>447</sup> *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, [35]-[36]

<sup>448</sup> Above, p.269-270 and below p.319-321

<sup>449</sup> *Laskey, Jaggard and Brown* (n.447), [40] & [44] and *Brown* (n.435), 237, 245-246, 253 & 255

<sup>450</sup> Above p. 80-81 & 100

perspective of the will conception PGC. With masochistic acts, the most direct danger of infringing the generic rights is from the risk that the parties to them do not freely consent to the harm. Where serious harm is inflicted, as opposed to the ‘spanking’ in *Mosely*,<sup>451</sup> then the gravity of the potential infringement of the generic rights is more serious and the precaution of prohibiting the action, which cannot be regulated to ensure consent, is justified to protect those who do not truly consent. The limitation of the freedom of some, who do truly consent is justified by the weight of the danger of the freedom and well being of others. Although the PGC is a deontological principle, it is necessary in applying it to look at the qualitative likelihood of the potentially consequences of an action would be contrary to the PGC,<sup>452</sup> to determine whether, when it is balanced against the infringement of rights not to allowing the action would entail, the action should be prohibited to protect the rights of others. Such an approach has theoretical consistency with the precautionary approach to the possession of rights,<sup>453</sup> and has substantive legal coherence with the prohibition on allowing persons to waive the protection of the right to life to allow another to assist them to commit suicide, in case a vulnerable person should have their freedom and well-being infringed by coercion to consent.<sup>454</sup>

Another clear and coherent will based justification which is available to court in upholding *Brown*, is the cost to society of the treatment of people who had validly consented to the harm. This can be seen to be a factor in the domestic and Strasbourg courts’ thinking.<sup>455</sup> As noted above, under the PGC the indirect implications of actions on the generic rights of others can give rise to duties constraining action.<sup>456</sup> It would therefore be justifiable under the

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<sup>451</sup> *Mosely* (n.200), [67]

<sup>452</sup> Above p.56-57

<sup>453</sup> Above p.141-143

<sup>454</sup> Above p.146-147

<sup>455</sup> *Laskey, Jaggard and Brown* (n.447), [40] and *Brown* (n.435), 245

<sup>456</sup> Above p.282

will conception of the PGC to prevent valid consent to such actions because of the indirect implications for others, rather than to protect the participant themselves from the freely chosen harm. Such an approach would also be consistent with existing laws limiting the potential for persons to choose to risk harm to themselves, because of the wider implications to society, such as the requirement of helmets for motorcyclists.<sup>457</sup>

As a capacity for choice is fundamental to the possession of rights under the will conception, only beings capable of such choice can hold these rights.<sup>458</sup> Consistent with this, under the approach to the possession of the generic rights argued for previously, as the capacities of voluntariness and purposiveness are necessary to hold the generic rights, only agents can possess those rights.<sup>459</sup> Thus, animals and children cannot be said to hold the waivable generic rights, however, they must be deemed to have generic interests which should be respected under the precautionary thesis.<sup>460</sup> It follows from this that, in determining whether a particular person can waive the benefit of a Convention right, regard must be had to whether they have sufficient capacity to choose to abdicate its protection. Those without this capacity but with sufficient characteristics of agency to be protected by PGC based Convention rights, including some children, thus should not be deemed capable of waiving<sup>461</sup> the protection of the Convention rights which apply to protect their generic interests.

As noted above,<sup>462</sup> the will and interest theories are however conceptions of rights as a whole, and the rights stated by a moral theory such as the PGC can therefore only be of one of these sub-species. However, by distinguishing between substantive Convention rights of the ECHR

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<sup>457</sup> s.17 Road Traffic Act 1988

<sup>458</sup> H. Hart, 'Are There Any Natural Rights?' (1955) 64(2) *Phil. Review* 175, 181, Holm and Coggon (n.38), 297 and Beyleveld and Pattinson (n.35), 44

<sup>459</sup> Above p.239-241

<sup>460</sup> Above p.241-242

<sup>461</sup> Beyleveld and Pattinson (n.35), 47

<sup>462</sup> Above p.103

as a system of rights for the protection of those who fall within its scope<sup>463</sup> and the generic rights of agents under the PGC when used as a justifying basis for the ECHR in this way, it is possible for the Convention rights to be coherently applied as either will or interest rights. Depending on the capacities of the holder of those rights, as either having the agency which gives rise to generic rights, the benefit of which is by nature necessarily waivable, or as non-ostensible agents with generic interests, whose benefit is not necessarily so, the nature of their substantive Convention rights should be interpreted accordingly. Decisions consistent with this approach can be seen in both the domestic and the Strasbourg case law. The ECtHR's concern to ensure that a person displays an unequivocal intention to waive the benefit of a Convention right,<sup>464</sup> and asking whether a person has had sufficient information to make such a choice,<sup>465</sup> can be seen to ensure that only those capable of waiving the benefit of rights are deemed to have done so. A similar knowledge of the risks was said to be required in the obiter statements in the domestic case of *Dica*.<sup>466</sup>

Although some domestic decisions appear to apply an interest conception of rights, the law concerning a person's ability to consent to or refuse medical treatment shows that consideration of capacity to consent to or refuse actions done towards them, is not a concept alien to domestic law. The Mental Capacity Act 2005 sets out a statutory framework for making such decisions<sup>467</sup> and the courts have held that mentally competent persons can refuse treatment even if necessary to save their life.<sup>468</sup> Although such a decision is an instance of the exercise of a right to be free from interference to which one does not consent, that the respect

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<sup>463</sup> D. Beyleveld, 'The Principle of Generic Consistency as the Supreme Principle of Human Rights' (2012) 13 *Human Rts.Rev.* 1, 2 (note 2), 7 & 9

<sup>464</sup> *Pfeiffer and Plankl v Austria* (1992) 14 EHRR 692, [37]

<sup>465</sup> Above p.102

<sup>466</sup> *Dica (Mohammed)* (n.437), [40]-[50]

<sup>467</sup> s.2(1), (3) and 3(1) Mental Capacity Act 2005

<sup>468</sup> *Re T (Adult: Refusal of Treatment)* [1993] Fam 95, 102



for an individual's capacity for choice given by the courts in these cases<sup>469</sup> is not replicated in the context of waiving the benefit of rights to non-interference is an inconsistency in the courts' approach. This existing law thus demonstrates that there is scope and support within domestic law for a move towards a will conception of the Convention rights.

### *Conclusion*

Although the approach of United Kingdom courts is unclear, with elements of both will and interest conceptions arguably apparent, it would not require a seismic shift in the tectonics of the case law to recognise a will conception. Substantively, many of the elements of a will conception have played a part in the courts' decisions, all that is required is a change in the underlying theoretical conception of rights – to one which recognises their foundation in respecting the choices of purposive action.

### ***Horizontal and Vertical Gewirthian Rights***

An immediate formal difference between the PGC's conception of rights and the statement of rights in the Convention is the parties who are the primary concern of the rights. The generic rights, by virtue of being derived dialectically from agency, primarily state rights and duties that exist between individual persons as agents.<sup>470</sup> The Convention rights, however, as a result of the historical context from which the ECHR arose,<sup>471</sup> can be seen from Article 1 of the Convention to concern themselves primarily with the rights of persons which impose obligations upon the state. In spite of these differences, however, the PGC is capable of supporting the existence of vertical rights against the state, and the Convention rights are capable of practical application between individuals.

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<sup>469</sup> *St George's Healthcare NHS Trust v S* [1999] Fam 26, 43 and *ibid.*, 117 citing *Malette v Shulman* (1990) 67 DLR (4th) 321, 336

<sup>470</sup> Gewirth (n.1), 132 and above p.194-195

<sup>471</sup> Above p.38-40

### *Vertically Challenged*

Although the very nature of the dialectical means by which the PGC is derived and its substantive content<sup>472</sup> focuses its application upon the actions of individuals, it also has application to social rules and institutions.<sup>473</sup> These social institutions are the ‘relatively stable, standardized arrangement[s] for pursuing or participating in some purposive function or activity that is socially approved on the ground...of its value for a society.’<sup>474</sup> Whether structured groups such as a governing state or a standard activity such as truth telling, these institutions have rules which must be followed to participate in the activity of the group.<sup>475</sup>

Thus, not only does the PGC apply directly between individuals, but also indirectly between individuals and the state and its laws.<sup>476</sup> The application to the state is indirect because the question of whether state rules or institutions comply with an agent’s generic rights arises because the determination of whether the action of an agent acting under state rules or institutions, which directly effect another agent,<sup>477</sup> can only coherently be assessed by applying the PGC to the state power which controls their action.<sup>478</sup> These actions compelled by social rules are not the direct transactions between individuals with which the PGC is concerned; individuals are fulfilling social roles rather than acting in their individual capacities.<sup>479</sup> As the social rule dictates the transaction between individuals it is the rule that should be evaluated under the PGC.<sup>480</sup> The consequence of this indirect application is that, even if an individual’s actions in isolation appear to conflict with the generic rights of another agent, if the social rule which directs that action is justified under the PGC as furthering the

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<sup>472</sup> Gewirth (n.1), 135

<sup>473</sup> Gewirth (n.12), 1163

<sup>474</sup> Gewirth (n.1), 274

<sup>475</sup> Ibid, 274-275

<sup>476</sup> Ibid, 200

<sup>477</sup> Ibid, 274 and Gewirth (n.12), 1163: giving the example of a judge sentencing a person to imprisonment

<sup>478</sup> Gewirth (n.1), 273 and Gewirth (n.12), 1163

<sup>479</sup> Gewirth (n.1), 277

<sup>480</sup> Ibid

generic rights or interests of others, and these outweigh those of the individual in question, then it will be justified under the PGC.<sup>481</sup>

The PGC's requirement of an equality of generic rights<sup>482</sup> is of particular relevance when the generic rights of individuals are applied to social institutions. The EGR, like the PGC, is not only concerned with agents' actions directly effecting other agents, but also with 'the ways institutions affect the persons subject to them.'<sup>483</sup> Gewirth indeed recognises that the provision, restoration and reinforcement of the generic rights to all agents, which the EGR may require, will usually operate through social institutions<sup>484</sup> because these will best be able to assist most agent's to attain and maintain their freedom and wellbeing.

If the PGC is the supreme principle of morality, it follows that it is the standard against which the state's laws and actions should be held and their moral validity assessed.<sup>485</sup> Practically, this will be the case if the Convention rights are interpreted and applied in accordance with the generic rights. If the interpretations argued for above are adopted in recognition of the necessity of the compliance of the HRA and ECHR with the PGC, the vertical application of Convention rights provided for in the Convention and the HRA against the state will serve to protect the generic rights and interests of individuals from violation by state laws and actions under them. The obligations imposed under s.6(1) and (3) HRA, requiring that bodies exercising state functions either acting under the control of<sup>486</sup> or applying the laws of the

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<sup>481</sup> Ibid, 276-277

<sup>482</sup> Above p.267-268

<sup>483</sup> Gewirth (n.1), 207

<sup>484</sup> Ibid, 200, 206 & 209

<sup>485</sup> Ibid, 281

<sup>486</sup> *YL v Birmingham CC* [2007] UKHL 27, [31] & [102]-[104]

state<sup>487</sup> comply with the Convention, thus can be seen expression to the need to ensure that some structured social institutions are subject to the constraints of individual rights.

### *Horizontally Challenging*

Whereas the application of the generic rights to the state is an indirect application of the PGC, that individuals as agents are bound to act in accordance with the generic rights and interests of others is the immediate and direct<sup>488</sup> obligation imposed by PGC. However, just as the pre-eminence given to the vertical application against the state under the ECHR and HRA is in contrast to the indirectness of the application of generic rights to states, the logical primacy of rights and duties betwixt individuals is not explicitly given similar direct protection by these rights documents.

The direct applicability of the generic rights provides a theoretical basis to support the previously described arguments<sup>489</sup> for the horizontal applicability of the Convention rights; although human rights are traditionally seen as protecting against acts of the state, the actions of individuals are just as capable of violating the generic rights or interests.<sup>490</sup> That the claiming of the protection of a right by one person for their action may impinge upon the right of another is recognised theoretically by the PGC,<sup>491</sup> and also tacitly in the qualified rights of the Convention. These recognise the need to balance the exercise of rights against ‘the rights or freedoms of others’<sup>492</sup> and other general interests which have been argued to be general categories protecting more specific rights.<sup>493</sup>

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<sup>487</sup> s.6(3)(a) HRA

<sup>488</sup> Gewirth (n.1), 200 and Gewirth (n.12), 1163

<sup>489</sup> Above p.104-106

<sup>490</sup> Gewirth (n.12), 1162-1163

<sup>491</sup> Above p.184-185 & 189-190

<sup>492</sup> Articles 8(2), 9(2), 10(2) and 11(2)

<sup>493</sup> Articles 8(2), 9(2), 10(2), 11(2) and also Article 15 derogations as applied in *A (Belmarsh)* (n.363)

The direct horizontal applicability of generic rights, also supports the acceptance of the interpretation of other provisions of the Convention which are open to readings that support giving some horizontal effect to the rights. The interpretation of Article 13's particular focus upon breaches of the Convention rights by a public authority, in requiring that remedies be available for breaches of the substantive Convention rights, as implicitly recognising that the rights may also be interfered with by persons not acting on behalf of the state,<sup>494</sup> is buttressed theoretically by the PGC. Similarly, the implicit recognition that persons in their individual capacity, rather than as a state representative, may breach the rights of others, apparent in Article 7(2)'s recognition of the applicability of the *jus cogens* norms,<sup>495</sup> finds support in the direct applicability of generic rights.<sup>496</sup> Thus, the ECHR, when combined with a basis for its rights in the PGC, justifies the domestic courts in giving as much horizontal effect as possible<sup>497</sup> within the constraints of the provisions of the HRA and principles of the British constitution.

It is philosophically fitting that the term indirect horizontal effect is applied to the protection of the Convention rights of individuals from infringement by other individuals under s.6 HRA, for it is supported by the indirect applicability of the generic rights to the state. The courts' decisions, compelled under s.6(3)(a)'s requirement that they act in accordance with the Convention rights of the parties, gives effect to the direct applicability of the generic rights between individuals.

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<sup>494</sup> Above p.108

<sup>495</sup> F. Bouchet-Saulnier and L. Brav (tr), *The Practical Guide to Humanitarian Law* (Rowman and Littlefield 2002), 107-108 & 200

<sup>496</sup> Above p.108

<sup>497</sup> Gewirth (n.12), 1163

As noted previously,<sup>498</sup> several different justifications were, however, invoked by the Law Lords in *Campbell v MGN* to justify their application of the Convention rights to freedom of speech and privacy in the development of the common law of confidentiality. Baroness Hale alone had explicit regard to the court's obligations under s.6 in considering the balance between the parties' claims in terms of the conflict between Articles 8 and 10.<sup>499</sup> The other Lords did not rely upon this section, instead they took approaches which recognised that the underlying applicability of rights between individuals justified them in giving indirect effect to the parties' rights within the common law.

The application of the PGC by the court would not necessarily have altered the substantive outcome of *Campbell*, however its explicit recognition that the fundamental source of the possession of Convention rights in the agency of persons, not as the self-restraining gifts of the state, could have given a clarifying fundamental weight to the Lords justification for their decision. Lord Nicholls went some way towards recognising this in holding that the, 'values embodied in [the rights in question were] as much applicable in disputes between individuals'<sup>500</sup> without making the deeper argument as to why this is the case. Lord Hoffman went further in arguing that there was 'no logical ground for saying that a person should have less protection against a private individual than he would have against the state,'<sup>501</sup> grounding this recognition in 'human autonomy and dignity.'<sup>502</sup> A wider explicit recognition of the horizontally applicable nature of the Convention rights, by virtue of rights and duties primarily and necessarily existing between human agents, would provide the clear theoretical bedrock for the indirect horizontal effect of rights for which some of the Lords in *Campbell* were grasping, but not clutching. Were this approach to be adopted by the judiciary, it would

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<sup>498</sup> Above, p.157

<sup>499</sup> Above, p.157

<sup>500</sup> *Campbell* (n.347), [17]

<sup>501</sup> *Ibid*, [50]

<sup>502</sup> *Ibid*

also assist in the clarification of the nature of rights within British society, which will be argued in the next chapter to be one of the wider effects that a grounding of rights in a PGC based concept of dignity can have;<sup>503</sup> a recognition that everyone has the Convention rights by being human agents, and that they are distinct from other forms of legal protection.

From the perspective of theoretical coherence, a basis in the recognition of the possession of rights in this fundamental characteristic of agency, is also required for the answer to the question of the horizontal effect of rights to be consistent with grounds for possession of Convention rights, and the deontological approach to the balancing of conflicting rights, argued for previously.<sup>504</sup> If the balancing required under the qualified Convention rights is not a utilitarian calculation, but instead the general interests considered are actually manifestations of, and serve to protect, individual rights, the horizontality of the rights is a necessary consistent corollary.

Gavin Phillipson argues that the court was reluctant to engage with s.6 due to a desire to leave the question of the extent of horizontal effect under the Act unresolved.<sup>505</sup> The observation of Lords Nicholls and Hoffman that the common law in this area has developed over the years under the influence of the Convention rights,<sup>506</sup> can similarly be seen to be part of the judicial concern to stay within the balance of powers within British Constitution in protecting the Convention rights. However, the protections of the Convention rights, as human rights, arise directly from a fundamentally different basis to those of the common law generally, and a judicial recognition of this will be necessary if the courts are to make a strong argument for giving as much as indirect effect as possible to the horizontal

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<sup>503</sup> Below p.355-356

<sup>504</sup> Above p.237-238 & 293-294

<sup>505</sup> Phillipson, see above p.157

<sup>506</sup> *Campbell* (n.347), [16]-[17], [43], [46], [55]

applicability of PGC based Convention rights. This recognition by the courts is, however, subject to the limitations of the HRA imposed by parliamentary sovereignty and the separation of powers.<sup>507</sup> Thus, although the courts appear willing to recognise the horizontal applicability of Convention rights as the PGC requires, constitutional concerns restrain their ability to give effect to it.

The courts have been shown to be capable of giving effect to positive obligations the PGC imposes to ensure that others attain the generic goods in applying Convention rights.<sup>508</sup> One way in which the courts can be seen to have done so is in their decisions under s.6(3)(a). In cases such as *Venables v NGN*, where the court granted an injunction preventing press publication of information which could have resulted in harm being caused to the claimant,<sup>509</sup> the courts can be seen to be acting on behalf of the members of society as the indirect means of the fulfilment of the direct positive obligations under the PGC, to ensure that persons can attain their generic goods and are not prevented from doing so by the actions of others.<sup>510</sup>

As with the interpretation and application of the common law under s.6, the HRA also enables the courts to give indirect horizontal effect to the direct applicability of the generic rights in its interpretation of statutes under s.3(1).<sup>511</sup> However, this indirect effect of the Convention and generic rights is limited by the same constitutional concerns that apply to the use of s.6(3)(a), the courts must not upset the separation of powers by using interpretation to effect *de facto* legislation and usurp the power of Parliament. This would be the case if the courts were to adopt an interpretation that departed ‘substantially from a fundamental feature

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<sup>507</sup> Above p.155-156 & 158-160

<sup>508</sup> Above p.277-280

<sup>509</sup> *Venables v NGN* [2001] Fam 430, 444-445, 462-463 & 468

<sup>510</sup> *Gewirth* (n.1), 218 and *Gewirth* (n.12), 1164-1165

<sup>511</sup> Above p.154-156



of [an Act],<sup>512</sup> which the text of the Act could not support.<sup>513</sup> Faced with these constitutional constraints, a basis for Convention rights in the direct applicability of the generic rights provides the courts with a sound theoretical moral basis which supports giving as much horizontal effect to the Convention rights protecting the generic rights 'as it is possible to do'.<sup>514</sup> It supports pushing the bounds of the possible<sup>515</sup> to their furthest legitimate extent, for to fail to do so would contradict the necessary recognition of the direct horizontal applicability of rights.

The lack of direct horizontal effect under the HRA and its consequence for judicial protection of the Convention rights, from a moral angle, unjustifiably prevents full protection being given to the generic rights by the courts. If parliamentary sovereignty, the British Constitution's main tenet, is to be supported by the PGC as protecting the voluntary purposiveness of individuals to which democratic decision making gives effect,<sup>516</sup> it is contradictory for this sovereignty to prevent the protection of the generic rights by limiting horizontal effect being given to the Convention rights. However, as this constitutional principle appears immovably established,<sup>517</sup> the practical constitutional reality is that the courts are prevented from giving full protection to the horizontal applicability of the generic rights.

If the HRA is to give adequate effect to the direct applicability of the Convention rights between individual persons, then the horizontal means of indirectly challenging the actions of

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<sup>512</sup> *Re S* [2002] UKHL 10, [40]

<sup>513</sup> *Ibid*, [40] & [42]-[43]

<sup>514</sup> s.3(1) HRA

<sup>515</sup> Lord Lester, 'The Art of the Possible - Interpreting Statutes Under the Human Rights Act' [1998] *E.H.R.L.R.* 665, 669

<sup>516</sup> Gewirth (n.1), 309

<sup>517</sup> A. Dicey, *An Introduction to the Study of the Law of the Constitution*, E. Wade (intro) (10<sup>th</sup> edn., Macmillan 1959), 39-40, *Cf. R (Jackson) v A-G* [2005] UKHL 56, [102], [104]-[107] & [158]

individuals must compensate for the House of Lords' restrictive approach to the actions that can be challenged vertically under s.6(3)(b).<sup>518</sup> This will not be possible where there is no legislation which can be interpreted as giving protection or common law that can be developed to do so. If this is the case, then the direct applicability of the generic rights would support a reconsideration of the court's rejection of Baroness Hale's dissenting approach in *YL*, that the courts should look at the nature of the particular action,<sup>519</sup> rather than the nature of the body performing the function and the duty under which it is performed,<sup>520</sup> in order to maximise the horizontal protection of the generic rights. Alternately, the decision made in the drafting of the HRA that the Convention rights should not be directly enforceable between individuals<sup>521</sup> should be revisited in any reform of the Human Rights Act. In the absence of a horizontal remedy, the vindication and protection of individuals' generic rights are left to the will of the majority represented through the legislature, the very thing the Convention was designed to prevent,<sup>522</sup> subject only to the possibility of claiming that the state has failed in its positive obligations of protection.

Although there are constitutional constraints upon the extent to which the domestic courts can give effect to the direct applicability of generic rights and Convention rights interpreted in light of them, ECtHR case law does not prohibit horizontal effect. It has been argued above in the context of the mirror principle that the courts should not be constrained from giving greater protection to the Convention rights than the ECtHR<sup>523</sup> and the fact that Ireland, also a

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<sup>518</sup> Above p.151-152

<sup>519</sup> *YL* (n.486), [65]-[68]

<sup>520</sup> *Ibid*, [28], [31], [102]-[103] & [119]

<sup>521</sup> Joint Committee on Human Rights, 'The Meaning of Public Authority under the Human Rights Act' 7th Report HC (2003-04) 382 / HL (2003-04) 39, 30

<sup>522</sup> G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007), 74 and S. Greer, "'Balancing" and the European Court of Human Rights: a Contribution to the Habermas-Alexy Debate' (2004) 63(2) *C.L.J.* 412, 431

<sup>523</sup> Above p.224-233

signatory to the ECHR, gives horizontal effect to fundamental rights under its national constitution proves this to be permissible and possible.<sup>524</sup>

### *Conclusion*

The HRA thus gives clearest effect to the indirect applicability of the generic rights. The direct applicability of the generic rights between individuals which is at the heart of Gewirth's dialectically necessary argument for the PGC is only protected in an indirect manner. If the PGC is applied as a moral guiding basis for the interpretation and application of the Convention rights the courts must, so far as is constitutionally possible, ensure that the direct as well as the indirect applicability of individuals' rights are upheld. Such an approach would be coherent with the basis on which rights are held under the PGC, and provide a strong and clear basis for the courts maximisation of the horizontality of Convention rights enforcement.

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<sup>524</sup> *Meskeil v Córas Iompair Éireann* [1973] IR 121, 133 & 136 and M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *P.L.* 423, 428-429

## CHAPTER VIII: THE PRINCIPLE OF DIGNITY AS A MEANS FOR THE JUDICIARY TO HAVE REGARD TO GEWIRTHIAN IDEAS IN INTERPRETING THE CONVENTION RIGHTS

### *Introduction*

That the PGC can guide the courts in the interpretation of the Convention rights, by providing principled and justified answers to the five fundamental questions of rights interpretation, was established in the preceding two chapters. This final chapter seeks to show how the domestic judiciary can in practice bring regard to the PGC and its requirements into their judgements, by using it to give content to the principle of dignity. It will be shown that although this will require a modified understanding of, and greater engagement with, the concept of dignity generally applied by the courts, such an approach is possible and desirable, and finds support in the jurisprudence of the ECtHR, the decisions of the German and Canadian courts, and international human rights documents.

### *The Role of Dignity in Context of Human Rights*

At the most general level, to ascribe dignity to a person is to recognise that they have a value<sup>1</sup> or characteristic which is of worth<sup>2</sup> and they are thus deserving of respect,<sup>3</sup> this is consistent with the roots of the word in Latin, *dignitas* meaning ‘worth.’<sup>4</sup> In the human rights context specifically, respect for the dignity of the individual has been argued above to be the most

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<sup>1</sup> *Airedale NHS Trust v Bland* [1993] AC 789, 826 and O. Schachter, ‘Human Dignity as a Normative Concept’ (1983) 77 *A.J.I.L.* 848, 848

<sup>2</sup> D. Weisstub, ‘Honour, Dignity and the Framing of Multiculturalist Values’ in D. Kretzmer and E. Klein, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002), 263 and Oxford English Dictionary <<http://www.oed.com/view/Entry/52653?redirectedFrom=dignity#eid>> accessed 24<sup>th</sup> September 2012

<sup>3</sup> G. Moon and R. Allen, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’ (2006) 6 *E.H.R.L.R.* 610, 618 & 627 and *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2005] 1 CMLR 5, [AG75]

<sup>4</sup> Schachter (n.1), 849

fundamental of general principles, including respect for equality and autonomy, which can be seen to underlie human rights.<sup>5</sup>

This dignity of the individual has been explicitly used by many of the human rights documents of the latter half 20<sup>th</sup> century as the basis upon which the rights they contain are founded.<sup>6</sup> Similarly, to varying extents the judiciary of different legal systems have recognised dignity ‘as providing the basis for human rights in general’.<sup>7</sup> The first sentence of the preamble to the UDHR, closely replicated in the preambles of the ICCPR and ICESCR, recognises the foundational role of dignity within the landscape of human rights, stating it prior to the recognition of the rights of individuals, as ‘a formal, transcendental norm to legitimatise [the subsequent] human rights claims.’<sup>8</sup> Eleanor Roosevelt, chairman of the Commission that drafted the UDHR, stated that dignity was included as a description of the worth of individuals which justified the recognition of them as possessors of rights.<sup>9</sup> The Helsinki Declaration contained a similar explicit recognition that all human rights ‘derive from the inherent dignity of the human person’.<sup>10</sup> Such is the prevalence of the use of dignity in the context of legal human rights protection that it can now be seen to be central to human rights discourse generally.<sup>11</sup>

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<sup>5</sup> Above p.44-45, 49 & 51

<sup>6</sup> See for example: UDHR, ICCPR and ICESCR discussed by C. McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19(4) *E.J.I.L.* 655, 664 and B. Hale, ‘Dignity’ (2009) 31(2) *J.Soc.Wel. & Fam.L.* 101, 103, see for example the Article 1 Basic Law for the Federal Republic of Germany 1949, *Cf.* US Bill of Rights

<sup>7</sup> McCrudden (n.6), 680

<sup>8</sup> K. Dicke, ‘The Founding Function of Human Dignity in the Universal Declaration of Human Rights’ in *The Concept of Human Dignity in Human Rights Discourse* (n.2), 114 & 118

<sup>9</sup> M. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House 2001), 146 and see also McCrudden (n.6), 677

<sup>10</sup> Organisation for Security and Co-operation in Europe (OSCE) ‘Conference on Security and Co-Operation in Europe Final Act’ (1 August 1975), Principle VII, see also Schachter (n.1), 848

<sup>11</sup> McCrudden (n.6), 655

Although the Convention and other rights documents have been stated to also protect the principles of equality, and autonomy or freedom, dignity necessarily underlies these other principles.<sup>12</sup> The content of dignity, as the essential nature and characteristics of the person to which rights attach, entails that the statements in rights documents and judgements, that human rights also further and protect the principles autonomy and equality, reinforce rather than contradict the most fundamental basis of rights in dignity. As argued above, dignity provides the ultimate justification for the requirement of the protection of both autonomy and equality in the rights context, because the protection of these principles in the form of substantive human rights is ultimately required by the dignity of the individual.<sup>13</sup> Thus, where equality or freedom or autonomy are invoked in the preambles of rights documents such as the UDHR and used to support interpretations of the substantive rights,<sup>14</sup> behind them, justifying their protection, is the dignity of the individual.

Whilst there is generally agreement that dignity is ‘the foundation and the ultimate aim of human rights systems’,<sup>15</sup> there is disagreement as to its exact nature.<sup>16</sup> The key question accompanying a basis of rights and respect in the possession of dignity is to what does the dignity attach?<sup>17</sup> Opinion on the value or characteristic to which dignity is ascribed in the human rights context has been described as falling within two camps. The Neo-Classical conceptions asserts that by being of the human species individuals have a worth which requires that they not be subject to treatment which would humiliate them or otherwise fail to respect the value of being human.<sup>18</sup> Conversely, the Kantian conception of dignity deems a

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<sup>12</sup> Above p.40-42

<sup>13</sup> Above p.44-45 & 49-51

<sup>14</sup> Above p.40-44 and below p.335-336 & 347-249

<sup>15</sup> C. Dupre ‘Unlocking Human Dignity: Towards a Theory for the 21<sup>st</sup> Century’ [2009] *E.H.R.L.R.* 190, 201

<sup>16</sup> *Ibid*, 202

<sup>17</sup> McCrudden (n.6), 657 and D. Beylveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (OUP 2001), 22

<sup>18</sup> Above p.45-46

particular characteristic to be of value and worthy of respect.<sup>19</sup> For Kant whose theory can be seen as the genesis of this approach,<sup>20</sup> it was the capacity for rational thought which deserved this respect.<sup>21</sup>

However, just as the textual and semantic uncertainty of the substantive Convention rights has been argued to be to a certain extent a deliberate means of ensuring maximum agreement amongst states to add their signatures to international human rights documents,<sup>22</sup> the openness of the concept of dignity to different interpretations has performed a similar function. In order to fulfil a role of being the theoretical basis upon which the different substantive rights of different rights documents are based and their requirements given legitimacy,<sup>23</sup> such a founding principle must attract a consensus of agreement amongst states with different ideologies.<sup>24</sup> Consistent with this aim, in domestic and international rights documents dignity, has been left undefined and thus capable of having different content attributed to it<sup>25</sup> by parties who might otherwise disagree as to the basis of human rights.<sup>26</sup>

That the concept dignity is capable of fulfilling this role as a ‘linguistic-symbol’<sup>27</sup> for potentially differing underlying ideas is apparent from discrepancies that can be seen in the ratifications of the ICCPR and the ICESCR. Both contain an identical reference to dignity in their preambles, however the USA has ratified the ICCPR but not the ICESCR and China the

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<sup>19</sup> Above p.46-48

<sup>20</sup> Hale (n.6), 104

<sup>21</sup> Above p.47

<sup>22</sup> Above p.25-27

<sup>23</sup> Dicke (n.8), 118, McCrudden (n.6), 677 and Hale (n.6), 104

<sup>24</sup> McCrudden (n.6), 677 and D. Shultziner, ‘Human Dignity- Functions and Meanings’ (2003) 3(3) *Global Jurist Topics* Article 3, 5

<sup>25</sup> Schachter (n.1), 849 and McCrudden (n.6), 678

<sup>26</sup> Shultziner (n.24), 5 and McCrudden (n.6), 678

<sup>27</sup> Shultziner (n.24), 4-5 and McCrudden (n.6), 678

ICESCR but not the ICCPR.<sup>28</sup> From this it is apparent that states may agree on a commitment to the open textured idea of dignity; the disagreements as to the content of substantive rights can be seen to be a symptom of a different underlying principled ideology which they see rights as founded upon.<sup>29</sup>

Although there is clearly scope for disagreement as to the content of dignity, the position given to dignity within rights documents shows an international acknowledgement of the need for the some theoretical basis to justify the recognition of human rights.<sup>30</sup> Such a deeper justification is necessary for without it the rights human rights documents state would appear to exist merely as the gift of states that recognise them to be enjoyed at their whim.<sup>31</sup> Such a position would be contrary to one of the aims of the drafters of the rights documents of the post-WWII era of preventing a repetition of the state actions which characterised the Nazi regime<sup>32</sup> and had shown the rule of law alone provided inadequate protection to individuals.<sup>33</sup>

The role that dignity plays in rights documents as an underlying theoretical justification of the rights they state has led to it being used by judicial bodies attempting to interpret those rights.<sup>34</sup> Its use by the ECtHR in this way has already been noted, and its use by the courts of Canada and Germany will be described below.<sup>35</sup> Various theorists have recognised the

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<sup>28</sup> ICCPR: <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en&clang=\\_en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en&clang=_en#EndDec)> accessed 6<sup>th</sup> September 2011 and ICESCR: <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)> accessed 6<sup>th</sup> September 2011

<sup>29</sup> J. Carter, 'U.S. Finally Ratifies Human Rights Covenant' (29<sup>th</sup> Jun 1992) <<http://www.cartercenter.org/news/documents/doc1369.html>> accessed 6<sup>th</sup> September 2011 'Those who oppose the ratification of the second Covenant believe governments have no obligation to safeguard the rights of their citizens to jobs, education, housing, and an adequate standard of living.' On the Chinese approach to human rights see F. Zakaria, *The Post-American World: And the Rise of the Rest* (Penguin 2009), 108 & 112

<sup>30</sup> McCrudden (n.6), 677 and Shultziner (n.24), 1

<sup>31</sup> A. Gewirth, 'Human Dignity as the Basis of Rights' in M. Meyer and W. Parent (eds) *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992), 14 and Schachter (n.1), 583

<sup>32</sup> McCrudden (n.6), 662

<sup>33</sup> Hale (n.6), 103

<sup>34</sup> McCrudden (n.6), 712-713 and *Omega* (n.3), [AG 76]

<sup>35</sup> Above p.43 and below p.339-340



applicability of conceptions of dignity in answering the five key questions of rights interpretation that have been highlighted as key in determining the application and content of any human rights document.<sup>36</sup> However for dignity to be used in this way content must be given to it<sup>37</sup> by deciding what it is that is of value and constitutes dignity and is thus worthy of protection.<sup>38</sup>

### ***Dignity as a Means of Regard to Morality***

In this thesis several arguments have been made to support Gewirth's moral philosophy as providing a cogently justifying basis from which to interpret open textured human rights.<sup>39</sup> It is submitted that the means by which the British judiciary can best apply the PGC in practice to guide their interpretive judgements is by having regard to the principle of dignity underling the rights which in turn is informed by Gewirthian theory. In this way the PGC provides the 'deeper principles'<sup>40</sup> which give content to dignity.

The less fundamental principles of autonomy and equality can also be used and given content as means through which to invoke particular requirements of the PGC, the generic right to freedom and the requirement of the Equality of Generic Rights (EGR), and their ability to do so will be described in detail below.<sup>41</sup> However, whereas dignity is the principle which encapsulates the very basis on which rights are held, the purposive agency from which the

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<sup>36</sup> Weisstub (n.2), 269 and D. Beyleveld and R. Brownsword 'Human Dignity, Human Rights, and Human Genetics' (1998) 61(5) *M.L.R.* 661, 671 (who has rights), McCrudden (n.6), 716 (balancing rights), Beyleveld and Brownsword (n.17), 18 (positive and negative obligations), Hale (n.6), 106 (will or interest conception) and A. Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006), 545 (horizontal and vertical)

<sup>37</sup> E. Klein, 'Human Dignity in German Law' in *The Concept of Human Dignity in Human Rights Discourse* (n.2), 149

<sup>38</sup> D. Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] *P.L.* 682, 688

<sup>39</sup> Above p.175-201

<sup>40</sup> Feldman (n.38), 688

<sup>41</sup> Below p.348-350

PGC dialectically derives, autonomy and equality are only secondary manifestations of some of its requirements.<sup>42</sup>

There have been few attempts to apply legal and political philosophy to the interpretation of the ECHR;<sup>43</sup> the use of dignity in such interpretation involves engaging with moral questions<sup>44</sup> because of the aim of attempting to determine the ethics of which actions are right or wrong under the Convention rights. However, even prior to the enactment of the HRA the domestic courts recognised that some of the cases they were required to decide raised moral questions. In the previously discussed case of *Bland* Hoffman LJ. (as he was then) recognised that the case involved ethical questions upon which no ‘difference can be allowed to exist between what is legal and what is morally right.’<sup>45</sup> Although in this case he also stated that it was ‘not the function of judges to lay down systems of morals’, Hoffman LJ. thought that reaching a judgement in this case required regard to ‘underlying moral principles’.<sup>46</sup> The ECtHR has similarly recognised that it is generally required to engage with moral issues in interpreting the requirements of the Convention. In the case of *Dudgeon v United Kingdom*, in trying to determine the substantive requirements of Article 8, the ECtHR held that there now a ‘better’ tolerance of homosexuality amongst member states.<sup>47</sup> From this George Letsas argues that it is apparent that the ECtHR ‘was primarily interested in evolution towards the moral truth of the ECHR rights, not in evolution towards some commonly accepted standard, regardless of content’.<sup>48</sup> He thus argued that the ECtHR engages in a ‘first order moral

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<sup>42</sup> Above p. 49-51 and Below p.337-338 & 351

<sup>43</sup> G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007), 5 and McCrudden (n.6), 663

<sup>44</sup> Beyleveld and Brownsword (n.17), 68

<sup>45</sup> *Bland* (n.1), 825

<sup>46</sup> *Ibid*

<sup>47</sup> *Dudgeon v United Kingdom* (1982) 4 EHRR 149, [60], see also Letsas (n.43), 79

<sup>48</sup> Letsas (n.43), 79

reading of the ECHR rights<sup>49</sup> which it phrases in terms of interpretations commonly accepted by the member states so as to make its approach acceptable to them.<sup>50</sup>

Thus, the mere fact that engagement with dignity in interpreting the Convention rights makes the engagement with morals by the courts more explicit should not be seen as a radical departure from the current or pre-HRA position. Indeed such open acknowledgement of the moral dimension of the questions raised by Convention rights will engage the criticism that judges can have regard to their own morality in interpreting rights by ensuring perceptive scrutiny of such reasoning.<sup>51</sup> Acknowledging that such decisions have previously been, and are now more so, part of the allotted judicial function, subject of course to the final decision making power of Parliament,<sup>52</sup> will bolster the legitimacy of those decisions.

### *Gewirthian Dignity*

The content of dignity which must be recognised under Gewirthian theory is closest to the Kantian conception in that it attaches to an aspect of the human condition which is inherently all be it contingently of value to all who poses it<sup>53</sup> and which, having such worth, must be respected.<sup>54</sup> This characteristic is the purposive agency<sup>55</sup> which is at the foundation of the dialectically necessary and contingent arguments to the PGC.<sup>56</sup> With this agency as the characteristic to which dignity attaches, it follows that the interpretation of the human rights which flow from dignity should be interpreted in accordance with the PGC, which

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<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Feldman (n.38), 697 and D. Feldman 'Human Dignity as a Legal Value: Part 2' [2000] *P.L.* 61, 76

<sup>52</sup> s.3(2)(c) and 4(6) HRA 1998 and *A v Secretary of State for the Home Department (Belmarsh)* [2004] UKHL 56, [144] & [220]

<sup>53</sup> Gewirth (n.31), 12 and Beyleveld and Brownsword (n.36), 671

<sup>54</sup> Gewirth (n.31), 17

<sup>55</sup> Ibid, 22-23

<sup>56</sup> Ibid, 19-20 and above p.194-195

dialectically describes the generic rights and interests which must be respected in order to act in accordance with purposive agency.

Under the dialectically necessary method, and as the necessary premise of the contingent arguments,<sup>57</sup> all agents see themselves as distinct from other creatures because of their capacity for freely chosen purposive action, and '[b]y virtue of these characteristics...the agent regards himself as having worth or dignity.'<sup>58</sup> This dignity provides a basis for a conception of human rights as possessed inherently by all humans.<sup>59</sup> Due to the arguments of universalisability and sufficiency of agency, or the contingent application of the moral point of view or the principle of impartiality, in the argument for the PGC, agents must therefore also recognise the dignity of other human agents and therefore must respect the human rights that flow from it.<sup>60</sup> The argument above concerning the status and treatment of possible agents also applies to extend the precautionary protection of human rights to them.<sup>61</sup>

The susceptibility of the concept of dignity in the human rights context to being given content by the conception of purposive agency, and its requirements by the PGC that derives from it, receives supported from judicial engagement with dignity in other countries. The German courts have been particularly proactive in their engagement with the concept of dignity protected with the first article of their constitution. Conversely the Canadian Supreme Court's interpretive use of dignity within their common law system is enlightening because, like the HRA, the Canadian Charter of Rights and Freedoms 1982 contains no mention of dignity.

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<sup>57</sup> Above p.194-195

<sup>58</sup> Ibid, 23 and Beyleveld and Brownsword (n.17), 64

<sup>59</sup> Gewirth (n.31), 15 and Beyleveld and Brownsword (n.36), 671

<sup>60</sup> Gewirth (n.31), 24-25 & 28

<sup>61</sup> Above p.241-243

The clear statement by Article 1(1) of the German Basic Law 1949 (BL) of the inviolability of human dignity was held by the Federal Constitutional Court to be the underlying principle of all other rights within the Basic Law.<sup>62</sup> The reference to the concept of inalienable rights in Article 1(2) BL was influenced by the 18<sup>th</sup> Century revolutions and supports interpreting the conception of dignity in Article 1(1) as proceeding ‘from the assumption that individuals are reasonable beings, autonomous and capable to decide for themselves their own paths to happiness.’<sup>63</sup> Such an interpretation of the characteristic to which dignity attaches is consistent both with the Kantian conception applied by the German constitution court<sup>64</sup> but also with the characteristics of the purposive agent who has dignity under Gewirthian conception. Similarly, the potential for the capacity for purposive action to underlie the conception of dignity can be seen from McIntyre J.’s judgement in the Canadian case of *R v Morgentaler* where he argued it required respect for the choices made by individuals.<sup>65</sup>

### ***The Susceptibility of British Law to a Dignity Basis for Rights Interpretation***

Prior to the coming into force of the HRA there was very little explicit mention of dignity in statute or case law in the sense that it is used in treaties such as the UDHR.<sup>66</sup> Gay Moon and Robin Allan’s review of the law reveals that of the 800 statutes that mentioned dignity, most references are concerned with the dignities of offices such as Bishopsrics.<sup>67</sup> However, since the enactment of the HRA references have increased, with ‘judges, advocates and legislators...increasing confident in referring to dignity.’<sup>68</sup>

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<sup>62</sup> *Mephisto* BVerfGE 30, 173 (1971), T. Weir (trans) <[http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=1478](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1478)> accessed 6 September 2012, [5] and Klein (n.37), 146

<sup>63</sup> Klein (n.37), 149

<sup>64</sup> Eg. *Aircraft Hijacking Case* BVerfGE 357/05, 1 (2006), [119] & [122]

<sup>65</sup> *R v Morgentaler* [1988] 1 SCR 30, 1988 CanLII 90, McIntyre J. (dissenting), [225] & [227]

<sup>66</sup> Feldman (n.51), 62

<sup>67</sup> Moon and Allen (n.3), 625

<sup>68</sup> *Ibid*, 626 report that there have been 48 judicial mentions of dignity in the 5 years following the coming into force of the HRA compared to only 19 in the previous 5.

The greater judicial use of dignity has been accompanied by arguments that the dignity of the individual was in fact protected as an important value by the common law prior to the HRA.<sup>69</sup> Concern for dignity has been argued by Munby LJ., a leading advocate for and practitioner of the judicial use of dignity, to underlie the pre-HRA case law on the treatment of those in a permanent vegetative such as *Bland*.<sup>70</sup> Similarly, David Feldman argues that the well established pre-2000 case law requiring respect for patient control over their medical treatment protected dignity by preventing people from being treated without regard for their opinions as if they were of no worth.<sup>71</sup> Consistent with this he also argues that the decision in *R v Secretary of State for the Home Department Ex p JCWI* gave protection to dignity by seeking to uphold to the fundamental value of the individual<sup>72</sup> which underlies the protection given by the ECHR.<sup>73</sup> Thus, it is apparent that even prior to the enactment of the HRA, the worth and value of the person protected by the references to dignity in treaties mentioned above, can be seen to have already been a concern underlying the judge made common law and now to support more explicit protection and recognition for this worth and value by explicit judicial regard to dignity.

Since the coming into force of the HRA, in the course of interpreting the Convention rights regard has been had to dignity in several cases. The foremost judicial exponents of dignity have been Baroness Hale and Munby LJ. who together have demonstrated its potential utility as an interpretive tool.<sup>74</sup> Both have recognised dignity as the basis of the Convention rights, Baroness Hale quoted the ECtHR's statement in *Pretty*<sup>75</sup> to that effect<sup>76</sup> and Munby LJ.

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<sup>69</sup> *R (A, B, X and Y) v East Sussex CC (No.2)* [2003] EWHC 167 (Admin), [86], *R (Burke) v GMC* [2004] EWHC 1879 (Admin), [57] & [80] and *ibid*, 618

<sup>70</sup> *Burke* (n.69), [58], citing the reference to dignity by Hoffman LJ. in *Bland* (n.1), 829

<sup>71</sup> Feldman (n.38), 685 and Feldman (n.51), 67-68

<sup>72</sup> Feldman (n.51), 61-62

<sup>73</sup> *R v Secretary of State for the Home Department Ex p JCWI* [1997] 1 WLR 275, 292

<sup>74</sup> *Dupre* (n.15), 191 (at FN.5)

<sup>75</sup> *Pretty v United Kingdom* (2002) 35 EHRR 1, [65]

<sup>76</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [132]

argued that although dignity was not mentioned explicitly in the ECHR it is implicit ‘in almost every one of the Convention's provisions.’<sup>77</sup>

Consistent with the use of dignity in the human rights context described above, the domestic courts have held it to be concerned with the value or worth of the individual. Prior to the HRA in *Bland* it was recognised that dignity is the intrinsic value possess by the individual.<sup>78</sup> Subsequently in *Godin-Mendoza* it was held that to treat someone as of lesser value than another person, in this case by discriminating against them, was to fail to respect their dignity.<sup>79</sup> Baroness Hale recognised that the human rights are held by all persons because they are all of equal value, they all possess dignity, and thus she argued discrimination in the respect accorded to them is an unacceptable violation of the very basis on which the rights are held.<sup>80</sup> Recognition of this definitional link between the worth of the individual and their possession of dignity can similarly be seen in the statutory instruction to the Commission for Equality and Human Rights to foster a society which respects ‘the dignity and worth of each individual.’<sup>81</sup> Munby J. summed up the position well by arguing that respect for dignity requires the recognition that a human being is more than a machine, their greater intangible humanity must be respected.<sup>82</sup>

The substantive conception of dignity that has thus far been used by the courts, the specific value that the courts have argued dignity protects, closely resembles the neo-classical conception that has been described previously. However, the current case law on dignity will be argued not to be preclusive of a movement towards the adoption of a conception of dignity

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<sup>77</sup> *East Sussex CC* (n.69), [86]

<sup>78</sup> *Bland* (n.1), 826

<sup>79</sup> *Ghaidan* (n.76), [132], see also *Moon and Allen* (n.3), 629

<sup>80</sup> *Ghaidan* (n.76), [132]

<sup>81</sup> s.3(c) Equality Act 2006

<sup>82</sup> *East Sussex CC* (n.69), [120]

based on purposive agency and the PGC, and to acknowledge the possibility of a conception of dignity that goes beyond the neo-classical.

In *Bland* dignity was held to be concerned with the prevention of demeaning or embarrassing treatment of another.<sup>83</sup> Subsequently in *Campbell* Lord Hoffman reaffirmed his position by stating that dignity is concerned with the ‘right to the esteem and respect of other people.’<sup>84</sup> In his explorations of the concept of dignity Munby J. has similarly applied a neo-classical conception of dignity by talking in terms of the protection of the human person against humiliation and debasement as the concern of ‘human dignity’<sup>85</sup> explicitly following the approach of Hoffman LJ. in *Bland*.<sup>86</sup> In all these cases the mere fact of being a human being has been regarded as the value or worth underlying the dignity of individuals, with even the permanently unconscious being held to possess a dignity worthy of respect.<sup>87</sup>

However, although Munby J. acknowledged the neo-classical conception of dignity stated in previous judgements, he recognised that the concept of dignity was not confined to this narrow speciesist conception of what is of value and had the potential to be a much wider concept embracing ‘such elusive concepts as, for example, (feelings of) independence and access to the world and to others.’<sup>88</sup> These latter elements can be tentatively seen to be closer to the attributes that form purposive agency under a PGC based conception of dignity, the capacity of freely choosing purposes to pursue through action. This suggests that it would not be impossible for the domestic courts to broaden their conception of what dignity encompasses.

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<sup>83</sup> *Bland* (n.1), 826 and Moon and Allen (n.3), 627

<sup>84</sup> *Campbell v MGN* [2004] UKHL 22, [51] and Moon and Allen (n.3), 627

<sup>85</sup> *Burke* (n.69), [178] and *East Sussex CC* (n.69), [121] & [149], see Moon and Allen (n.3), 628

<sup>86</sup> *Burke* (n.69), [58]

<sup>87</sup> *Bland* (n.1), 829

<sup>88</sup> *East Sussex CC* (n.69), [122]



The reason why the British courts have unnecessarily restricted themselves to the neo-classical conception of dignity, in contrast to countries such as Germany who have applied a more Kantian conception,<sup>89</sup> is the sharp line they have drawn between the principle of dignity and that of autonomy. Back in *Bland* dignity and autonomy were distinguished as ‘separate though interrelated principles’,<sup>90</sup> distinct but both concerned with the ethics of how we should live, with the former capable of overriding the latter.<sup>91</sup> This distinction was maintained by Munby J. in his review of the area<sup>92</sup> describing autonomy as protecting ‘self-determination and...bodily integrity’.<sup>93</sup>

This dichotomy has thus resulted in the courts adopting a conception of dignity which does not recognise the capacity for purposive action which, under the arguments to the PGC, dialectically must be what gives humans value.<sup>94</sup> That the concept of dignity should be extended by the domestic courts, to encompass the capacity for purposive action, follows from the fact that such a capacity underlies the principle of autonomy and forms the characteristic of value which the principle of autonomy seeks to protect. The courts protection of autonomy raises the above noted<sup>95</sup> question of why is it that autonomy is worthy of respect and worthy of protection by human rights?<sup>96</sup> The answer to this question can be found, though the dialectical approaches outlined above, to be in purposive agency. As this must be accepted as of fundamental value by such agents, it constitutes their dignity in the sense in which the term is used in human rights documents and concerns the capacities that

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<sup>89</sup> Above p.331

<sup>90</sup> Moon and Allen (n.3), 627

<sup>91</sup> *Bland* (n.1), 826

<sup>92</sup> *Burke* (n.69), [51] & [130]

<sup>93</sup> *Ibid*, [124], adopting Dame Butler-Sloss’s definition in *NHS Trust A v M* [2001] Fam 348, [28], see also *R (Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin), [88]

<sup>94</sup> Above p.329-330

<sup>95</sup> Above p.49

<sup>96</sup> Beyleveld and Brownsword (n.17), 23

are currently protected under the heading of autonomy. Thus, if the arguments to the PGC's dialectical conclusions are valid, the British courts should alter their conception of dignity to encompass the purposive agency elements of the capacity for autonomy they have distinguished it from, as a properly justified basis for the Convention rights and from which they should interpret them.

Practical support for the adoption of such an approach can be seen in the substance of Munby J.'s decision in *R (Burke) v GMC*. The case involved an argument by a patient with spino-cerebellar ataxia, that he should be able to require that artificial nutrition and hydration (ANH) should not be removed from him when his condition irreversibly deteriorated to the extent that he would be dependent on such treatment whilst remaining mentally competent.<sup>97</sup> The applicant argued that removal of ANH against his wishes would violate, amongst others, his Article 3 and 8 Convention rights. Munby J. held that the interest in autonomy which underlay Article 8 encompassed choosing how to pass one's final days, whereas the Article 3 embraced the right to die with dignity.<sup>98</sup> What is significant is that Munby J. recognised that the patient's autonomy interest entailed that it is for patient to determine what would be distressing for him (ie. whether to continue to be treated or to not be treated) and a violation of his dignity, and therefore the competent patient's decision whether ANH should be withdrawn was determinative.<sup>99</sup> This approach is *prima-facie* consistent with the recognition of the basis of the Convention rights in a concept of dignity (encompassing what the courts label as the autonomy interest) characterised by purposive agency.<sup>100</sup> Additionally in *Burke* a neo-classical conception of dignity was stated *obiter* as determining the treatment of incompetent patients, it was held that ANH could be removed from a person who had not

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<sup>97</sup> *Burke* (n.69), [3]-[6]

<sup>98</sup> *Ibid*, [166]

<sup>99</sup> *Ibid*, [166]-[169]

<sup>100</sup> Above p.247, 252-253 & 258-259

demanded that it be continued if ‘right-thinking bystanders’<sup>101</sup> would view its continued provision as humiliating or debasing the victim and thus violating their dignity.<sup>102</sup> This approach could also be brought within a purposive agency and PGC based approach to the interpretation of Convention rights and dignity if it were used as a means of applying precautionary reasoning<sup>103</sup> to determine what treatment should be given to such a patient. Although, the Court of Appeal subsequently criticised Munby J.’s attempt in *Burke* to set out a ‘textbook or practice manual...on the right to treatment generally’<sup>104</sup> with advice on questions which were not pertinent to the case potentially creating confusion,<sup>105</sup> his judgement nonetheless demonstrates the way the principle of dignity can be judicially applied to resolve cases.

Under the approach advocated here, the principle of autonomy is therefore to be characterised more narrowly as protecting a specific element of what the basis of rights in dignity and purposive agency require be respected, rather than being itself a fundamental basis of all rights. Autonomy should instead be invoked as a principle encompassing the protection of the generic rights to freedom.<sup>106</sup> Similarly, the principle of equality is not to be invoked as the basis of rights, but rather as a manifestation of requirements of the Equality of the Generic Rights (EGR)<sup>107</sup> which flows from the basis of rights in purposive agency. In relying on purposive agency as the fundamental basis for the Convention rights and the PGC deriving from it for their interpretation, it is more appropriate for the judiciary to use the principle of dignity to encapsulate and convey the fundamental nature of purposive agency, as interpreted by the PGC, as the basis for the interpretation of the Convention rights, with the principles of

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<sup>101</sup> *Burke* (n.69), [178]

<sup>102</sup> *Ibid*

<sup>103</sup> Above p.241-242

<sup>104</sup> *R (Burke) v GMC* [2005] EWCA Civ 1003, [19]-[20]

<sup>105</sup> *Ibid*, [21]

<sup>106</sup> Above p.180 & 184

<sup>107</sup> Above p.267-268

autonomy and equality invoked as specific manifestations of it. This is more than a mere semantic distinction, it goes directly to the heart of ensuring the judicial and public recognition of the fundamental basis of the Convention rights. The foremost use of dignity over the other principles also links our domestic judicial application of human rights to the wide body of international rights protection, whose preambles frequently cite dignity as their foundation.<sup>108</sup>

This basing of rights judgments in dignity will be argued below to also have the advantage of increasing the acceptability of human rights more generally within the UK, by highlighting their fundamental nature.<sup>109</sup> However, the open use of a concept of dignity specifically characterised by purposive agency has advantages over the mere invocation of dignity as loose and general justification, or as defined by the neo-classical perspective. The PGC, which derives from purposive agency, has been shown above to be capable of giving specific and dialectically grounded guidance on the five fundamental questions of rights interpretation.<sup>110</sup> With a more defined content than the neo-classical conception, the answers to the five questions can be logically derived, rather than having to be divined from what the nebulous status of being a human entails. In contrast to the Kantian conception of dignity, the approach of purposive agency again provides a more detailed conception of what interpretations follow from this basis, due to the PGC's more detailed content and its nature as a rights based theory fitting the core features of the Convention rights.

At present it is apparent that currently domestic judicial regard to the underlying value of dignity in human rights cases is not widespread. Where it is used, the neo-classical

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<sup>108</sup> Above p.323-324, Eg. Universal Declaration of Human Rights 1948, International Covenants on Civil and Political Rights and Economic Social and Cultural Rights 1966 and UN Convention on the Rights of the Child 1989

<sup>109</sup> Below p.355-357

<sup>110</sup> Above p.235-321

conception applied is limited and does not reflect the characteristics that has been argued to be dialectically of worth. However, the current case law has the potential to develop to into one which openly recognises purposive agency as the attribute which characterises dignity and the basis to which rights attach.

### ***Extra-national Support for the Increased Domestic Regard to Dignity***

Support for the recognition and adoption of a concept of dignity grounded in purposive agency and its wider interpretive use by the British courts can also be found in the jurisprudence of other countries and in the protection of human rights above the national level.

### *Dignity in other States*

It has already been noted that the German and Canadian courts have developed conceptions of dignity which they have regard to in some of their human rights judgements. Although these legal systems and systems of rights protection vary in their similarity to the British common law and the HRA, influencing the consequent strength of the analogies that can be drawn from them,<sup>111</sup> these jurisdictions demonstrate the practicality of the judicial interpretive use of dignity.

The Canadian use of dignity is of particular significance in supporting the interpretive application of dignity in the United Kingdom. The courts of Canada have recognised dignity as underlying the rights<sup>112</sup> in the Canadian Charter of Rights and Freedoms (CCFR)<sup>113</sup> and have been prepared to use it to interpret the Charter Rights even though, as with the HRA,

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<sup>111</sup> D. Ulrich, 'Concurring Visions: Human Dignity in the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany' (2003) 3(1) *Global Jurist Frontiers* 1, 3

<sup>112</sup> Eg. *Morgentaler* (n.65), McIntyre J. (dissenting) [225] & [227]

<sup>113</sup> Constitution Act 1982, Part I

there is no explicit mention of the dignity in that rights document.<sup>114</sup> The Canadian Supreme Court has nevertheless recognised that dignity is one of the ‘values and principles essential to a free and democratic society’<sup>115</sup> and as such should guide the Court in its interpretation of the Charter rights.<sup>116</sup>

The Canadian courts have to a certain extent used the reference to dignity in the preamble of the 1960 Canadian Bill of Rights to support their use of it in the interpretation of the Charter rights.<sup>117</sup> It is conceded that the HRA contains no provision comparable to the Bill’s recognition that the ‘dignity and worth’ of the human person are founding principles of the nation however, in spite of this comparative difference, the Canadian experience can still be seen to support the interpretive use of dignity by the British judiciary. The Canadian legal system is a child of our common law system and in several cases the Canadian judges have found a basis for the interpretative use of dignity in the common law as well as their Bill of Rights.<sup>118</sup> In *R v Stillman* Cory J. based his interpretive use of dignity upon the recognition that ‘[t]raditionally, the common law and Canadian society have recognised the fundamental importance of the innate dignity of the individual.’<sup>119</sup> Similarly, in *R v S (R.J.)* it was recognised that the dignity was a fundamental value which underlay not only the CCFR but also the common law.<sup>120</sup> The experience in Canada thus indicates that, although unlike Germany the principle of dignity is not explicitly stated within our core human rights document, this is not an absolute bar to its use in judicial interpretation of those rights.

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<sup>114</sup> McCrudden (n.6), 685 and Ulrich (n.111), 3 & 22, eg. *Morgentaler* (n.65), McIntyre J. (dissenting) [225] & [227]

<sup>115</sup> *R v Oakes* [1986] 1 SCR 103, 1986 CanLII 46, [64]

<sup>116</sup> *Ibid* and *Re Secession of Quebec* [1998] 2 SCR 217, 1998 CanLII 793, [64], see also Ulrich (n.111), 21

<sup>117</sup> *Re Motor Vehicle Act (British Columbia) s. 94(2)* [1985] 2 SCR 486, 1983 CanLII 268, [30], see also Ulrich (n.111), 17

<sup>118</sup> Ulrich (n.111), 16-17

<sup>119</sup> *R v Stillman* [1997] 1 SCR 607, 1997 CanLII 384, [88]

<sup>120</sup> *R v S (R.J.)* [1995] 1 SCR 451, 1995 CanLII 121, [270]

### *Dignity above the National Level*

The characteristics of the conception of dignity widely found within international human rights documents,<sup>121</sup> as encapsulating the basis of the rights in human value,<sup>122</sup> has been described in detail previously. Its prominent position<sup>123</sup> in their preambles has given dignity a central position in human rights discourse<sup>124</sup>

Such widespread recognition can be called upon to support the domestic courts use of the concept of dignity to interpret the Convention rights, many of which closely resemble those found in the rights treaties. More specifically, prior to the creation of the HRA and in the absence of clear domestic protection for fundamental rights, over the course of 25 years the courts had developed a cannon of statutory interpretation under which it was permissible to have regard to international human rights treaties to interpret the provisions of domestic statutes.<sup>125</sup> In the earliest case of *Waddington v Miah*<sup>126</sup> Lord Reid cited the prohibitions on retroactive criminal legislation in the UDHR and ECHR as supporting the conclusion that Parliament could not have intended to pass such legislation and therefore held the provision in question should not be construed as having that effect.<sup>127</sup> In this decision Lord Reid can be seen to argue for a presumption in favour of a construction of legislation that was consistent with assuming an intention on the part of Parliament to legislate in accordance with the countries' international obligations.<sup>128</sup>

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<sup>121</sup> McCrudden (n.6), 668 and Feldman (n.38), 683-684, Eg. UDHR, ICCPR, ICESCR and the UN Convention on the Rights of the Child 1989

<sup>122</sup> Beyleveld and Brownsword (n.17), 11, Clapham (n.36), 538 and Feldman (n.38), 682

<sup>123</sup> Moon and Allen (n.3), 610

<sup>124</sup> McCrudden (n.6), 655 and Clapham (n.36), 537

<sup>125</sup> See generally M. Hunt, *Using Human Rights Law in English Courts* (Hart 1998), 131-139

<sup>126</sup> *Waddington v Miah* [1974] 1 WLR 683

<sup>127</sup> *Ibid*, 694-695

<sup>128</sup> Hunt (n.125), 132

The open textured nature of the Convention rights stated within the Human Rights Act makes the use of this pre-HRA case law particularly apt, for it was in particular used to address ambiguities in statutory meaning.<sup>129</sup> Although the incorporation of the Convention rights has significantly reduced the need for the courts to have regard to this cannon of interpretation as a circuitous means of protecting human rights, it has the potential to support the courts in the use of the frequent mentions of dignity in international rights treaties to which the United Kingdom is a party, to interpret the Convention rights. Practical support for such an approach can be found in the case law of Canadian Supreme Court where the protection of dignity in rights treaties has been recognised as a source of interpretation of the CCFR.<sup>130</sup> Some encouraging steps towards such a regard to use of dignity in other rights documents can be seen in Lord Steyn's judgement in *R (European Roma Rights Center) v Immigration Officer, Prague Airport*.<sup>131</sup> Here, in the course of construing the non-discrimination requirements of customary international law, the noble Lord cited the Article 1 UDHR statement of equal dignity of all human beings and noted that the ECHR and other rights treaties were 'direct descendants of the Universal Declaration.'<sup>132</sup> Similarly, Munby LJ. in the course of his judgement in *R (A, B, X and Y) v East Sussex CC (No.2)*, which made considerable interpretive use of concept dignity, noted the prominent place given to it within the UDHR.<sup>133</sup>

Munby LJ. in *E. Sussex CC (No2)* also relied upon the references to dignity in the Charter of Fundamental Rights of the EU to support his interpretive use of it.<sup>134</sup> Prior to the creation of the EU Charter A-G Stix-Hackl argued that '[a]s an emanation and as specific expressions of human dignity...all (particular) human rights ultimately serve to achieve and safeguard

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<sup>129</sup> *R v Secretary of State for the Home Department Ex p Phansopkar* [1976] QB 606, 626

<sup>130</sup> *Re Public Service Employee Relations Act* [1987] 1 SCR 313, 1997 CanLII 88, Dickson C.J. (dissenting), [57], see also [59] and Ulrich (n.111), 11-12

<sup>131</sup> *R (European Roma Rights Center) v Immigration Officer, Prague Airport* [2005] 2 AC 1

<sup>132</sup> *Ibid*, [46]

<sup>133</sup> *East Sussex CC* (n.69), [72]

<sup>134</sup> *Ibid*, [71] & [73]



human dignity',<sup>135</sup> this sentiment has been reflected in the Charter whose first chapter is dedicated to dignity and includes the rights to life, personal integrity and freedom from slavery or torture, and whose drafters recognised dignity as the basis of rights.<sup>136</sup>

Although there is no explicit mention of dignity in the ECHR, its preamble makes several references to the UDHR and states that the Convention is aimed at furthering certain of the rights the UDHR recognises as universal. This is significant because the UDHR's preamble makes reference to dignity as the basis of the need for universal respect for the rights which the ECHR in turn claims to further. Thus, it can be argued that in this way the ECHR can itself be seen to be implicitly claiming a basis in human dignity<sup>137</sup> and Munby LJ. can be seen to be vindicated in his argument that the protection of dignity is implicit within the Convention rights.<sup>138</sup>

In spite of the absence of explicit mention of dignity which Jochen Frowein attributes to the view on the part of the drafters that it was too wide a concept to include,<sup>139</sup> the ECtHR held in *Pretty v United Kingdom* that respect for dignity was 'the essence of the Convention',<sup>140</sup> recognising it as underpinning the substantive rights.<sup>141</sup> Such recognition has formed the basis for the various judgements in which the judicial organ of the Convention have made use of it in giving cogent meaning to the Convention rights<sup>142</sup> beginning with the Commission's

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<sup>135</sup> *Omega* (n.3), [AG81]

<sup>136</sup> European Convention, 'Draft Charter of Fundamental Rights of the European Union' CONVENT 49, 3 and Moon and Allen (n.3), 622, see also Hale (n.6), 104

<sup>137</sup> Moon and Allen (n.3), 621 and Feldman (n.38), 689

<sup>138</sup> *East Sussex CC* (n.69), [86]

<sup>139</sup> J. Abr. Frowein, 'Human Dignity in International Law' in *The Concept of Human Dignity in Human Rights Discourse* (n.2), 123

<sup>140</sup> *Pretty* (n.75), [65], see also Hale (n.6), 104 and S. Millns, 'Death, Dignity and Discrimination: The Case of *Pretty v United Kingdom*' (2002) 3(10) *German Law Journal*, [14] <<http://www.germanlawjournal.com>> accessed 6<sup>th</sup> September 2012

<sup>141</sup> McCrudden (n.6), 683

<sup>142</sup> Clapham (n.36), 538 and *ibid*

judgement in the *East African Asians Case*<sup>143</sup> and the Court's judgement in *Tyrer v United Kingdom*.<sup>144</sup> The ECtHR has considered dignity in interpreting a verity of Convention rights,<sup>145</sup> in particular Articles 3,<sup>146</sup> but also Articles 2,<sup>147</sup> 7,<sup>148</sup> 8<sup>149</sup> and 10.<sup>150</sup> As the HRA actively encourages that account be taken of ECtHR's jurisprudence in the interpretation of the Convention rights<sup>151</sup> these judgements provide strong support for the use of dignity in interpretation by the British courts.

The relationship between domestic judgements on the interpretation of the Convention rights and relevant ECtHR jurisprudence has been described as characterised by the mirror principle.<sup>152</sup> However, even if this questionable self-limiting position continues to be maintained by the courts, and is applied to the tools of interpretation as well as the substantive decisions of the ECtHR as has been the case with the principle of proportionality,<sup>153</sup> it is submitted that this need not prevent the British judiciary from applying a conception of dignity characterised by purposive agency.

As noted previously, the ECtHR in *Pretty* stated a neo-classical approach to dignity<sup>154</sup> which is conceptually different from that entailed by Gewirthian theory. However, in the early case of *Tyrer* the ECtHR, as well as applying the neo-classical conception,<sup>155</sup> did appear to

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<sup>143</sup> *East African Asians v United Kingdom* (1981) 3 EHRR 76

<sup>144</sup> *Tyrer v United Kingdom* (1979-80) 2 EHRR 1

<sup>145</sup> See generally: Feldman (n.38), 691-694

<sup>146</sup> *East African Asians* (n.143), [207]-[208], *Tyrer* (n.144), [33] and [35], *Ribitsch v Austria* (1996) 21 EHRR 573, [38]

<sup>147</sup> *Pretty* (n.75), [8], [39] & [65], see generally Millns (n.140), [8]

<sup>148</sup> *SW v United Kingdom* (1996) 21 EHRR 363, [44]

<sup>149</sup> *Pretty* (n.75), [18], [21] & [65], see generally Millns (n.140), [14] & [19]

<sup>150</sup> *Gündüz v Turkey* (2005) 41 EHRR 5, [40]

<sup>151</sup> s.2(1) HRA

<sup>152</sup> Above p.218-219

<sup>153</sup> Above p.220

<sup>154</sup> Above p.46

<sup>155</sup> *Tyrer* (n.144), [35], see also Feldman (n.38), 691

recognise that the principle of dignity could be violated by treating a person as an object,<sup>156</sup> echoing the conception of dignity applied by the German constitutional court which goes beyond the neo-classical.<sup>157</sup> Similarly, just as the conception of autonomy used by the British courts should be seen to be founded in and required by a conception of dignity, so too can the principle of autonomy used in interpretation by the ECtHR. In *Pretty* the ECtHR argued that the principle of the autonomy of the individual involves respect for the choices of individuals as to how they live their lives<sup>158</sup> which is consistent with the purposive agency that is at the heart of the Gewirthian conception of dignity. Thus, although the conception of dignity adopted by the ECtHR appears to be different from one characterised by purposive agency, the divergence is not sharply cut.

The mirror principle itself requires that in determining the scope and applicability of the Convention rights the domestic courts give no more or no less protection than is given in ECtHR judgements.<sup>159</sup> However, in this principle the domestic courts have tightly bound themselves to Strasbourg's substantive judgements, through fear of being out of step and to allow Strasbourg the final determination of the requirements of the Convention,<sup>160</sup> not the means of interpretation by which they are arrived. Although it has been noted that the courts have held that they should apply the proportionality standard of review used by Strasbourg, rather than the domestic judicial review standards, they have held that the value judgements and evaluations made in the course of such review are for themselves to decide subject to the supervision of the ECtHR.<sup>161</sup>

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<sup>156</sup> *Tyrer* (n.144), [33], see also *Frowein* (n.139), 124

<sup>157</sup> *Aircraft Hijacking* (n.64), [119] & [122]

<sup>158</sup> *Pretty* (n.75), [61]-[62] and see also *Goodwin v United Kingdom* (2002) 35 EHRR 18, [90]

<sup>159</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [20] and *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26, [106]

<sup>160</sup> This is apparent from concern in *Al-Skeini* (n.159), [106] that the state would be unable to appeal domestic judgements on the interpretation of rights.

<sup>161</sup> *R (Begum) v Governors of Denbigh High School* [2006] UKHL 15, [29]

Thus, it can be seen that, although the courts continue to bind themselves to follow Strasbourg's final determinations, it is open to the domestic courts to apply a different conception of dignity when interpreting the rights for themselves where the conclusion in a case is not clearly indicated by ECtHR jurisprudence or is left to the court under a margin of appreciation. The mirror principle does not present a general obstacle to the courts applying a conception of dignity characterised by purposive agency and using it and the generic rights which follow from it to interpret the Convention rights.

### *The Practicality of Dignity*

It has been shown to be legally and theoretically desirable for judicial regard to be had to a conception of dignity based in purposive agency and the PGC that gives content to it in deciding questions of the interpretation of Convention rights. That dignity can practically be used in resolving the five key questions of rights interpretation, is apparent from the case law of other countries and the tentative steps have already been made to use it in this way in the United Kingdom.

Both the Canadian Supreme Court (CSC) and the German Federal Constitutional Court (FCC) have explicitly recognised that dignity, by virtue of its fundamental nature underlying other rights, can be used to interpret those rights.<sup>162</sup> Although the CSC has not yet made clear where a person begins to be a human with dignity,<sup>163</sup> the FCC has had regard to dignity in holding that a foetus's life is of value<sup>164</sup> and demonstrated the role of dignity in determining who has rights. In both systems the courts have made use of dignity in balancing competing

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<sup>162</sup> *Stillman* (n.119), [88], *R v S (R.J.)* (n.120), [270], *Census Act Case* BVerfGE 65, 1 (1983), 41 (noted by Klein (n.34), 152-3), Klein (n.34), 157 and for example *Mephisto* (n.62), [5]

<sup>163</sup> Ulrich (n.111), 30

<sup>164</sup> *First Abortion Decision* BVerfGE 39, 1 (1975) (R. Jonas and J. Gorby (trans) 'West German Abortion Decision: A Contrast to *Roe v Wade*' (1975-1976) 9 *J. Marshall Journal of Practice and Procedure* 605), 617

rights, characterising the rights of both parties in terms of the concern for dignity which underlies them<sup>165</sup> and seeking to avert the more grievous interference with dignity.<sup>166</sup>

Munby J., in *E. Sussex (No2)*, recognised that basing the Convention rights in dignity entailed that dignity had to be considered in balancing the rights of the claimants to manual handling against those of their carers to a safe working environment, the rights of both being underpriced by their dignity.<sup>167</sup> He also recognised in the same case that the protection of dignity could also lead to positive obligations upon the state ‘to secure...essential human dignity’.<sup>168</sup>

In relation to the debate concerning whether a will or interest conception of rights should be adopted, the French *Conseil d'Etat* in *Lancer de Nain* applied an interest conception of dignity to find that the M. Wackenheim, a dwarf sized person, could not waive the benefit of his right not to be treated as a projectile which was protected under Article 3 ECHR.<sup>169</sup> This case also shows a recognition that the dignity of individuals can be infringed in a horizontal manner by other individuals, in addition to the engagement of dignity in the context an individuals vertical relationship with the state that is found in other cases.

It is also apparent in the case law addressing most of these core questions of rights interpretation, that principles of autonomy and equality have been invoked by the courts in justifying their interpretations. Under the approach advocated here, these could provide helpful clarification of the specific aspect of the requirements of purposive agency and the

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<sup>165</sup> Germany: McCrudden (n.6), 717, eg. *ibid*, 617-618 & 633; Canada: McCrudden (n.6), 718 and Ulrich (n.111), 29, eg. *R v Keegstra* [1990] 3 SCR 697, (1990) CarswellAlta 192, [94]-[95], *Ross v New Brunswick School District* [1996] 1 SCR 825, 1996 CanLII 237, [94]

<sup>166</sup> McCrudden (n.6), 719

<sup>167</sup> *East Sussex CC* (n.69), [117]-[118]

<sup>168</sup> *Ibid*, [93]

<sup>169</sup> *Lancer de Nain*, Conseil d'Etat, 27 October 1995 – 265340

PGC that is being applied by the courts. However, in order for the fundamental basis for the interpretation of the rights in purposive agency to be made clear, it is, as argued above, essential that these other secondary principles be acknowledged to be ultimately protecting the dignity of the individual from which they derive their content.<sup>170</sup> Were autonomy and equality to be used in isolation, without a stated basis in dignity, the dialectical basis of their requirements in purposive agency and the PGC would not be apparent, and their moral force would be less explicit.

As the question of who can possess rights is directly concerned with the question of the basis on which they are held, dignity as the most fundamental principle of human rights discourse,<sup>171</sup> rather than autonomy or equality, is the most appropriate principle for the courts to invoke. However, in determining the extent and assistance of the negative and positive obligations under the Convention, the case law shows that autonomy and equality could usefully be invoked to explain the more specific substantive requirements of the basis of the rights in dignity characterised by purposive agency. In the law on privacy, autonomy and individual freedom have been regularly invoked to justify interpretations of the scope of negative obligations imposed under Article 8,<sup>172</sup> giving effect to the generic right to freedom which underlies several Convention rights.<sup>173</sup> Similarly, the principle of equality could continue to be invoked in the context of positive rights imposed by Article 14,<sup>174</sup> to more clearly explain how the dignity basis of purposive agency requires that the generic rights of all agents be protected under the EGR.

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<sup>170</sup> Above p.49-51 and p.327-328

<sup>171</sup> Above p.44-45 & 322-324

<sup>172</sup> Above p.261-262

<sup>173</sup> Above p.261

<sup>174</sup> Above p.271

In the context of the balancing of conflicting rights, the principle of autonomy, sometimes in the form of freedom,<sup>175</sup> is invoked by the courts to justify their decisions. In *Campbell* the Lords considered the claimant's autonomy, weighing the interference with her ability to pursue her purposes against the importance of the press's freedom to report her drug treatment.<sup>176</sup> However, the generic right of freedom of action, which autonomy most easily embodies,<sup>177</sup> is only one factor that the PGC requires be considered when balancing generic rights. Questions of moral status, being connected directly to the basis on which the rights are held, are better encapsulated within the concept of dignity, and the multifaceted needs of well-being are broader than autonomy and all fall within the requirements of dignity defined by purposive agency.<sup>178</sup> Additionally, when the courts must balance competing autonomy claims, as in *Pretty* where the Article 8 claim to choose to end one's life conflicted with the danger to the Article 2 rights of the vulnerable who might be pressured into choosing to die, another standard is required.<sup>179</sup> The protection of dignity can encompass this standard under the PGC, focusing upon the needfulness of the generic good or Convention right in question to a person's purposive agency.<sup>180</sup> Thus, although autonomy is a useful principle in encapsulating one aspect of the PGC's application to the interpretation of Convention rights, it is not by itself sufficient.

Autonomy is similarly relevant as a principle which could be invoked in applying the will conception nature of the Convention rights. When characterised in terms of freedom of action, autonomy explains in a practical sense the ability being given effect to when the waiving of the benefits of rights is upheld, thus in *Brown* the claimants argued autonomy

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<sup>175</sup> Above p.42

<sup>176</sup> *Campbell v MGN* [2005] UKHL 61, [12], [55], [105] and above p.292

<sup>177</sup> Above p.42 & 261-262

<sup>178</sup> Above p.284-290

<sup>179</sup> Above p.56

<sup>180</sup> Above p.284-285

required their choices be respected.<sup>181</sup> However, whether rights conform to the will or interest conception has been noted above to be determined by the very basis on which the rights are held, the characteristic to which the rights attach, the content of the principle of dignity within human rights discourse.<sup>182</sup> Thus, here as on other questions, to determine and explain what autonomy requires on this question, to which conception it is giving effect, regard must be had to dignity. To attempt to answer this question merely in terms of autonomy does not give a full reasoned justification for the conception of rights arrived at.

The final question, of the vertical and horizontal applicability of rights, is similarly determined by the basis on which rights are held. Thus dignity should be invoked to encapsulate the ultimate foundational characteristic on which a fundamental argument for the applicability of the Convention rights must be made. As argued previously, the EGR entails that positive obligations to ensure the fulfilment of other agent's generic rights can be interpreted as requiring horizontal effect be given to the Convention rights between individuals.<sup>183</sup> If claims of dignity and equality are combined, a strong argument can be made for increasing the horizontal effect of the Convention rights. However, although philosophically justified, it would require a significant departure from the current interpretation of the HRA and Article 14, whose contingent nature prevents equality being applied to create horizontal effect outside of the area positive obligations.<sup>184</sup>

It has thus been shown that dignity by itself, or together with the elaboration provided by autonomy and equality, can be used by the judiciary to give effect to the requirements of the PGC in answering the five questions of rights interpretation. This indirect means of using the

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<sup>181</sup> As in *Brown* where the claimant's interests were described in terms of the protection of autonomous choices: *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39, [44]-[45]

<sup>182</sup> Above p.91-96

<sup>183</sup> Above p.269-271

<sup>184</sup> Above p.272



dialectical requirements of purposive agency to interpret the Convention rights, compared to an unmediated open judicial application of the PGC, is necessitated by the practical and legal environment within which the judiciary operates.

Although regard to the PGC is dialectically required and answers the five questions of rights interpretation, direct appeal to it alone would be a significant departure for the British legal system. Human rights have only recently been adopted domestically as substantive norms governing legislation and judicial decisions. There has also been past rejections by the judiciary of open moral decision making and the creation of 'systems of morality.'<sup>185</sup> This has moderated to some extent under the HRA, with the increased use of principles such as dignity,<sup>186</sup> but a judiciary which is still hesitant to use such general principles would be even more wary of explicit 'systems of morals'<sup>187</sup> such as the PGC.

Judicial willingness to rely upon dignity as a principle of interpretation, although not yet widespread, is slowly increasing,<sup>188</sup> with politicians and others also making use the language of dignity in the rights context.<sup>189</sup> As a consequence of this, to invoke dignity as a means through which to apply the PGC, is to present it as a development of the current law rather than a radical departure from it. This would be more politically, publically and judicially acceptable than simple invocation of the PGC, thereby lessening resistance to decisions based upon it.

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<sup>185</sup> *Bland* (n.1), 825, *R (Pretty) v DPP* [2001] UKHL 61, [2] and above p.328-329

<sup>186</sup> Above p.331-333 & 335

<sup>187</sup> *Bland* (n.1), 825

<sup>188</sup> Above p.331

<sup>189</sup> Eg. D. Cameron, *Speech on the European Court of Human Rights*  
<<http://www.number10.gov.uk/news/european-court-of-human-rights/>> accessed 11<sup>th</sup> April 2013

The widespread use of dignity within international human rights law and discourse<sup>190</sup> similarly makes this a more acceptable principle than a boldly stated PGC. The general acceptance of dignity as shorthand for the basis of rights, has the advantage of familiarity, which the concept of purposive agency does not. Thus, just as purposive agency and the dialectical PGC give content to dignity and its requirements, so dignity explains the nature of purposive agency and the PGC as deriving from it. These advantages of dignity as a vector through which to give effect to moral principles is not unique to this argument, they were, as noted previously, the reasons for use of the concept of dignity in the first rights treaties, and it can perform a similar function in our domestic legal system.

#### *Potential Problems with the use of Dignity*

The core problem with the practical judicial use of dignity that Feldman identifies is that it is capable of being imbued with different meanings, to greater extent than even the specific substantive human rights that it is argued to underlie.<sup>191</sup> It has already been noted that it was this characteristic that led to its use in the preambles of rights documents as a basis for the rights they contained.<sup>192</sup> Whilst this metamorphic quality is politically desirable in achieving agreement amongst states upon dignity as the basis of rights, when called upon to as an aid to the interpretation of specific rights, without substantive form it cannot provide specific guidance<sup>193</sup> and can merely direct judges to consideration of the basis of rights in broad terms.<sup>194</sup>

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<sup>190</sup> Above p.323

<sup>191</sup> Feldman (n.38), 682, this has also been noted by Moon and Allen (n.3), 616, C. Gearty, *Principles of Human Rights Adjudication* (OUP 2004), 84 and *Omega* (n.3), [AG74]

<sup>192</sup> Above p.325-326

<sup>193</sup> Moon and Allen (n.3), 615 and HL Deb 19 October 2005 vol.674, col.829-830

<sup>194</sup> Feldman (n.51), 75-76 and Ulrich (n.111), 103

Given the open textured nature of dignity, Feldman argues that if used by the judiciary to interpret substantive rights it creates the potential that judges will apply their own morality to give it content.<sup>195</sup> Additionally as it is apparent that there are multiple possible and conflicting conceptions of dignity and of the constituent human worth<sup>196</sup> this creates the potential for inconstancy when principle is applied and in the conclusions reached using it,<sup>197</sup> which in turn may render judgements reached using the principle of dignity of questionable legitimacy<sup>198</sup> given that certainty is an important element of the rule of law.<sup>199</sup> Feldman thus warns that judicial regard to dignity may ‘simply shift the terminology in which disputes are conducted rather than resolv[e] them,’<sup>200</sup> limiting its utility as a judicial interpretive tool.<sup>201</sup>

However, these particular arguments against the interpretive use of dignity are largely addressed when the principle is given content by the concept of purposive agency and the generic rights that derive from it within the PGC.<sup>202</sup> Derived by dialectical reasoning, whether directly necessary or via the contingent assumption of the moral point of view or the golden rule, imbues dignity with a content which must be accepted on pain of logical inconsistency or the abandonment of a commitment of the current human rights regime.<sup>203</sup> The form of this argument for this consent to be given to dignity, the avoidance of self contradiction, is itself not alien to the domestic courts. It was apparent in the Torture

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<sup>195</sup> Feldman (n.38), 697 and Moon and Allen (n.3), 616-617

<sup>196</sup> Feldman (n.51), 75, McCrudden (n.6), 712 and Dupre (n.15), 191 and above p.44-48

<sup>197</sup> Beyleveld and Brownsword (n.17), 25-26 (citing the example of dwarf tossing), Hale (n.6), 106, Feldman (n.51), 70 and Millns (n.140), [5]

<sup>198</sup> Feldman (n.38), 697 and Moon and Allen (n.3), 617

<sup>199</sup> *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 638 and T. Bingham, *The Rule of Law* (Penguin 2011), 38-39

<sup>200</sup> Feldman (n.38), 688 & 699

<sup>201</sup> *Ibid.*, 698 and Gearty (n.191), 91

<sup>202</sup> Cf. S. Fredman, ‘From deference to democracy: the role of equality under the Human Rights Act 1998’ (2006) 122 *L.Q.R.* 53, 72 who recognises this problem and attempts to define dignity using underlying concepts of distributive justice. Cf. Gearty (n.191), 85 & 88 who argues the problem will be addressed through a marketplace of ideas.

<sup>203</sup> Above p. 184-189, 194-196 & 200-201

Evidence case of *A v Secretary of State for the Home Department (No.2)*<sup>204</sup> where Lord Hoffman argued that the courts could not accept evidence obtained by torture without contradicting the fundamental tenets of the British legal system.<sup>205</sup> If this approach is accepted then the problem of the uncertainty and competing conceptions of dignity is resolved in favour of purposive agency and the PGC.

It is acknowledged that, even guided by the PGC, there is still room for judicial disagreement about what respect for purposive agency and the generic rights or interests that follow from it require on the facts of particular cases.<sup>206</sup> However, such disagreement currently exists in judicial attitudes as to how the Convention rights should be interpreted, and all interpretative approaches carry with them the potential for disagreement as to how they should be applied and the need for them themselves to be interpreted.<sup>207</sup> The advantage of regard to a PGC inspired conception of dignity is that their judgements will be guided by a fundamental justificatory basis of human rights.<sup>208</sup> The role of deciding such disputes within a society has been allocated by society to the judiciary, and although this cannot ensure consensus or guarantee correctness of interpretation of the requirements of purposive agency and the PGC, it has been decided to give them the adjudicative jurisdiction over the interpretation of human rights.<sup>209</sup>

This adjudication is not undemocratic, rather it strengthens ‘accountability by exposing decisions to public scrutiny.’<sup>210</sup> In protecting minorities from intolerant majorities, the courts

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<sup>204</sup> *A v Secretary of State for the Home Department (No.2) (Torture Evidence)* [2005] UKHL 71

<sup>205</sup> *Ibid*, [82] & [91]

<sup>206</sup> A. Gewirth, *Reason and Morality* (University of Chicago Press 1978), 245 acknowledges this in relation to the protection of additive goods.

<sup>207</sup> H. Hart, *The Concept of Law* (2<sup>nd</sup> edn, OUP 1994), 126-127

<sup>208</sup> Gewirth (n.31), 13

<sup>209</sup> Fredman (n.202), 54-55

<sup>210</sup> *Ibid*, 62 & 76 and D. Beyleveld and S. Pattinson, *Defending Moral Precaution as a Solution to the Problem of Other Minds: A Reply to Holm and Coggon* (2010) 23(2) *Ratio Juris* 258, 269

act democratically by upholding the value of each individual upon which democracy is based,<sup>211</sup> enabling minorities to have means by which to participate in process of which legitimates the norms effecting them.<sup>212</sup> As Fredman argues, this can be seen in practice from the nature of the claimants who have been ‘prisoners, detainees, the homeless and the excluded.’<sup>213</sup>

### ***From the Acceptance of Dignity to the Acceptance of Rights***

The success of a transplantation of a norm has long been argued by constitutional theorists to be heavily dependent on its compatibility with the contextual characteristics of the recipient legal system,<sup>214</sup> including its ‘maxims of government’,<sup>215</sup> political context<sup>216</sup> and the ‘social, cultural and legal circumstances that have shaped’<sup>217</sup> its constitution, when contrasted with those of the donor system. Unlike the French Declaration of the Rights of Man and the Citizen, the German Basic Law or indeed the ECHR, the HRA did not arise from any clear widespread movement to depart from a system of government which involved sustained systematic infringement of the fundamental value of man. In light of this difference of context, it is less surprising that its introduction and enforcement has been met with some resistance.<sup>218</sup> It is submitted that this domestic context can be seen to be an underlying cause of the perception amongst some sections of the British public and press that the HRA’s incorporation of the Convention rights is an alien and unnecessary piece of legislation imposed by our European neighbours.

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<sup>211</sup> *Ghaidan* (n.76), [132] and Fredman (n.171), 68

<sup>212</sup> Fredman (n.202), 77

<sup>213</sup> Fredman (n.202), 77 cites: *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, *R v Secretary of State for the Home Department ex p Simms* [2000] 2 AC 115, *R v DPP ex p Kebilene* [2000] 2 AC 326, *A (Belmarsh)* (n.52), *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, *Qazi v Harrow* [2003] UKHL 43, *Bellinger v Bellinger* [2003] UKHL 21 and *Ghaidan* (n.76).

<sup>214</sup> C. Montesquieu, *The Spirit of Laws* (first published 1748, Prometheus Books 2002), vol.2, 164

<sup>215</sup> *Ibid*, 293-294

<sup>216</sup> A. Watson, ‘Legal Transplants and Law Reform’ (1976) 92 *L.Q.R.* 79, 81 and O. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *M.L.R.* 1, 11-13 & 17

<sup>217</sup> Ulrich (n.111), 3

<sup>218</sup> Watson (n.216), 81

In the absence of such a nationwide popular movement recognising the need for the greater protection of rights, it is submitted that one means by which the acceptance of the Convention rights as part of domestic law might be increased is by clearly showing them to be based in the fundamental value individuals share by being a human. The HRA like the ECHR contained no such explicit recognition of the basis of human rights in the value shared by all humans<sup>219</sup> which constitutes their dignity. However, by clearly rooting the interpretation of the Convention rights in a philosophically cogent concept of the dignity of the individual, it is submitted that the judiciary might help counter the perception of human rights protection as something alien and unnecessary. By basing rights in dignity they can be clearly seen to derive from an element of what it is to be human, and thus be possessed by all humans, rather than being a foreign imposition.

Were the British Bill of Rights currently under consideration<sup>220</sup> actually created, a preambular commitment to dignity would be desirable. It would signal a clear metaphysical grounding for the rights which is not explicit in the HRA. It would also give the strongest legal support to judicial regard to dignity in the interpretation of human rights and hence also facilitate judicial regard to purposive agency and the generic rights as the basis for rights interpretation. The Bill of Rights Commission was tasked with promoting ‘a better understanding of the true scope’<sup>221</sup> of the Convention rights and existing British liberties, the recognition of philosophically cogent conception of dignity as the basis of these may go some way to achieving this aim.

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<sup>219</sup> Fredman (n.202), 53

<sup>220</sup> Commission on a Bill of Rights, ‘Do we need a UK Bill of Rights?’ (Discussion Paper) (August 2011, Revised September 2011) < <http://www.justice.gov.uk/downloads/about/cbr/cbr-discussion-paper.pdf> > accessed 6 September 2012

<sup>221</sup> Ibid, [1]

## ***Conclusion***

It is thus, through the use of the concept of dignity, legitimate and practically possible for the courts to have regard to purposive agency and the PGC deriving from it as a justified basis from which to interpret the Convention rights. By doing so the courts gain guidance in the interpretation of the deliberately open textured Convention rights and increase the moral legitimacy of their judgements. This will practically enable them to give coherent and logical justified answers to the five key questions of rights interpretation which underlie all questions of the interpretation of the substantive rights included within the HRA.

## CHAPTER IX: CONCLUSION

This thesis has sought to add to existing scholarship by establishing that the use of the moral Principle of Generic Consistency by the British judiciary, in the interpretation of the Convention rights, is both necessary and possible, in light of the current approaches to rights interpretation of the domestic and Strasbourg judiciary. Such an interpretative approach was argued to be necessitated in a general sense by the open textured wording of the substantive rights, an inevitable feature of language, which was deliberately exploited in the drafting process to create semantically ambiguous statements of rights. More specifically, the task of determining the practical content and application of the rights in cases brought under the HRA has been allocated to the courts, and if arbitrariness of interpretation is to be avoided, a principled judicial approach to construction is required, one the PGC can provide.

It has been claimed that questions of the scope and application of the Convention rights that arise before the courts, are specific manifestations of five fundamental questions of interpretation with which it is necessary to engage to determine the Convention's requirements. These questions of who has rights, the substantive nature of the obligations they impose, how conflicting rights are to be weighted and balanced to determine priority, as well as whether it is possible for a person to waive the benefits of their rights, and finally of against whom the rights can be held, in turn have been shown to mirror the substantive, distributive and authoritative questions of moral philosophy. Analysis of the approaches to these five questions applied in the domestic courts and Strasbourg was used as the foundation against which potential receptivity of domestic law to an interpretive approach based in the PGC was ultimately analysed. These questions also formed a framework through which the substantive requirements of PGC in the Convention rights context was demonstrated.



Regard to the PGC, and the respect for the generic rights or interests of freedom and well-being it requires, in determining the interpretation of the Convention, was shown to be supported by the dialectically necessary argument that the PGC must be recognised by all agents, on pain of contradicting their agency, as the supreme principle of action. Additionally, it has been shown that the acceptance of a fundamental tenet of international human rights treaties, impartiality between the treatment of persons' rights, entails the recognition and acceptance of the PGC as the supreme principle of morality in a dialectically contingent manner. Similarly it has been argued that a contingent coupling of the dialectically necessary recognition of the nature of purposive agency to the acceptance of the moral point of view also dialectically entails the acceptance of the PGC.

The legal coherence of the interpretive use of the PGC by the courts, was demonstrated through its fit with the settled core features of the Convention rights under Dworkin's criteria of interpretive validity: their universality, their inherent and inalienable nature and their rights rather than duties focus.

The practical consequences and utility of regard to the PGC by the judiciary in addressing the five questions of Convention rights interpretation under the HRA was demonstrated in chapter seven. Here it was also shown that jurisprudence of the ECtHR does not prevent the domestic courts from adopting the integrations of the Convention rights which the PGC dialectically requires, even if they continue to apply the mirror principle and its no more than element which this thesis has argued is unjustified and conflicts with the aim of the HRA to create a culture of domestic rights protection.

The means through which the interpretive use of the PGC can be accomplished in the most judicially acceptable manner was argued in the penultimate chapter to be by its use to give to give content to the principle of dignity. The possession of dignity, as a justificatory basis in the human rights documents of the 20<sup>th</sup> Century, is semantically open to being defined as constituted by purposive agency thus enabling the judiciary to through it interpretively apply the requirements of the PGC to the Convention rights. This argument has been shown to be supported by the jurisprudence of domestic and foreign courts, which demonstrate that such an interpretive use of dignity is within the ability of the British judiciary.

Although it has been shown that the interpretive use of the PGC is both necessary and possible, it has also been conceded that the approach advocated cannot completely eradicate uncertainty from the interpretation of the Convention rights. What the generic rights to freedom and well-being themselves require on the facts of a particular case can be open to dispute. Similarly, the weight of the moral status of beings and their generic rights or interests in cases where they conflict is a matter of judgement. However, as established at the very beginning of the thesis and in the survey of the domestic and Convention case law, uncertainty as to the requirement of rights is already present both within the wording of the Convention and in the current judicial approaches to their interpretation. Regard to PGC in interpretation, however, improves upon the present situation by providing a coherent and justified principled basis for the resolution of the five questions of interpretation where one is currently lacking. The dialectical justifications for the PGC give it force, and its content forces the judiciary to engage directly with the fundamental questions of rights interpretation from a principle perspective in a way that has been absent from their judgements, particularly on the questions of the nature of the obligations imposed by the Convention rights, and whether they are rights under the will or interest conception.

Ultimately, it is this engagement with the fundamental basis of rights that it is hoped this thesis will encourage. It has been shown that such an approach can provide principled guidance on all questions of substantive Convention rights interpretation. It is conceded that, although regard to the PGC has been shown to be both dialectically necessarily required and contingently entailed by the acceptance of the most basic moral principles or the acceptance of the authority of the international human rights regime, and practically possible though the principle of dignity, the courts may be unwilling to engage explicitly with the generic needs of freedom and well-being, declining to recognise that such moral reasoning is within their powers, as it has been argued to be. If this proves to be the case it is hoped that they will at least feel encouraged by the arguments of this thesis to engage directly and openly with the five fundamental questions of rights interpretation and in a principled manner. This is approach will be one that the author will argue for in the research which will follow on from this thesis, as a means of analysing the fundamental issues at stake in cases of rights interpretation.

It is also hoped that the judicial approach which has been advocated will also lead to a wider public recognition and understanding of the fundamental nature of the open textured Convention rights, within society generally. As submitted at the end of the eighth chapter, the lack of an explicit statement of the Convention rights within the HRA, as something more than positivist norms, can be seen to have contributed to the misunderstanding and hostility that has sometimes surrounded them. It is submitted that, were the rights seen clearly as the product of answers to the authoritative, substantive and distributive questions of morality, there might be a re-characterisation of the debate about their interpretation and application and a reduction in hostility to them. The public debates on the rights of immigrants and

prisoners can only be helped by a recognition that the possibility of the possession of rights derives from agency, not nationality or personal liberty. Similarly the continuing debate of a right to die would benefit from a contribution to the clearer understanding that fundamentally at issue are questions of the outer limits of positive obligations and the capacity to waive the benefits of rights.

It is in this way that the arguments made in this thesis will be continued, through arguing for an increased recognition of the fundamental moral dimension of human rights which in turn supports legitimacy of rights claims generally and the HRA in particular. Alongside, and drawing support from this general argument, the judicial approaches to the interpretation of the Convention rights will be critiqued from the perspective of the PGC's answers to the five fundamental questions of interpretation, with the aim of informing the debate with the light of fundamental principles, in the greater hope that through the such debate the right rights judgements will be reached.

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