Human Rights as Governmentality

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Introduction

Approaching human rights via the practice based on human rights norms

This inquiry analyzes human rights as a systemic phenomenon. One of the central arguments of this inquiry is that it is not possible to consider human rights claims in abstraction from the question of institutional structures, processes of subjectification, the provision of collective goods, and the normative ideas concerning what it means to be a human. In the recent years, a number of political and legal theorists have variously explored these points. They have called our attention to situate human rights within an institutional framework. They have stressed the need to understand human rights from a sociological viewpoint. They have argued that human rights make sense only in a specific sort of social context, e.g., 'the culture of autonomy' or 'the context of modernity' or 'the context of mutual respect and trust and common understanding'. However, they have struggled to analyze the way human rights discourse subsequently manages human conduct because of the fact that they have explored all these aforementioned points singly.

Given this gap, theoretical works on 'the sociological dimensions of human rights law', 'the politics of human rights advocacy', 'political realism and human rights architecture', or 'human rights as a practical code of conduct' have had marginal influence on the standard elaboration of human rights. Consequently, in political science, the idea of human rights functions as a conceptually fixed variable in its scientific analyses. Thus, the theoretical exploration of human rights operates within a threshold that would not ultimately lead a political scientist to interminable normative difficulties. Likewise, standard textbooks on human rights law stick with the doctrinal elaboration of human rights. They relegate sociological analyses and political theories exploring human rights to a peripheral status. This is because the doctrinal literature believes that the theoretical questions of such nature have little bearing on the actual professional practice touching the domain of, say, human rights law. After all, the doctrinal academic assumption is that the signifier 'human rights' is of such value that only that theory – and as much theory – is conceptually useful which can endorse, elaborate, and justify human rights practice.[1] If theory begins to question, or, at least, problematize, certain

[1] Given the increasing salience of human rights practice in recent times, academic commentaries now reinterpret theorists skeptical of human rights tradition, by showing that those theorists instead advocated a critical appropriation of human rights. In such narratives, embracing human rights in terms of appropriation functions as the structuring norm with which to understand rights-holders' behavior. Thus, the critical effects and intentions of holders function as one strategy, among others, emanating from such appropriation. Two examples concerning such rehabilitation would suffice. Take Arendt first. Arendt saw rights as entitlements. In her *The Origins of Totalitarianism*, she argued that human rights are rights of 'humans' without membership. As 'minimum' standards, Arendt saw human rights as rights of those humans who were with minimal protection (Arendt 1973, 290-304). Given 'international institutionalization of human rights' (Gündoğdu 2015, 5), scholars using Arendt's insights, like Gündoğdu, find it important to 'reinterpret and revise some of her key concepts and arguments' (Gündoğdu 2015, 6). Arguing that Arendt's account of human rights acknowledges the contingency and

crucial presumptions guiding human rights practice, it remains useless both in guiding its practitioner because it is irrelevant and in guiding its students because it is conceptually eccentric.

At a moment when professional practice is becoming technical in order to increase professional objectivity, the evaluation of a theory's major contribution in the light of practice alone signifies the way the participants in the human rights discourse understand their tasks and roles. Alternatively, however, this entails that theorizing the content of human rights discourse would remain, from the viewpoint of discourse's self-understanding, largely irrelevant, if descriptive and analytical tools focus on isolated statements concerning human rights rather than the practice based on human rights norms.[2]

Theorizing human rights at the crossroads between legal and political theory

Given the aforementioned factors, this inquiry makes it point by focusing on human rights claims. With this practical focus, the inquiry then intervenes into the theoretical debates. It is hard to see how without such a focus theoretical literature on human

equivocality of human rights, Gündoğdu argues that 'Arendt "resets" the question of human rights to think about them anew beyond these conventional binaries that fail to respond to the crisis of statelessness' (Gündoğdu 2015, 53). Consider Foucault now. Foucault saw rights as tools allowing organization of society (Foucault 1977, 222). In his lectures *Security, Territory, and Population*, he argues that rights of individuals allows a society to protect freedom by governing it (Foucault 2007, 353). Given an increase in 'claims of justice made in the name of rights' (Golder 2015, 2), Golder finds it important to interpret Foucault's 'deployment of rights' (Golder 2015, 22). Arguing that Foucault's account of rights (including that of human rights) has both a strategic and ambivalent aspect to it vis-à-vis the forms of power it contests, Golder argues that rights function as 'critical counter-conduct in Foucault that allow for 'strategic reversibility' on behalf of different political interests and function as a part of diverse struggles' (Golder 2015, 22).

[2] 'A perspective on the question of human rights … [deals with] questions about how political actors … actually use words like rights rather than with questions about how such words can best be defined in relation to other words' (Tushnet 1989, 403-4). 'Human rights names not so much an abstract normative idea as an emergent political practice. Those interested in the theory of human rights are not at liberty to interpret this idea in whatever way best suits their philosophical commitments' (Beitz 2009, xii; c.f., 6-7, 11-12, 42, 72, 102-6, 197, 212). '[Traditional theories of human rights] derive [human rights] from concerns which do not relate to the practice of human rights … The problem is the absence of a convincing argument why human rights practice should conform to [such] theories' (Raz 2010a, 327-8). 'Because much philosophical work on human rights exhibits [a] fixation on abstract theoretical structures, it often results in a disappointing non-engagement: a failure to bring into focus human rights as that notion is understood in the wider culture in which it has its home' (Tasioulas 2012, 3). 'Our classification [of human rights] must fit [the] practice [based on human rights norms] sufficiently well to make our discussion [of human rights] pertinent to [that practice]' (Dworkin 2011, 333). While focusing on the drafting process of the Universal Declaration, Glendon notes: 'Maritain and his colleagues did not regard [a] lack of consensus on foundations [of human rights] as fatal. The only feasible goal for the UN, [Maritain] maintained, was to achieve "[agreement] not on the basis of common speculative ideas, but on common practical ideas"' (Glendon 2001, 77). Concerning methodology in general, Wittgenstein notes: 'The confusions which occupy us arise when language is, as it were, idling, not when it is doing work (*nicht wenn sie arbeitet*)' (Wittgenstein 2009, 56).

rights can resist steering itself away from human rights practice and ironically developing a life of its own.

The thesis that it is not possible to understand human rights claims either with the sole reference to the legal norms of human rights or with the sole reference to the normative accounts in political theory occupies much of this inquiry. It is obvious that as claims human rights address law and legal and political institutions. Indeed, legal theorists have recognized that human rights claims, even when presented in moral terms, presuppose a legal power that is capable of interpreting and implementing human rights norms, and punishing violations. They usefully pinpoint that the ultimate objective of human rights claims by the rights-holders is the enforcement of human rights norms in a certain practical way. Thus, human rights legitimize a legal structure, only when legal rules exist in a specific normative form. The legal aspect connects both the normative and the political dimensions of rights claims. This logically requires that one expand one's horizon to view human rights as a systemic phenomenon. However, acknowledging this causes a legal theorist to focus on the broader socio-legal questions concerning individuals and population, and a lawyer to focus on theoretical issues of 'non-legal' nature.

Further, political theorists have pointed out the fact that human rights claims presume descriptive views concerning the motivation and the interests of rights-holders, and the normative views regarding autonomy and freedom. Understanding both these theoretical views in legal terms alone is difficult, even when these may have legal effects. However, as legal hermeneutics tells us, interpretation approaches norms dynamically. It is not obvious that the meaning of norms presumed in human rights claims remains the same, as and when those claims are legally determined.[3] This logically requires that one analyze normative debates in the literature on political theory concerning human rights against the background of human rights practice, say, human rights law. However, acknowledging this causes a political theorist to focus on the factual circumstances surrounding legal regulation, interpretation, and trade-offs, and a political scientist to abandon a 'positivist' view of his vocation.

Both attitudes are useful but neither of them is sufficient in itself to reconstruct the theoretical content of the concept of human rights. If one wants to avoid the reductionism inherent in each, making them both enter into a dialogue with each other is an option. Consequently, this inquiry analyzes human rights claims by entangling descriptive and normative views concerning human rights. To argue my points, I focus on the practice based on human rights norms. This task would allow us to understand the way legal determination based on human rights norms becomes effective by making certain norms binding in a society. Importantly, I analyze human rights in order to lay basis for a theory that explicates how human rights address and influence

[3] C.f., 'Abstract rights … provide arguments for concrete rights, but the claim of a concrete right is more definitive than any claim of abstract right that supports it' (Dworkin 1978, 94-4).

conduct. Focusing on this aspect would allow us to explicate the 'regulatory' aspect of human rights that resultantly give human rights norms their binding potential in a society.

Accentuating the importance of the regulatory aspect: Beyond standard dichotomies

I explore the 'regulatory' aspect of human rights by identifying how the interpretive structure of the legal system that guarantees human rights (in Ignatieff's words) not 'only protects but also produces' humans.[4] I shall explore how the formal constraints of a legal system define the content of human rights, and how the content of human rights reveals the normative assumptions underlying the legal system. I do this by focusing on the manner legal rules utilize human rights norms to define, say, the legally protectable. This focus would help us operate beyond the standard dichotomies of, say, form/ content and norm/ fact.

Many legal theorists have argued that even when one considers human rights as 'natural', their enforcement and interpretation depends on the formal legal system. Resultantly, they have focused on structural questions, while analyzing human rights. These include questions such as the sources of law, procedural frameworks, judicial decision-making patterns, executive discretion, and legislative authority. However, given this primacy accorded to the question of form, these theorists have had difficulty in focusing on the content of human rights. This difficulty gets visible when the changing interpretation of human rights alters the formal structure – what legal realists call as 'hard cases'. Alternatively, some legal theorists have argued that human rights provide the parameters with which one can evaluate the formal legal system. They focus on normative questions, such as legitimacy, accountability, and justifiability. They shift our attention to the fact that human rights are a normative vocabulary that serves to limit legal and political power. However, given this focus on the question of content, these theorists seldom comment on the way the formal conditions relating to, for example, necessity or proportionality remain an inherent part of human rights discourse. If all law is formal, it becomes difficult to orient one's narrative to the dynamic of a changing content. Thus, in terms of scholarship at least, there is no place for content, but rather only for legal interpretation, the latter again understood in a formal manner. If content is the basis of law, the question of form is of secondary interest. This may not be a problem for law as a functioning system. However, when one views

[4] Ignatieff argues that the vocabulary of human rights is central not only for 'the protection but also for the production of modern individuals' (1999, 323). Donnelly says something similar:

> 'When human rights claims bring legal and political practice into line with their demands, they *create* the type of person posited in the underlying moral vision … Human rights shape political society, so as to shape human beings, so as to realize the possibilities of human nature, which provided the basis for these rights in the first place' (2013, 15-16; original emphasis).

human rights from such perspectives, it appears that human rights norms themselves possess such a dichotomy.

Therefore, the focus of this inquiry is on the interpretive structure of human rights. This focus would allow us to pinpoint the importance of legal medium and formal procedures in the interpretation and enforcement of human rights norms (i.e., form) and to explore the role that normative ideas play in structuring human conduct (i.e., content). On the one hand, I operate regressively: In what manner does law define something as protectable? What kind of legal and social practices make such a legal determination possible? On the other hand, I operate progressively: In what manner do human rights norms affect rights-holders? What kind of practices and behavioral expectations such a legal determination enables? The manner through which this dynamic influences human conduct would allow us to bridge the gulf between form and content.

Political theorists take a different route to address the dichotomy of norms and facts. They argue that human rights are primarily the rights of individuals. As such, political theorists pinpoint that human rights provide the normative basis through one can assess factual problems. If one does not appreciate the normative basis, they believe that one would have a conceptually absurd situation in which law refers only to law. They rightly shift our attention to the fact that broadly 'liberal' ideas underpin human rights. These include, for example, autonomous agency, self-development, individuality and the priority of the individual (e.g., Griffin 2008, 4, 32, 35, 46, 49, Donnelly 2013, 55, 65, c.f., Douzinas 2000, 2, 373-4). No matter what kind of a philosophical outlook a human rights lawyer personally adheres to, the professional practice of that lawyer remains structurally constrained (Dworkin 1986, 101). A human rights lawyer (no matter how theory-resistant!) has to accept the validity of these ideas because legal arguments touching human rights claims operate within this distinctive normative field. However, these theorists share common problem questions, when they begin analyzing the limitations on rights, proportionality analysis, or the margin of appreciation doctrine. From their perspective, it appears something extraneous that human rights based practice imposes on human rights norms. More, human rights depend on a political and legal power, and give that power certain 'rights' thereof. Think of derogation in time of emergency. Additionally, these theorists seldom evaluate norms in the light of factual circumstances. In itself, this theoretical attitude may not be a problem, if norms were separable from facts, inhabiting a different conceptual reality. However, what autonomy means varies from one situation to another. A practitioner cannot banally say, 'I know intuitively that autonomy means X. Hence, I should evaluate the situation Y in terms of X to guarantee autonomy'. For example, in the care proceedings, the observations from national social workers, expert psychologists, welfare authorities, immediate teachers underpin the idea of 'the welfare of the child' or 'the child's best interests'. We cannot understand the normative idea of autonomy in concrete terms by disregarding the situational dynamics. Indeed, it is difficult to grasp these situational and interpretive aspects, if one simply refers norms to further

theoretical constructions. Facts may be theoretically trivial; however, they are important when it comes to the legal determination of norms.

Alternatively, some political theorists and historians of politics have argued that the contextual circumstances determine what kind of legal system is established. They argue that the decision to establish a certain legal system is neither legal nor normative. They either believe that human rights are a part of certain social history (hence, non-universal) or that certain circumstances have cohered to give human rights their present force (hence, contingent). Focusing on the systemic questions, these theorists seldom interests themselves with the question of the content of human rights. However, once norms become a part of a legal system, norms tend to influence the course of social history and solidify the conditions underlying their own systemic basis. The fact that normative claims can cause social change, i.e., influence practice, or change the terms through which one understands the history of the present, does not seem to have occurred to them.

By analyzing the regulatory character of human rights norms, I focus on both facts and norms. I shall analyze how norms address human conduct in the light of factual circumstances, and how norms influence certain factual situations. It is obvious that the influencing human behavior through human rights norms in a society determines the effectiveness of human rights in that society. On the one hand, I 'trivialize' normative accounts: In what manner do certain facts, such as a technological innovation, redefine, for example, consent and autonomy (e.g., Ch. 2)? How certain facts and objects remain far from passive, when it comes to the legal determination of norms (e.g., Ch. 5)? On the other hand, I highlight the function of norms: In what manner do human rights norms tell one that the factual situation does not hold (e.g., Ch. 6)? How do norms govern social practices (e.g., Ch. 4)?

Possible routes available to pursue the inquiry and their limitations

Two routes remain open to us, if we operate from the perspective of justice. First, we can focus on the demand for justice articulated in terms of human rights. This would shift our focus to solidarity movements, human rights advocacy, foreign interventions to protect human rights, and social struggles. The question ignored is, 'What then?' 'What is the endpoint?' 'How do these movements know that they have achieved their goals?' Following this route, one would provide either a purely evaluative or a simply factual analysis.

Second, we can focus on the guarantee of justice based on human rights norms. This would shift our focus to the question concerning human rights compliance, non-governmental supervision, and legitimacy concerns. The question ignored is, 'What effects does this process have on those 'humans' who are protected?' If one follows this route, it is difficult not to be technical.

A third route remains, if we consider the concept of human rights as a discourse. It would allow us to analyze those legal and political setups, wherein there is an overlap between the guarantee of justice and the demand for justice, when human rights articulate both aspects. This would shift our focus to the question of legal interpretation, organized social power, social attitudes and beliefs, and the rationalities of government. The question ignored is, 'How can one construct an applied theory of justice?' It is hard to opt for this route and to remain something more than being analytical. Given the focus of this inquiry on developing an analytical account of the interpretive structure of human rights discourse, I follow the third route. The limitations of the opted route are visible in the following pages. However, these limitations do not affect the inquiry's central objective.

On the selection of the European human rights law as our focus

When it comes to analyzing human rights in a legal and political setup, there are two general options available to us. First, we can focus on 'international human rights law'. Generally, human rights' advocates believe that it is in international terms that one can analyze human rights with justice because human rights are universal in their appeal and global in their scope. However, most legal commentators agree that it is far-fetched to argue that international regime of human rights is akin to a domestic regime writ large, especially in terms of effectiveness (including interpretive), compliance, and enforcement.[5] Further, the role of human rights in public international law is equally unclear because of the problem of interpretation (two sovereign states can equally advance valid legal arguments reflecting conflicting opinions) and enforcement (states are both sovereign and equal, and international law cannot force a non-signatory state to comply with a human rights charter it did not sign).

Second, we can focus on human rights norms in the context of domestic law of a specific country. However, this would make our analysis of human rights inseparable

[5] Brownlie notes:

> 'Human rights problems occur in specific legal contexts. The issue may arise in domestic law, or within the framework of a standard-setting convention, or within general international law. But, there must be a reference to the specific and relevant applicable law. In the real world of practice and procedure, there is no such entity as 'International Human Rights Law'' (Brownlie 2008, 554).'

International human rights practice notoriously lacks a standing capacity to enforce many of the rights listed in the major treaties, and even when an enforcement capacity exists, it usually applies selectively and often only at the sufferance of those states against which it might be used' (Beitz 2009, 3; c.f., 132). Henkin, whom Moyn calls '"grandfather" of human rights in American international law' (Moyn 2010, 201), noted in his Hague Academy lectures:

> 'The United Nations Charter, a vehicle of radical political-legal change in several respects, did not claim authority for the new human rights commitment it projected other than in the present consent of States … the Charter in effect justifies human rights as a State value by linking it to peace and security' (Henkin 1989, 215).

For a detailed account of international human rights law in skeptical terms, see, for example, Goldsmith and Posner (2005, 107-134) and Posner (2014, 79-136).

from the peculiarities of that national legal system. Further, as human rights' advocates and international regulatory bodies tell us, the viewpoint through which one evaluates that domestic law which applies human rights cannot be that domestic law itself. Focusing on international law alone makes human rights purely normative, detached from the complexity of international relations. Focusing on domestic law alone robs human rights of their universalizing potential, giving too much discretion to national authorities. In order to avoid opting for either extreme, this inquiry instead focuses on a specific legal context situated in between the international and the national: a legal framework based on a regional standard.

Focusing on a regional legal framework allows us to bridge the problem of interpretation and enforcement that exists at the international level and the gap between the particular and the general that exists at the national level. Further, regional judicial bodies apply human rights norms to both interstate (like international law) and intrastate (like domestic law) questions. When it comes to the national legal systems forming a part of that regional legal framework, the regional standard, ideally speaking, provides an overarching yardstick with which to define and protect human rights.

Unsurprisingly, regional legal frameworks vary in their ability to enforce human rights norms. Obviously, even when all of them may mention broadly similar human rights, the way they interpret them and develop interpretative tools, and the manner they are able to ensure compliance do not remain identical, even when those interpretations are equally valid. Nevertheless, political scientists have noted that it is possible to speak of the comparative effectiveness of regional human rights frameworks. This depends on institutional checks, national compliance, nature of regional political integration, and judicial structures. This problem is not a problem of human rights norms but of system-based rules. However, these various considerations nevertheless influence human rights. Indeed, this problem seems to replicate in part the problem of analyzing 'international human rights law'. This fact forces us to make a pragmatic choice. That is, we would focus on that regional standard in this inquiry, which, for a number of political and legal commentators, is the most effective regional human rights framework in the world: the European human rights law (e.g., Danchin and Forman 2002, 192, Therborn 2001, 83). In fact, some analysts have been surprised to note the remarkable compliance of national political bodies with the decisions of European judicial organs, despite an absence of those enforcement procedures at the European level, which would be a norm in a strong federal state. The position of human rights norms as an important component of regional legal identity and consciousness, and the entanglement of institutional integration with legal rules, enables us to see European human rights law both as a distinct and as an effective legal framework.

The European Convention on Human Rights (the Convention) is the regional human rights instrument in Europe. I analyze how European judicial bodies interpret the Convention. Consequently, I shall focus on the case law of the European Court of

Human Rights (the ECtHR) and the European Commission of Human Rights (the Commission).[6] Obviously, one can object that judicial decisions neither provide the final word on human rights nor are they their ultimate source. No matter how valid this objection is, the important point is that the institutional structure, authority, and expertise of the judiciary provides a focal point through which one can explore human rights as a binding, coherent, and consistent discourse as compared to, say, academic treatises that seek to construct human rights models or disparate professional statements that advocate human rights.

Introducing our theoretical perspective: Reading Soering v. the UK *and Dworkin's* A Bill of Rights for Britain

I proceed by examining two scenarios. I reconstruct and analyze these scenarios in order to frame the theoretical perspective (i.e., governmentality) that I use in this inquiry. Both these occurrences are from the year 1990. Although it is around this time that legal and geopolitical commentators confidently began to view human rights as 'the single most magnetic political idea of the contemporary times' (Brzezinski 1989, 256), the two occurrences which I examine are rather ordinary.

First occurrence: On June 21 1990, the Bedford Circuit Court in Virginia delivered two sentences of life imprisonment to Mr. Jens Söring on two counts of first-degree murder for deaths of his girlfriend's parents (Davey 1990). The UK had extradited the applicant to stand trial in the US. Prior to his extradition, the applicant challenged his extradition before the ECtHR. In *Soering v. the United Kingdom,* the applicant argued that his extradition would expose him to 'inhuman and degrading treatment' in the US that the Convention's Article 3 prohibits. In a unanimous verdict, the ECtHR deemed that extradition in this case 'would be contrary to the spirit and intendment of Article 3' (para. 88). It was because the ECtHR believed that there was a tangible likelihood of the applicant's exposure to the death row phenomenon in Virginia.[7] The assumption is that capital punishment psychologically torments the one undergoing the experience of the death row phenomenon because a legal verdict ends, on socio-legal grounds, death's unpredictability.[8] Further, the ECtHR also took into account the mismatch between such a practice, the applicant's age, and his disturbed mental state at the time of

[6] Protocol no. 11 restructured the ECtHR and abolished the European Commission of Human Rights.

[7] A report submitted by Amnesty International London to the ECtHR in *Soering* (dated 12 April 1989) noted that 'the evolving standards in Western Europe regarding the existence and use of the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of the Article 3'.

[8] Other grounds, such as medico-biological, do not raise the question of Article 3. Therefore, when a medical doctor diagnoses a patient as terminally ill, the doctor also relies on a discourse that measures death's predictability in terms of life chances. Fundamentally, this act similarly ends 'the radical uncertainty' (Derrida's phrase, in Derrida 2014) of a patient's death. Despite this, from a legal perspective, the doctor does not subject the patient to psychological torment, even if the patient is unable to handle such news emotionally and psychologically.

offence (para. 111). Only after receiving formal assurances that the Virginian authorities will not impose a capital punishment on the applicant, the UK extradited him to the US (Lillich 1991, 141). The fact that the ECtHR attached his extradition with the fulfilment of certain conditions is important for our present purposes.

Two points are notable. First, it is important to focus on the manner through which law interprets human rights norms in order to determine the apt form of violence (c.f., Foucault 1977, 9). What explains inhuman and degrading treatment is not obvious per se. Therefore, law relies on rationalization and reconstruction. Thus, several factors guide what law understands as inhuman and degrading in this situation. These include psychiatric reports (para. 21), biomedical discourse on adulthood (paras. 44-7, 51), statistics and projections (paras. 91-92), the idea of psychological deterioration (para. 64), the idea of diminished legal responsibility vis-à-vis mental disorders (paras. 49-51), and, an observation on prison services such as library facilities and dentistry (para. 67). Law interprets human rights norms in a manner that the violence to which a criminal is exposed should neither be excessive (otherwise, any kind of violence would become justifiable) nor minimal (otherwise, punishment would miss its deterring and reforming purpose). Second, it is important to note what happens when law applies human rights norms to specific practices. Consider confinement and extradition. Confinement does not banally mean a deferral of one's enjoyment of rights, as Foucault (1977, 11) for example believes. Instead, law uses human rights norms to evaluate confinement. Consequently, one is a rights-holder even when and as confined. Therefore, law treats a rights-holder accordingly. Similarly, rather than arguing that the legal application of human rights norms to extradition would open a Pandora's Box, as some commentators believed (Wyngaert 1990), extradition here relies on human rights norms. Only human rights compliant extradition is acceptable. Further, as law considers an issue as an object of attention, the legal task becomes to preempt possible violations. In this case, it means that society develop legitimate social institutions (e.g., prison) in a manner that they conform to what rights-holders deserve (para. 96).

Second occurrence: In 1990, Ronald Dworkin wrote a tract entitled *A Bill of Rights for Britain: Why British Liberty Needs Protection* (Dworkin 1990).[9] In it, he identifies a number of issues afflicting Britain related to: 'official secrecy' (p. 2), 'publishing' (p. 3), 'broadcasting' (pp. 3-5), 'privacy and surveillance' (pp. 5-6), 'moralism' (p. 6), 'protest' (pp. 6-7), and the 'right of suspects' (pp. 7-9). After having listed these issues, Dworkin argues in favor of 'a bill of individual constitutional rights' for Britain. He believes a bill of rights necessary in order to regulate the aforementioned issues in a rights friendly manner (Dworkin 1990, 13).

[9] This tract formed a part of the heated constitutional debates in the United Kingdom over the adoption of a bill of rights (Loughlin 1992, Zander 1996, Allan 1996, Waldron 1993). Finally, the Human Rights Act 1998, which received Royal Assent on 9 November 1998, came into force in the United Kingdom on 2 October 2000.

Two points are notable. First, he situates rights in a framework. Dworkin locates human rights in their practice: law, institutions, collective goods, behavioral transformations and impact. Within such a framework, he discerns 'the culture of liberty' (Dworkin 1990, 1). Therefore, in order to appreciate the constitutive role of freedom in those societies that uphold freedom as the basic normative value, he believes that we should focus on those practices that produce the conditions suitable to an autonomous life. Thus, 'the value of liberty', Dworkin tells us, 'cannot be measured piecemeal' (Dworkin 1990, 12). Second, the way this problematic is connected with human rights is important. On the one hand, he operates regressively. He argues that one can strengthen a legal culture lacking a bill of rights by adding one because the continuous existence of that legal culture in a definite rights friendly manner requires clarity, consistency, and textual support. On the other hand, he operates progressively. He advances his point by arguing that a charter is not simply an abstract legal document. In fact, it is a text closely interconnected with certain praxis. He believes that what is therefore important is not simply to focus on human rights textually but to identify the possible impact of human rights norms. By introducing a bill of rights, these norms would influences law, lawyers, courts, universities, law schools, legislation, government, industry, upcoming generation's moral outlook and professional priorities, and future judges' bent of mind. As such, a human rights charter encourages a 'further cycle in the renaissance of liberty' (Dworkin 1990, 23).

For the purpose of this inquiry, two points are important. First point concerns the reliance of norms on facts. Legal rules refer to certain practices in order to rationalize norms. In *Soering*, the use of scientific standards and institutional practices determines the classification of a practice as being inhuman and degrading treatment. The reliance on psychological discourse determines the threshold of accountability and diminished legal responsibility. The circumstances of the situation and the applicant's life history signify what law should consider as amounting to attenuating circumstances. The form of national and international legal rules determines the manner law deal with a prohibited action, even when this would require confining a body for life without killing it. These practices rationalize and interpret conduct. Law approaches rights-holders as specific subjects, e.g., responsive body, patient, criminal, student, incarcerated. It is impossible to analyze any concrete legal regulation without taking into account the reliance of human rights norms on certain rationalities.

Second point concerns the application of norms to facts. To the extent that the legal system in Virginia permits what the European Convention does not, the European human rights law forbids extraditing someone from a territory that falls within its jurisdiction to Virginia. This prohibition is valid no matter what internal legitimacy Virginian legal system has. To the extent that a norm defines any treatment as impermissible, its normative effects also influence other related facts. Then, the effect of that norm is to develop compliant practices within those institutional setups. Without this normative impact, it is impossible to speak of the effectiveness of human rights.

However, in human rights law, law does not apply norms to all but only the 'relevant' facts. Think of intergovernmental proximity or political power asymmetry in *Soering*. The idea that 'some' facts are relevant is not always normative or legal. Therefore, the legal self-understanding that considers which norms to apply to which set of facts remains situated in a certain interpretive framework.

Another aspect of our second point is important for the question of human rights. Both what a specific right itself means and how other human rights relate to it are important. For example, by defining death penalty as excessive, Article 3 on inhuman and degrading treatment redefines Article 2 on the right to life (mutual dependence). Further, Article 5 on liberty and security permits detention of mentally unstable persons without criminal charge because of their unsound minds, and requires that when such persons have committed a crime law should not punish them because of their unsound minds (internal asymmetry). Therefore, an inquiry into human rights needs to theorize how the case law of a particular human right approaches rights-holders specifically. Indeed, some validity exists in political theorists' belief that the human rights discourse connects various human rights in a manner that participants come to see all particular human rights as logically related. However, the fact that particular human rights speak of different human capacities is important. It means that particular human rights generate different effects and focus on different objects. If political theory is not to consider the difference inherent in the interpretation of these particular human rights as trivial, a case law focus is inevitable.

We can now recapitulate the role of the aforementioned two points in guiding our inquiry. The first point is concerning the role of a regressive analysis. As Dworkin points out, when law defines something as protectable, it assumes a context in which different social variables aptly interact. Before a polity gives human rights norms a constitutional status, a society already has institutions in place, such as, courts, mass media, universities, bar associations (Dworkin 1990, 23). Similarly, law cannot do without the processes of subjectification (c.f., Foucault 1983, 210-212). Thus, human rights norms both draw on and operate through these social variables. The second point is concerning the importance of a progressive analysis. This is to study the impact of human rights norms. As Dworkin argues, human rights address certain practices to create a rights friendly society. This means that human rights norms cannot be effective, unless they influence the rights-holders in an appropriate manner. By focusing on the influence of human rights on human conduct, I analyze how a rights friendly society constructs freedom because of and within certain social practices. Alternatively, I shall argue that the praxis of freedom, i.e., freedom as a social arrangement promoting autonomous lives, is only possible because of certain constraints.

It is not obvious that analyzing human rights claims in different setups, i.e., with a focus on the case law of different rights, would provide theoretically related results.[10] If that might indeed not be the case, it would entail that what provides a connecting link is irreducible to exploring its particular manifestations. This would risk making a case law based analysis of human rights claims inadequate to the extent that one focuses on something else than that connecting link. Thus, what we need is a theoretical lens that allows us to discern the interpretive structure guiding different human rights, while allowing us to develop an analytical account of human rights.

I analyze human rights claims from the theoretical perspective of 'governmentality' (Foucault 2007, 136-144).[11] First, this perspective requires that an analyst focus on human conduct by appreciating how knowledge rationalizes 'facts' (Foucault 2007, 144; c.f., Hart 1994, 199-200). The idea that facts are social constructions, which structure the inputs of participants engaged in a discourse, is important,[12] at a time

[10] It is a common observation in literary criticism that an insistence on generality consumes than clarify distinctions and discontinuities, and an insistence on difference absorbs than explore interrelatedness and meaningfulness. For example, in his essay 'Kafka and his Precursors', Borges famously writes: 'If I am not mistaken, the heterogeneous pieces I have enumerated resemble Kafka; if I am not mistaken, not all of them resemble each other' (Borges 2007, 201).

[11] The term 'governmentality' precedes Foucault's usage (Bröckling, Lemke und Krasmann 2010, 1). However, the consequent 'governmentality studies' literature draws on Foucault's theoretical elaboration of it (Burchell, Gordon und Miller 1991). Foucault first elaborated the idea in his 1977-78 lecture course at Collège de France entitled *Security, Territory and Population*. In this course, he considers governmentality as a social phenomenon first appearing in the eighteenth century that has 'population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument'. He later came back to this idea in his 1978-79 lecture course at Collège de France entitled *The Birth of Biopolitics*. In contrast to the previous one, this course did not limit 'governmentality' in either a historical or a political sense. In this course, he uses governmentality as an idea that remains interested in understanding the way 'one conducts the conduct of men', and which, therefore, functions as an 'analytical grid for these relations' (Foucault 2008, 186). Thus, *The Birth of Biopolitics* interchangeably uses terms as governmentality, governmental reason, art of government, modern governmental rationality, and art of governing. The 'Course Summary' of 1979-1980 lecture course at Collège de France entitled *On the Government of Living* again attests to the expansive sense of the idea of governmentality, i.e. 'the broad sense of techniques and procedures for directing men's conduct' (Foucault 2014, 321). It is the second, more developed version of the idea of governmentality that I find helpful for the purpose of this inquiry. Snellart importantly cautions us: 'Foucault strives to distinguish the two notions [of government and governmentality, where governmentality defines] … "a strategic field of power relations in their mobility, transformability, and reversibility," within which the types of conduct … that characterize "government" are established' (Senellart 2007, 388-89).
Dean defines governmentality in a 'wide, if precise' sense as:

> '… any more or less calculated and rational activity, undertaken by a multiplicity of authorities and agencies, employing a variety of techniques and forms of knowledge, that seeks to shape conduct by working through desires, aspirations, interests, and beliefs of various actors, for definite but shifting ends with a diverse set of relatively unpredictable consequences, effects, and outcomes' (Dean 2009, 18; c.f., Foucault 1983, 220-221).

For a summarized exploration of the idea of governmentality, see Burchell, Gordon, and Miller (1991), chapter 1 and Dean (2009), chapter 1. For a brief literature review, see (Rose, O'Malley und Valverde 2006).

[12] Indeed, both the recent analytic philosophy inspired by Wittgenstein's idea of 'the form of life' and the philosophical hermeneutics inspired by Gadamer's idea of pre-judgment (*Vorurteil*) acknowledge the importance of a socially shared world in constraining individual understanding. However, both these theoretical traditions assume certain social permanence. Thus, if one uses their analytical tools, one

when legal theorists are developing normative models without feeling the need to analyze rationalities articulating human rights norms. As such, this perspective brings to light the interrelatedness of norms and institutions/ practices (Foucault 2007, 144). A norm outside any institutional setup or without influencing any practice is ineffective; an institution or a practice unconstrained by any norm is impossibility. This entanglement is important, despite the fact that political scientists generally refer to institutions in abstraction from norms and lawyers generally refer to interpretation in abstraction from their normative strictures.

Second, this perspective focuses on the way certain rationalities guide human conduct.[13] This point is crucial from a historical perspective because, under the constraints of modernity, one now understands the functions of legal and political power in increasingly administrative and regulatory terms (Foucault 2007, 109, 144-145, Foucault 1983, 209, 212, 214-15, Hart 1994, 114, 124). Therefore, one now believes that the task of law in contemporary societies is not justice construed in punitive terms alone. Instead, one gives priority to the problem of correcting subjects, correctly managing subjects, and forming correct subjects. This point is important because generally political theorists continue to explicate theories of law and justice without taking into consideration the question of regulation and management.

With the help of this perspective, I deploy a twofold strategy to explore human rights claims.

- 1a. I study the case law of specific human rights. I shall study how and through which rationalities law interprets human rights norms. Albeit the explicit argument advanced by the contending parties in a human rights dispute is crucial, what seems relevant is the interpretive context that structures the scope of the claims (regressive analysis).
- 1b. I shall analyze how specific human rights focus on a human capacity as an object of attention. This entails studying human rights norms in their institutional setups, and studying the influence of institutions on the interpretation of human rights norms. This is important because, as we shall see, what specific interpretation law accords to one's human rights depends on who and where one is (c.f., Agamben 2009, 20): the partitioning of a convict's daily routine into controllable phases in a prison setup is not the concern of human rights; the incidence of torture definitely is. Likewise, which specific human rights I have and how broad their protections is varies contextually, e.g., an alien in an occupied land where an occupant state is simply a 'protector' or a citizen of a

finds the analyses of those processes of socialization rather uninteresting. Hence, the charge of critics that those philosophers who want to advance conservative political projects rely on these social theories.

[13] C.f., Foucault: 'One must restrict one's use of the word [rationalization] to an instrumental and relative use … [and one needs to examine] how forms of rationality inscribe themselves in practices or system of practice and what role [those rationalities] play in [such practices]' (Foucault 1991a, 79).

state present in that state's territory where the jurisdiction of that state's legal system applies (the situational aspect).

- 2a. I shall explore how human rights influence institutional structures. Human rights norms both rely on a legal and political system and influence the social system (progressive analysis).
- 2b. I shall explore the regulatory role of human rights. This is important because a rights friendly society protects human rights by referring human rights axioms to certain rationalities and sites of government (the regulatory aspect).

This inquiry proceeds in two steps. Part I analyzes the right to life (Ch. 1), right to respect for private and family life (Ch. 2), freedom of religion (Ch. 3), and, lastly, freedom of expression (Ch. 4). I develop theoretical tools inspired by the idea of governmentality in order to theorize each right. Part II focuses on the right to derogate from the guarantee of certain human rights (Ch. 5), prohibition of abuse of rights, and limitations on and exceptions to rights (Ch. 6). By focusing on these heterogeneous elements, I shall argue that only a perspective that entangles human rights norms with the government of humans can provide us with an analytical theory of human rights that can variously explicate regularities within and across particular human rights (Postface).

Two brief clarifications: Terminological and methodological

Terminological: Analyzing ECHR to comment on human rights requires a terminological clarification. One can object that what we focus on are constitutional rights, fundamental rights, or simply rights, than human rights. Two points justify our use of human rights for the purpose of this inquiry, i.e., our idea that this inquiry explores human rights. 1) True, we can see a terminological overlap within the context of Europe, where human rights remain constitutionally guaranteed. A right to freedom expression is a constitutional right and a human right. Despite this, there is a normative distinction. The importance that constitutional systems accord to fundamental rights derive from the status of those rights as being *human* rights.[14] When participants engage in, or when scholars comment on, European human rights law, they know that even when European human rights law may overlap with constitutional law or comparative constitutional studies, it remains irreducible to both. 2) True, one can argue that European human rights law (x) remains narrower than a 'truly' international regime of human rights (y). The simple idea that y is broader than x in terms of human rights at least allows one to discern an agreement that x too validly deals with human

[14] In the context of fundamental rights, the FAQs on the website of EU's Agency for Fundamental Rights clarify that 'the term 'fundamental rights' … [only expresses] the concept of 'human rights' within a specific EU internal context' (FRA 2018).

rights. If one considers inductive path faulty, it would remain hard to discern any sense in which human rights rather exist as a specific meaningful and effective concept at all.

Methodological: One can object that an analytical perspective lacks an evaluative worth. As such, it fails to identify the 'unexplored' meaning of rights.[15] True, the ECtHR does not interpret ECHR fixedly. Textbooks on European human rights law unanimously begin by stating this maxim as signifying the principle of 'evolutive interpretation'. However, the ECtHR has itself influentially insisted that the Convention is a 'living instrument' (e.g., *Marckx v. Belgium*, para. 41; *Airey v. Ireland*, para. 26). Importantly, as philosophical hermeneutics tell us,[16] we can only look at an instrument by noticing how people handle it. For example, to understand a hammer means knowing *how* to hammer, not *what* properties a hammer has or what its use is. Therefore, an inquiry into human rights is theoretically incomplete, if it does not see how the praxis of human rights works. If one comments, in abstract terms, on humans and the related normative ideas concerning equality and autonomy, one ironically shifts a burden of proof to the practice itself to conform to one's theoretical models. By

[15] Foucault himself once noted: 'Maybe the target nowadays is not to discover what we are but to refuse what we are' (Foucault 1983, 336). Among political theorists, Rancière develops this point fully into a theory supposed to illuminate human rights and the status of their holders. Quoting the French revolutionary activist Olympe de Gouges that 'if women have the right to mount the scaffold; she must equally have the right to mount the rostrum', Rancière argues that the holders of human rights are ones 'who [do not have] the rights they [have] and [have] the rights [they have] not' (Rancière 2004, 304; c.f., Douzinas, 2000, 21). The second in the sense that they know how to use human rights that the law denies them. Thus, human rights exist between these two 'intervals' (Rancière 2004, 302, 304). As such, human rights allow their holders to 'stage … scenes of [disagreement]' (Rancière 2004, 304). However, three related problems limit the utility of such a perspective. First, it largely equates human rights with the right to freedom of association. Even the right to freedom of association functions reductively as a right to protest. Second, this stance prefigures disagreement, what he calls dissensus, as the central form of political practice. For him, only this entrenches freedom in an equal manner. However, disagreement is an aspect of social life; it is not all that is to it. When individuals fight against something, they also fight for something. The demand is not simply for deliverance but also for performance (Walzer 1984, 74). To understand what disagreement achieves, the social process through which the entrenchment of freedom and equality takes place is important. Obviously, human rights do not understand freedom as license, and human rights movements are not anarchistic struggles. More clearly, it would be strange to argue that human rights either lead to or countenance a police-free society ('police' understood in Rancière's sense). Third, such an analysis of human rights simply ends, when and if the social movement achieves its end. It leaves out the other side of human rights, i.e., the post-disagreement aspect. It is as if what rights-holders do is more important than what they want their rights to do for them. It is hard to see how Rancière can focus on the latter aspect without entangling human rights and its politics with what he terms as 'police' (Rancière 1999, 29) – a route that would largely undo the initial premise with which his works begin.

[16] 'When we are talking ontically, we sometimes use the expression 'understanding something' with the signification of 'being able to manage something', 'being a match for it', 'being competent to do something'' (Heidegger 2001, 183). In the footnote to this sentence in *Being and Time*, and in his 1927 lecture course, Heidegger explains this point in clearer terms: 'In German, we say that someone can *vorstehen* something – literally, stand in front of or ahead of it, that is, stand at its head, administer, manage, preside over it. This is equivalent to saying that he *versteht sich darauf*, understands in the sense of being skilled or expert at it. The meaning of term 'understanding' (*verstehen*) as defined above is intended to go back to this usage in ordinary language' (Heidegger 1988, 276). For a lucid explanation of Heidegger's account of understanding, see Drefyus's commentary on the Division I of *Being and Time* (Dreyfus 1993, 184-214).

analyzing European human rights law, this inquiry assumes that, if human rights norms are concrete standards that can guide human life, it is simplistic to explore human rights norms in a self-referential manner.

PART I: HUMAN RIGHTS, NORMS AND LAWS, AND HUMAN CAPACITIES

Narrowing the focus: On analyzing Section I of the ECHR

Section I of the Convention mentions rights and freedoms. Section II specifies the composition and powers of the ECtHR. Section III states miscellaneous provisions clarifying the Convention's scope. It is common for textbooks on European human rights law to begin with an exploration of the structure of the ECtHR. Later, they focus on the case law of the rights mentioned in Section I. If the reader does not extend this technical outlook to the entire Convention, the organization of the textbooks' content is justified. However, it is hard to see whether the discussion in the textbooks may not leave such an impression, because of a silence concerning the matters of 'theory'. On the other hand, political theorists focus on Section I of the Convention in itself to identify the sources and basis of rights and freedoms. Focusing on human rights norms alone, they believe they can answer whether the ECtHR applies norms correctly. However, this attitude ignores the extent to which European human rights law is a matter of professional practice. In fact, in the Convention's framework, Section I does not exist in abstraction from the competencies and structure of the ECtHR, or the conditions concerning admissibility, and or principles guiding the judicial interpretation.

Given our objective, i.e., theorizing the content of human rights as a discourse, my focus remains a case law one. While Sections II and III of the Convention are important in outlining how the cases are decided, there is obviously no case law based on Section II and III's articles. Albeit my case law focus assumes that the institutional structure, argumentative rules, and professional codes are important, I do not analyze Section II and Section III because identifying, for example, the structural nature of the European judicial bodies is secondary to our objective – voluminous literature already exists usefully performing this task. Moreover, Section I is normatively significant. In fact, the Convention mentions Section II and III in the light of securing rights and freedoms mentioned in Section I. As such, whereas Section I is categorical, Sections II and III are rather instrumental vis-à-vis Section I. If Section I is fundamentally altered, the European human rights based legal system would become something else than the one that we have known. Nevertheless, we cannot say the same, not at least with such a force, for Sections II and III. However, pace legal theorists, I analyze Section I's case law rather 'superficially'.[17] That is, I do not argue what the ECtHR case law ought to

[17] In *The Archaeology of Knowledge*, Foucault cautions that searching for a deeper essence to speech-acts remains parasitic on one's efforts to develop an analytical knowledge of discourses that one studies:

> 'What we are concerned with here is not to neutralize discourse, to make it the sign of something else, and to pierce through its density in order to reach what remains silently

be, i.e., where the Court got things wrong, or to develop principles and arguments with the help of which one may critically evaluate the ECtHR case law.

On Article 1 ECHR: Few remarks

Article 1 of the Convention imposes an obligation on the signatory states that they should secure within their effective jurisdictions all the human rights defined in the Convention. By imposing an obligation on the signatory states, Article 1 acknowledges that there could be legal systems not securing human rights, and that there are humans outside its jurisdiction to whom the Convention machinery does not apply. Thus, the Convention does not seek, in the words of the ECtHR, to 'govern the actions' of those states that are not its signatories (*Al-Skeini and Others v. the UK*, para. 141; *Soering*, para. 86). Importantly, Article 1 doubly challenges ascribing any natural law interpretation to human rights. First, the Convention relies on the actual consent of the signatory states – i.e., 'the High Contracting Parties' – to secure the 'rights and freedoms' protected by the Convention 'within their jurisdiction'. The Convention's human rights system structurally remains inactive without this prior consent or commitment. Of course, if a state withdraws its consent from the Convention, it does not meant that that state extinguishes all of its obligations based on human rights norms. It only means that the Convention machinery does not apply to it. More, the Convention develops a procedural framework that relies on a legal system because adjudication does not simply extract results from the obvious tenets of a natural morality. Further, Article 1 ECHR avoids referring to any idea of the human essence from which all human rights flow, unlike, for example, Article 1 of the (non-binding) Universal Declaration of Human Rights with its emphasis on reason and conscience.[18] The ECHR simply mentions human rights; it does not justify them. Thus, the ECtHR does not have any essentialist principle to deal with, when interpreting the Convention standards in an 'evolutive' manner. More, European human rights law lacks such an essentialist principle because inserting metaphysical ideas would impose one's own thick standards on the others and limit the possibility of domestic consensuses on human rights. Natural law, however, relies neither on consent nor on consensus.

One can perhaps see Article 1 as the Convention's premise because Article 1, unlike other articles, precedes the division of the Convention into different sections, and, as such, remains valid for all the later articles and sections that the Convention mentions. Further, given that Article 1 refers to other articles, it lays basis for a positive definition

anterior to it, but on the contrary to maintain it in its consistency, to make it emerge in its own complexity' (Foucault 1989, 52).

[18] Albeit the Universal Declaration contains an idea of human essence, it is not obvious how the Universal Declaration then derives the specific rights in questions from such an idea. In other words, the Universal Declaration cannot rely on that idea of human essence or on the rights it mentions, when someone else interprets the idea of human essence in a different manner and infers very different set of rights from the same idea.

concerning what a human rights-based legal system is. However, Article 1 only mentions an obligation in general terms. Thus, the ECtHR has read Article 1 only in conjunction with the other articles. Similarly, in cases where the ECtHR does not tackle Article 1 itself, it assumes that Article 1 applies to the case on hand. Consequently, Article 1 itself has no case law. The case law stands in a derivative relationship to Article 1. Alternatively, two others articles that conclude Section I of the Convention, i.e., Articles 17 and 18, define 'negatively' what a human based legal system is not. Since these articles define obligations in view of the human rights-based system, I will discuss their case law in the Part II of our inquiry (Ch. 6).

On Part I's focus on substantive rights: Few remarks on selection and organization

Given that there is no essentialist figure of the human in European human rights law, or at least not one that we can understand by simply looking at ECHR's text, the Convention mentions substantive and procedural rights, obligations, duties, discretionary powers, limitation, restrictions, and exceptions, without grounding them in an identical ontological structure. Part I of our inquiry focuses on substantive rights. Albeit procedural rights have independent normative value, any question concerning substantive right, in the case law, involves procedural questions. Later, Part II of our inquiry focuses on obligations, duties, limits, and exceptions. Part I selectively analyzes those substantive rights that address human capacities. It reads Article 2 (the right to life), Article 8 (the right to respect for private and family life), Article 9 (freedom of thought, conscience, and religion), and, finally, Article 10 (freedom of expression). Accordingly, following chapters take up each article. Respectively, each chapter majorly focuses on personhood and existence, intimacy and self-development, reflection and action, and linguistic agency and expression.

One can object that Part I of this inquiry operates in an apparent haphazard and selective manner. Further, one can inquire why Part I leaves out few human rights that arguably fall within the aforementioned category type.

Crucially, the Convention itself mentions articles without any order of priority. Indeed, it does consider certain human rights as 'fundamental' – only in the sense of not permitting any derogation from their guarantee even in emergencies. However, the arrangement of the Convention's text itself does not reflect a sort of Rawlsian 'lexical priority', i.e., a normative arrangement whereby a preceding article holds priority over the later articles. From a purely textual perspective of arrangement, even the rights from which Convention permits derogation remain unevenly scattered.

Albeit Part I's analysis of substantive rights draws on contributions from legal scholars and political theorists, the objective guiding this selection differs from their contributions. Like lawyers, I remain interested in the way law interprets substantive rights. Unlike lawyers, I see how the guarantee of substantive rights draws on broader

social practices and what does its guarantee mean for the rights-holders. ECHR articles mentioning substantive rights not simply protect freedom; they also constitute its necessary condition to ensure that right-holders are free. Thus, an account that presumes the importance of substantive questions in order to focus on technical questions cannot explain how norms underlying substantive questions function and how substantive norms regulate conduct.

On the other hand, political theorists generally speak of fundamental human rights. When political theorists develop arguments for broadening the human rights discourse (i.e., welfare rights, identity rights, democratic rights, the right to development), they base their cases for an extension of fundamental human rights on those basic set of human rights that protect, for example, life, privacy, thought, or expression.[19] However, unless we know what these human rights entail for their holders, it would be difficult for us to draw with validity any substantive inference from their legal existence. The discourse of human rights determines both how law should and should not treat rights-holders, and substantive rights play an important part that structure our understanding of how laws approach rights-holders' specific human capacities.

Crucially, however, Part I of our inquiry does not focus on three important related articles. First is Article 3 that prohibits torture (sentience concerning pain and suffering). Article 3's unconditional nature, i.e., mentioned without any limitation or exception, has influenced the case law of other articles, e.g., domestic violence (Article 8) or extradition (Article 2). In order to see how different rationalities conceptualize 'apt' treatment, our focus on Articles 2 and 8 remains helpful. Second is Article 4 that prohibits slavery and forced labor (personhood and being). To the extent that human rights presuppose a being that is free, the case law of any article presumes the prior valid existence of Article 4. Someone who enjoys all human rights except Article 4 does not enjoy any human right because one denies him the field of possibilities that human

[19] Theorists arguing for social and economic rights based on human rights (i.e., as human rights), for example, rightly argue that a right to respect for the privacy of one's home does not make much sense in a society where people do not have any shelter over their heads. In line with the 1993 Vienna Declaration and Program of Action, these theorists speak of 'interdependency' and 'interrelatedness' of different human rights. However, even if one discerns a certain interdependence between the sort of fundamental rights that the Convention protects and the sort of social and economic rights such theorists argue for, it does not entail that the terms of dependency in the relationship remain the same for each variable. To illustrate. True, a legal guarantee of the human right to life does not mean much in a society where people suffer from chronic malnourishment or face an impending risk of death through starvation. Given the right to life, one needs to bring (say) a right to nutrition into one's focus. However, being content with simply feeding people to the point of keeping them alive without legally guaranteeing any right to life negates human rights. In this instance, the right to life works not only as an initial premise with which to explore, entrench, and argue for the right to nutrition; it also works as a normative endpoint and regulatory norm that again relates the right to nutrition back to human rights. Within this normative framework, the right to nutrition has important but an intermediate position. The right to nutrition neither presupposes nor leads to a legally guaranteed right to life; its normative scope is limited. Likewise, the idea of interrelatedness points to the difference that each understanding of rights signifies, because of which each understanding serves qualitatively different purposes that may nevertheless allow one to discern a relational connection.

rights structure (Foucault 1983, 221). Despite this, Article 4 does not define the essence of the rights-holders as 'free rational beings', for example. Not the definition of freedom but leaving its idea open-ended importantly accounts for the Convention's status as a 'living instrument'. To the extent that Articles 3 and 4 define how one should not treat a rights-holder, they indirectly influence the interpretation of those articles that govern human conduct. As such, I focus on the later set of articles, which would clarify, by implication, the way the ECtHR interprets Articles 3 and 4. Further, in Part II, I analyze the limits and exceptions to both Articles 3 and 4 (§6.1). Another article which Part I leaves out is Article 11 on freedom of assembly and association (socialization and deliberation). Albeit this article is singularly important, Article 11 closely relates to Article 10 (expression) and Article 8 (intimacy). Consequently, analyzing Article 11's case law would risk making the inquiry appear repetitive.[20] As such, the decision not to analyze the aforementioned articles primarily remains pragmatic.

[20] I do not focus on Article 12 that protects the right to marriage because of two related reasons. First is textual. Article 12 rights closely relate with the rights mentioned in Article 8 on the right to respect for private and family life. On a textual basis alone, it is possible to understand Article 12 as standing in a somewhat derivate relationship to Article 8. In fact, few commentators have noted the probable conservative attitude of the drafters of the Convention that led them to separate Article 8 from Article 12. Second is the case law one. Given the aforementioned overlap, the applicants largely invoke Article 12 rights in conjunction with Article 8. Given the reason that the ECtHR now increasingly interprets Article 8 in autonomy-related senses, Article 12's interpretation is likewise affected. Whereas one can appreciate the theoretical strands guiding Article 12's case law by analyzing Article 8's case law in a rigorous manner, it is difficult to extrapolate theoretical findings from Article 12's thin case law to understand Article 8's expansive case law.

Chapter 1. On Biopolitical Governmentality of Human Rights: Reading Article 2 on the Right to Life

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
> (a) in defense of any person from unlawful violence;
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.
>
> Article 2 of the Convention: Right to Life

Article 2(1) requires that law secure everyone's right to life. The obligation that Article 2(1) imposes on the public authorities appears important in defining the normative significance of my right to life. Article 2(2) further specifies the correlation that Article 2(1) develops between law and my right to life. It grants the public authorities legal powers by mentioning exceptions to Article 2(1). The circumstances that Article 2(2) mentions justify deprivations of lives in a way that they do not amount to a violation of Article 2(1). More, the circumstances mentioned in Article 2(2) presume a certain social context, where practices regulate lives in a certain way. Thus, the use of the adverb 'intentionally' in Article 2(1) clarifies obligations of the public authorities in securing my right to life with respect to its legitimate regulation. Despite the reason that we can interpret Article 2 in a sense that *both* rights-holders and legal institutions are seen to have a certain 'agency', the normative significance of Article 2 in the structure of the Convention is central. True, Article 2 does not 'ground' all the other human rights. For example, I neither hold a right to specific (e.g., indigenous) life nor a right to live a specific (e.g., indigenous) life in virtue of my right to life. However, it is impossible to imagine other human rights without presupposing a certain human 'life' to which we can attach those human rights. Therefore, we cannot see a legal system that is unable to secure the right to life as the one that can effectively guarantee other human rights of rights-holders.

Political theorists usefully argue that the right to life depends on the meaningfulness that one ascribes to life (Dworkin 1994, 58–59, 66–74, 84–100). However, they analyze the meaningfulness of life in thick normative terms to answer 'difficult' questions, e.g., assisted suicide. Think of attempts to locate the basis of meaningfulness in the socially shared understanding of dignity, agency, or well-being (Donnelly 2013, 52-3, 64-5, Griffin 2008, 97-8). It is difficult to see how different social practices articulate a unique value, or, conversely, how a value remains immune to change as it influences social practices. In fact, the situational character of Article 2 makes it non-absolute, variable

(Beitz 2009, 111, Wellman 2011, 42-3). There are circumstances when Article 2 justifies killing, for example. Further, referring one indeterminate concept to another does not help us much in either analyzing situations or answering questions: Is 'dignity' the basis of respect for human personhood, or does human personhood ground the idea of 'dignity'? Unlike political theorists seeking to isolate something common in different circumstances (Finnis 1980, 220-222, Griffin 2008, 134, 215), lawyers are aware of the irreducible variability of the circumstances. Theorists focusing on the legal practice analyze positive and negative obligations that Article 2 imposes on the public authorities in a situational manner. They study this in the light of case law and interpretative rules. Nevertheless, they do not analyze the question of life's meaningfulness, or the effects that Article 2's case law has on it. They take the question of a life's meaning as a given that is outside legal scholarship's scope. As such, when one sees law from this perspective, there emerges a disjointed relation of law and society, which is at odds with their interdependency that social and political scientists empirically find.

Recent social theory on biopolitics views 'life' as a social and political issue (Foucault 1978, 143).[21] In agreement with political theorists and lawyers, this social theory tells us that viewing the right to life only in terms of 'making someone die or allowing someone to live' is primitive. Like political theorists, the literature on biopolitics believes that how law deals with a life largely depends on the meaning given to that life. However, from its perspective, certain rationalities articulate such meaningfulness. Like lawyers, it believes that the variety of practices and situations force one to remain analytical than narrowly normative. However, from its perspective, law cannot apply legal codes to a situation without appreciating a life's meaningfulness. As such, it believes, for example, that the case law of Article 2 is understandable only in a biopolitical framework, where the right to life itself orients certain practices to the question of life. In order to focus on both these points (i.e., meaning of life and the variety of practices), I rely on this social theory.

In this chapter, I argue that the right to life produces a differentiated government of lives. Thus, Article 2 applies universally but not uniformly to all the legal subjects. I begin by examining the different meanings accorded to lives with respect to which their legal protection works (§1.1). Later, I focus on the link of law, social practices, and life. I argue that every normative question of Article 2 is understandable only from the perspective of rationalities that give meaning to life. Thus, every instance of a legal

[21] See, for example, (Esposito 2008, Fassin 2009). Focusing on the idea of 'life itself' (the phrase coming from Franklin, 2000, and Rose, 2006a), the literature on biopolitics has shifted more to an analysis of the impact of life sciences on living organisms (e.g. Rose, 2006a; Rabinow, 1996, 1999). Fassin notes that this is 'one possible exploration of the anthropology of life' (Fassin, 2009: 48). This chapter demonstrates that there is more at stake here than organic life. Thus, I additionally see what the perspectives of law (one's status as a legal subject) and legal interpretation (one's status as a rights-holder), and politics (one's status as a citizen) and the provision of social goods (one's status as an individual belonging to specific population) entail for the question of life.

determination using Article 2 ties 'life' more bindingly to those frameworks that rationalize and govern it. Consequently, Article 2 performs a regulatory role (§1.2). In fact, in a human rights compliant society, human rights norms orient practices of government to rights-holders' lives and conducts. Finally, I discuss the conceptual implications of reading the perspective of governmentality in the light of the social theory on biopolitics. I also identify some shortcomings in an influential account theorizing contemporary biopolitics (§1.3). I conclude by commenting on the importance of extending the analysis offered to other fundamental human rights (§1.4).

§1.1 The right to life at the fringes: Reading *Finogenov* and *Al-Skeini*

Article 2 protects life. However, it also specifies certain circumstances, when the public authorities may deprive people of their lives. Further, as per Article 15(2), Article 2 is 'narrowly' derogable. Article 15(2) allows no derogation from Article 2 except in result of deaths results from lawful acts of war. Importantly, whereas Article 2 itself mentions certain exceptions, Article 15(2) allows flexibility in Article 2's application. At least from both these articles' text, we can discern two important points concerning the legal protection of lives and the withdrawal of that protection. First, legal protection varies with the surrounding circumstances. Second, legal protection depends on the way a life conducts itself during such moments, i.e., threatening/ compliant.

In this section, I read two judgments delivered by the ECtHR in 2011. The first case law deals with a scenario where the Russian authorities tackled a hostage-taking situation: *Finogenov and others v. Russia*. The second case concerns the application of Article 2 in the aftermath of a war situation: *Al-Skeini and others v. the UK*. I focus on these 'extreme' situations in order to explore the occurrence of violence and its connection with lives. With this focus, we can explore how the right to life legally addresses the phenomenon of violence and determines the legitimate relation of legal violence with life.

I advance two arguments in this section. 1) Article 2 orients governmental practices to lives in order to ensure that both deprivation and protection of lives is lawful. 2) A proper application of Article 2 grounds itself on a proper *discrimination* of lives. Consequently, legal rules apply Article 2 universally, but obviously not in a uniform fashion, to all the legal subjects as Article 2's rights-holders.

§1.1a. *Finogenov and Others v. Russia*

I begin by examining *Finogenov*. The hostage situation is useful in order to look at the phenomenon of violence. In such a violent situation, law draws a parallel between the occurrence of lawful and unlawful violence. *Finogenov* touched the October 2002 Moscow theatre hostage crisis in which more than 130 hostages died because of the use of narcotic gas during the counter-terrorism operation. The applicants complained that the way the Russian authorities violated the rights of the victims under Article 2 (*Finogenov*, para. 3). Apart from this substantive violation, they alleged that the investigations following the incident did not fulfill the requisite standards. Consequently, they alleged a procedural lag.

In those circumstances where any kind of violence occurs which either threatens or challenges legitimate violence, Article 2 legally permits the use of lethal force with mortal effects to counter that 'unlawful' violence. Albeit human rights indeed impose certain obligations on non-state actors, non-state actors and institutions cannot justify their violence by using the exceptions mentioned in Article 2(2), for example. In the jurisprudence of human rights, the legal standards concerning the use violence and the constrictions surrounding the use of violence presume that they are taking law-enforcement officials of a certain recognized political entity as their addressees. Lawful violence is the domain of a concrete politico-legal authority, i.e., an established nation-state.

Given that lethal but lawful violence needs to be both effective and efficient in combating unlawful violence, the public authorities cannot rely on the right to life itself to determine what specific means and precise procedures they should expend in specific circumstances. Albeit there is no carte blanche granted to authorities to use lethal force in such cases, there is also no delineable solution given in advance for unexpected problems (*Finogenov*, paras. 207-8). The first case would lead to unregulated use of force, where human rights protection would remain only nominal. The second one presupposes clear prior delineation that would fatally constrict the capacity of the public authorities to combat unlawful violence (*Finogenov*, paras. 207-8). As the ECtHR noted, the role of Article 2, in such circumstances, is only to determine ex post whether 'feasible precautions' had been taken during such situations in order to minimize human losses (para. 208).[22] This interconnection between law and life in the right to life gives the public authorities a somewhat laxer margin to deal with those situations wherein violence erupts both unexpectedly and forcefully from illegal quarters vis-à-vis those situations wherein the regulation of violence is a matter of routine (para. 209). Consequently, in *Finogenov*, the ECtHR applied different degrees of scrutiny to different aspects of the situation, depending on whether the hostage-

[22] In the landmark *Ireland v. the United Kingdom,* the ECtHR noted: 'It is certainly not the Court's function to substitute for the Government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. The Court must do no more than review the lawfulness, under the Convention, of the measures adopted by that Government' (para. 214).

takers took the public authorities by surprise or whether the public authorities were in control of the situation (para. 216).

The analysis of the right to life in *Finogenov* takes place from four different angles. Each angle requires different rationale and produces different results. This aspect of judicial interpretation already problematizes those methods in political philosophy that isolate a common variable 'subsisting through all the circumstances in which a human being with a right to life might find himself' (Feinberg 1978, 104). First, the ECtHR looked at the overall situation, whether the use of force in this case was required. It granted that the use of force pursued a legitimate aim of protecting persons 'from any unlawful violence' (para. 218). The ECtHR believed that the storming of the building and the use of gas did not run counter to Article 2 because the behavior of terrorists could not be adequately predicted (para. 221).

Further, the ECtHR acknowledged that the demand of hostage takers that Russian forces withdraw from Chechnya was 'unrealistic'. It agreed that such a move from the Russian government would 'have been tantamount to a *de facto* loss of control over part of the Russian territory' (*Finogenov*, para. 223). Importantly, this runs counter to the political logic of protecting territorial integrity, for which the human rights standards in the Convention make explicit room for (see, the discussion on the limitation clauses in §6.1). By having challenged law violently, terrorists desecrate their and others 'dignity'. To the extent that one understands law making as protecting human dignity, one would ironically see the deprivation of terrorists' lives as an effort that maintains dignity as such, especially when the actions of terrorists effectively challenge the law. In *Finogenov*, the deprivation of terrorists' lives was hardly straightforward because killing terrorists entailed possibly depriving some 'terrorized' lives in the process. However, at such moments, with some broad conditions, law nevertheless grants the public authorities permission to execute counter-terror moves based on the effectiveness of measures taken. Despite the presumption of such casualties in the calculations of life and death with respect to the effective damage, these collateral deaths are always tragic.[23] However, from a political-legal perspective, this does not prove effective violence as being in itself tragic. Indeed, the urgency to kill terrorists generally precedes rescuing terrorized lives. Given the circumstances, the ECtHR deemed the use of force in this case as unavoidable (*Finogenov*, para. 223).

Second, although the authorities' use of narcotic gas was an ad hoc solution for which there existed no prior legal rule explicitly (*Finogenov*, para. 229), the ECtHR acknowledged that its use was a tailor-made response in view of an unusual situation

[23] By seeking to regulate their occurrences, international humanitarian law does not – as a matter of principle – problematize violent acts pursuant to compelling military objectives. Thus, Finnis (2011) wonders whether contemporary military policies – which the law of armed conflict seeks to regulate – remain qualitatively different (keeping the enormity of their magnitude out of question for the moment!) from the 'old fashioned torturers seeking to change their victim's mind or the minds of those next in line for the torture' (224).

(*Finogenov*, para. 230). In the prior calculations relating to pain and death, the objective to 'neutralize' terrorists made the use of gas acceptable, even if it could be later argued that gaseous fumes affect all, i.e., without any regard to socio-legal distinction between hostages and terrorists. Thus, the public authorities could predict that gaseous fumes would cause unknown suffering. Importantly, they took measures to increase the efficacy of using such a strategy with maximum 'care'. To the extent that such a 'care' is absent, it is hard to see how the public authorities could secure Article 2. This dual attention – that is, sufficient infliction of pain in view of the attainment of the objectives on one hand, and necessary precautions with respect to that infliction on the other – was in line with Article 2.

Third, in the matters dealing with rescue and evacuation operation, the positive obligations of the public authorities were engaged in ensuring necessary precautions, prompt evacuation, and timely medical assistance (*Finogenov*, para. 237). For the ECtHR proceedings, it required that the official reports (compiled by the Public Health Department, the Centre for Disaster Medicine, and witness testimonies of several senior-level officials in the public health system and rescue services) should be compared with other evidence (the testimony of the rescue workers and the medical personnel on the field, expert evidence, victim statements, etc.) (*Finogenov*, para. 241). More importantly, the ECtHR opined that it could apply a thorough scrutiny to the medical issue of aid and rescue, in contrast to the military and political aspects of the situation (*Finogenov*, para. 243). Given inadequate information exchange between various services, the belated start of the evacuation effort, limited on-the-field coordination of various services, lack of appropriate medical treatment and equipment on the spot, and inadequate logistics, it concluded that there was a breach of Article 2 as far as positive obligations on the public authorities were concerned (*Finogenov*, para. 266).

Fourth, in the aftermath of operation, Article 2 required that the public authorities provide relatives of victims with satisfactory explanations of deaths. This explanation is necessary in order to establish the degree of authorities' responsibility for those deaths (*Finogenov*, para. 273). The facts that all witnesses were not interviewed, the file of the crisis cell was destroyed soon afterwards, the circumstances of rescue operation were not thoroughly analyzed, and that the investigating team was not 'independent' meant that there was a violation of Article 2 on this count too (*Finogenov*, para. 282).

§1.1b On the interrelation between legitimate violence and life

Three points are important. First is the meaning of specific lives depending on their conduct and surrounding circumstances. The hostages were Russian citizens held

captive in order to put some demands before the Russian authorities. They therefore stand in between the violence of Chechen rebels and the counter-violence of the Russian authorities. The terrorists challenged the law with the threat of unlawful violence and put certain lives illegally in danger. In order to uphold the law, it is required that certain other lives (i.e., law-enforcement personnel) deal with this situation on behalf of the law. As such, legal violence in such situations is always justifiable counter-violence. However, the possible exposure of law-enforcement personnel to death does not contradict their right to life. In this sense, counter-terrorism does not counter the possibility of elimination of lives per se; it directs this elimination to certain ends in order to maintain the public order buttressed by legal rules.

Second is the connection of these lives to a legal context. The hostages as rights-holders can make the legal violence protecting them accountable. This is valid when the violence protecting them exceeds a certain threshold. Article 2 provides here both the objective of protecting lives and offers the test through which law measures whether the public authorities aptly protected lives. Although Article 2(1) allows for death penalty, Article 2 Protocol 6 abolished it during peacetime and Protocol 13 now abolishes it in all circumstances. Nevertheless, the abolishment of death penalty does not mean an abolishment of *all* lawful deaths. However, as per Article 2, terrorists can be lawfully killed only when the situation is critical and the danger high. If the public authorities find it possible to preempt the harmful effects of their activities without the loss of terrorists' lives, they should prefer this option.[24] During such critical situations, this (terrorizing) life maintains a tenuous but palpable link with its right to life (c.f., Agamben 1998, 54, 111). This idea forced the Russian authorities to clarify that they only shot unconscious suicide bombers who could have woken to blow themselves up, and that their forces rather killed other terrorists in the ensuing gunfight (*Finogenov*, para. 100).[25]

Third, legal guarantee of the right to life depends on the differential meaning accorded to lives. As such, legal protection is variable. How the public authorities are to rescue hostage depends on the tackling capacity of that state and the temporal unfolding of the situation. The way the public authorities deal with terrorists depends on the weapons terrorists possess, their determination and will, possible training and

[24] The fact that the legal analysis of this situation only measures the response in line with the standards of Article 2 entails that law cannot account for the extra-legal basis on which the public authorities respond. These include the reason that hostage-takers had held out too long that affected the international prestige of Russia and the strategic idea that giving in to demands of hostage-takers would establish a dangerous secessionist precedent.

[25] Similarly, if the public authorities kill a terrorist, it is important that they do not intentionally desecrate his corpse – the symbol of, in Agamben's phrase, 'human being's biological humanity' (Agamben 1999, 55). In a reverse manner, there is not much sacred with a terrorist's life, until he is 'neutralized'. However, the intentional effect, when it occurs in the course of a dire situation, of contemporary weapons and bombs on tearing bodies apart is a different matter (Keegan 1976, 322-23). In both instances, law can interpret human rights norms contextually in line with modern social attitudes by legalizing the notions of intentionality and care.

expertise, their past record, lapse of time and their conduct, and their demands and behavior (*Finogenov*, paras. 192, 213, 220). In order to determine whether the public authorities complied with Article 2, law requires a complete disclosure of counter-terrorism and rescue operations. It means that it is not simply the rescue of hostages and the killings of terrorists that needs to be seen in the light of Article 2 but also the circumstances surrounding the planning and control of the rescue operation (c.f., *McCann v. the United Kingdom,* para. 150). Consequently, the right to life here works differently for specific subjects based both on the differential meanings accorded to lives, and on – in Alexy's words – 'legal and factual possibilities' (Alexy 2010, 47).

If one reads legal codes (permissible/ impermissible, right/ wrong, valid/ void) in distance from social practices and processes of subjectification,[26] it would appear to one that the judiciary interprets norms in a contradictory manner, e.g., authorities kill terrorists but respect their dead bodies, civilians saved but exposed to gases, counter-terrorists use gas to kill quickly and minimize their own loss. Furthermore, unlike doctrinal legal scholarship, we can see that legal rules orient certain practices to the question of life. As such, Article 2's case law and normative structure has effects on the way we manage, conceptualize, and deal with lives. Therefore, the right to life constricts law-enforcement agencies within limitations, requires an entire assemblage of institutions (police, elite counter-terrorist units, hospitals, emergency wards), and considers the way public authorities show a scrupulous care (criminal law, proper training, medical briefings, investigations) in order to justify actions leading to deprivation of lives. Thus, the role of legal rules is to ensure a proper management of lives through law's force of legitimate violence.

It is correct to say that the right to life connects life to law both for its protection and for exceptions. It would however be hasty to say that the deprivation, or even protection, of a life is solely a legal question. In fact, without reading Article 2 in both a regressive and progressive manner, it is hard to see how one can interpret Article 2 concretely or influence facts through its norms. First, in order to impose positive and negative obligations on the public authorities, Article 2 cannot but draw on social practices. It is by drawing on a diversity of strategies (arms and aims, rescue operations, planning and control), personnel (soldiers, special squads, doctors, bus drivers) and institutions (crisis cell, health committees, hospitals) that the right to life shapes the way they have to operate. Thus, legal rules have to insert themselves into certain rationalities and institutional sites in order to make sense, even if these legal rules maintain certain distinctiveness. Second, given this functionality, Article 2 influences the operation of those practices that come under its purview. Based on this twofold force, legal interpretation is able to determine the compliance of authorities with Article 2. Therefore, the legal decision bases itself on certain truth mechanisms involving knowledge (medical discourse, statistics and probability, human psychology),

[26] On the concept of the processes of subjectification, see Foucault (1983, 211-212).

techniques (interview, autopsy, cross-examinations, documentations, photos and videos, testimonies), and expertise (expert reports, fact-finding missions, investigations bodies). Only when practices rationalize objectives (minimum human loss, effective action, upholding law and territorial integrity) does it become possible for law to measure relevant 'facts' in a normative light.

§1.1c *Al-Skeini and Others v. the UK*

Social theorists working in the tradition of biopolitics have influentially argued that, because of the interconnection of law and life, law at times removes any kind of legal protection without giving up the idea of legal regulation. They argue that such instances, e.g., war scenarios, legally produce lives with ineffective or token rights (Agamben 1998). It is true that the scope of protection accorded to one's right to life depends on the political effectiveness of the legal guarantor and the surrounding circumstances. However, to the extent that kindred situations bring into light the applicability of Article 1, one can consider the Convention's standards, including Article 2, as valid instruments in regulating such a situation.

In order to analyze how Article 2 functions in the aftermath of a war, I now look at a second case law: *Al-Skeini*. This case arose in the context of the British administration of southern Iraq as a 'caretaker' provisional administrator in the wake of 2003 occupation of Iraq (*Al-Skeini*, para. 12). Each of the six applicants in *Al-Skeini* alleged killings by the British troops of their relatives. British troops killed five victims while they were on patrol. Another victim died in a detention facility maintained by the British forces (*Al-Skeini*, paras. 25-71). The focus on the post-wartime situation is useful because in such a scenario the establishment of order explicitly presupposes deprivation of certain 'dangerous' lives and more stringent control of the 'incompliant' ones.

In *Al-Skeini*, the British government initially disputed that the Convention was applicable. It argued that, as per Article 1 of the Convention, the United Kingdom did not have 'jurisdiction' over the area (*Al-Skeini*, paras. 109-119). The British government nevertheless conceded that the question of rights, in line with international human rights and humanitarian law contra the 'regional' Convention, might be selectively applicable. From the government's perspective, the question of human rights emerged as far as that victim was concerned who was tortured and killed in a British detention facility, and was inapplicable as far as those victims were concerned which patrolling troops killed in their homes or on streets (*Al-Skeini*, para. 118). Given dismantling of the Ba'athist regime and occupation of Basra by the British armed forces, the ECtHR

opined that Article 1 was applicable (*Al-Skeini*, para. 143, 149-151).[27] This measure was necessary in order to prevent a 'vacuum' of protection emerging from within the 'legal space of the Convention' (*Al-Skeini*, para. 142).[28]

The ECtHR noted that to the extent that during the period in question British forces maintained the law and order situation in southern Iraq and administered the civil affairs (*Al-Skeini*, para. 21), the United Kingdom exercised 'the public powers normally to be exercised by a sovereign government' (*Al-Skeini*, para. 149). In a jurisprudential sense, this fact created a 'jurisidictional link' between the United Kingdom and the deceased. This link was palpably there because the only political and administrative power that could be looked upon to legally guarantee human rights in that area during that time was the British (*Al-Skeini*, para. 149). Contra Arendt,[29] it means that at time when it becomes difficult to discern a nation-state proper ensuring the civil and political rights associated with national citizenship, rights-holders at present continue to remain within the protectable ambit of human rights. As such, the claims of those individuals to their *human* right to life simultaneously created a *legal* link between their protected capacities and the effective on-the-ground power. This take reflexively concretizes the effective on-ground power by permitting it 'non-arbitrary' use of lethal force (*Al-Skeini*, para. 163).

It is important to note that the notion of non-arbitrariness may be somewhat flexible because the United Kingdom confronted a security dilemma in 'the aftermath of the invasion' (*Al-Skeini*, para. 161, 168). Even then, Article 2 retains its force by requiring that there ought to be a procedural mechanism in place, in order to discern whether the lives were taken 'in conformity with the rules of engagement' (*Al-Skeini*, para. 170; 168-177). It would therefore be simplistic to interpret Article 2 as allowing life or disallowing it, since it more fundamentally works to develop an entire mechanism that preempts situations where lives may be at risk (*L.C.B. v. the United Kingdom,* para. 36). Similarly, as a standard, law applies Article 2 to those situations where killings took place in order to determine in a procedurally correct manner the lawfulness of those measures (the procedural limb of Article 2). In *Al-Skeini*, the ECtHR found a violation of the procedural requirements of Article 2 because there was an absence of

[27] In *Banković v. 17 NATO countries* and in *Issa and others v. Turkey*, the ECtHR construed jurisdiction in territorial terms, yet with adding caveat as to possible extension of this stance, as it later did in *Pad and others v. Turkey*, for instance.

[28] The ECtHR also drew on the observations of third-parties, including, among others, Human Rights Watch, Interights, the International Federation for Human Rights, the Law Society, and Liberty that opined that constricting states to the human rights standards within their territories but not outside would legalize 'unconscionable double standards' (paras. 128-129).

[29] This remark points to Arendt's famous observation:

> 'The conception of human rights, based upon the assumed existence of a human being as such, broke down the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human' (Arendt 1973, 299).

proper postmortem investigations, even if the killings themselves might not be substantively unlawful.

Three points are important. First is the way Article 2 works during wartime or in its immediate aftermath. Like other legal standards during such times, Article 2 bases itself on a distinction of combatants and non-combatants in order to regulate conduct during such scenarios. This demarcation marks out the manner through which law protects non-combatants and through which combatants mortally deal with each other. Further, the application of human rights norms to the situation is factually important. The application of Article 2 to the situation means that an occupying power that is constrained through human rights can kill those combatants that fight it with justification. Alternatively, these combatants 'criminally' kill the military personnel of an occupying power without being able to justify that deprivation of life through the normative perspective of human rights. Given the prior normative force of human rights on an authoritative power, law can interpret human rights norms to investigate killings done by that authority. This possibility reaches it limits for those killing done by actors who are not constrained in a likewise fashion. Therefore, the constrictions surrounding proportionality, pre-emption, and strategic necessity that apply to warring armies in order to humanize their warring stance do not apply to insurgents and rebels.

Second is the way Article 2 relates this regulation of conduct to its standards. Among others, it means that the state protecting the right to life is required to train its personnel through seminars, briefings, manuals, guidelines, or expert talks, in compliance with the human rights standards to ensure that 'others' are deprived of their lives as per the normativity of human rights alone (e.g., *Al-Skeini*, para. 24). The interconnection of the right to life with a state answers one important paradox. That is, the fact that a state may train its soldiers to kill and require from them that they expose their own lives to mortal danger without in turn violating the right to life of soldiers or making its soldiers the very nemesis of this right.

Third, the effect of interpretive process on the situation to reconstruct the legal system is important. It is correct to observe that Article 2 did not apply in an identical way to the situation in the postwar Iraq as it does in the peacetime United Kingdom (e.g., *Al-Skeini*, para. 168).[30] However, the fact that the applicants can invoke Article 2 as rights holders from a belligerent occupant generates further normative and legal effects. It requires from the applicants that they ensure in their claims that they were non-

[30] The essence of equality as a legal concept entails that all are equal as legal subjects in their capacity as rights holders. However, since legal protection depends on a concrete legal and political guarantor, and since this effective capacity differs from one polity to another, the margin of legal protectability varies with political belongingness and effectiveness of the legal-political guarantor. In post-Saddam Basra, where the UK was an occupying power in the aftermath of war, Article 2 could not therefore be invoked by the residents of Basra for, say, provision of clean water and healthy environment. It is because of this fact that international politics based on human rights focuses on developing apt legal and political frameworks to guarantee human rights, even at times when legal norms alone cannot explicitly regulate such a political project (see, The Postface, §2).

combatants through testimonies, witnesses, autopsies, and the like. It is so since being a 'civilian' alone at such moments is not sufficient. On the other hand, it regulates the conduct of the warring state that, by violating human rights, is required to secure human rights. Legal determination requires that such a warring state tailor its conduct in line with human rights norms without abandoning its warring stance.

Overall, by looking at these two case laws, we can note two points. First, certain way to look at things, argumentative rules, institutional sites, the provision of collective goods, and legal tools structure the interpretive praxis of the right to life. Even in those situations that are far from 'normal', certain conditions have to be fulfilled (e.g., proper planning of operations, objective investigations) in order to ensure that the corresponding practices operate within the limits of the legally permissible. In order to govern life, that is, to regulate its protection and deprivation, Article 2 requires a 'strict proportionality to the achievement of aims set out in subparagraph 2(a), (b), and (c) of Article 2' (*McCann*, para. 149). More importantly, although the right to life draws on and regulates the distinctions between insurgents, rebels, terrorists, or separatists, it is difficult to see how one can use Article 2 itself to problematize such prior 'political' distinctions.[31]

Second, Article 2 regulates life and ties it with law only by legally regulating a broader field of social practices, such as, for example, provision of adequate medical facilities because of hazardous impact of gaseous fumes, conducting 'objective' postmortem investigations. It also means that during such times when the effectiveness of law reaches a minimum, constricting those events and processes later through the legal arm allows the right to life to intervene into that situation with the force of law. It entails that only those politico-legal structures that operate within the threshold of legality can lawfully deprive others of their lives. By doing so, Article 2 problematizes the conduct of conduct (c.f., Foucault 1983, 208-228). Article 2 governs conduct by equating abstract rights claims with legal system and with a certain interpretive framework. Thus, one's claim to the right to life depends on the weapons used, legal rules in place, institutional coordination, political necessities, and external constraints, among others. Article 2 conducts government by allowing law to determine the peculiar content of specific lives, their legal statuses and their conduct, and the manner in which authorities can expose them to legal violence or protect from illegal violence. In sum, those legal systems that more carefully *discriminate* lives based on their conducts and subject positions are the ones whose deprivation of lives can be more easily justified.

It means that the application of Article 2 ties life more bindingly to such regulatory frameworks. Additionally, it entails that it is because subjects have human rights that

[31] Therefore, the political label 'terrorist', in contrast to that of 'enemy soldier', 'resistance fighter', or 'partisan' has important legal repercussions. From a legal perspective, terrorist stays at the margins of legitimate law. Thus, a terrorist is one who cannot legitimately be violent, even in a warzone. As such, law can hold a terrorist accountable not simply for violation of the humanitarian norms, but for being violent.

there are governmental practices oriented to their lives and conduct. The next section elaborates this proposition.

§1.2 On life and law in the right to life

I argue two points in this section. 1) The jurisprudence of Article 2 is theoretically appreciable only in a framework of 'politics of life'. As social theorists point out, without positioning Article 2 in this framework, it is difficult to see how Article 2 can orient governmental practices to the question of lives. 2) The focus of such a politics is not simply protection and deprivation but, more importantly, optimization. The argument offered in this section primarily focuses on a case law dealing with euthanasia: *Pretty v. the United Kingdom*.

In *Pretty*, the applicant, who suffered from a Motor Neuron Disease (MND), alleged that the refusal of British authorities to grant immunity from prosecution to her husband if he assisted her in committing suicide infringed her rights, notably under Article 2 (*Pretty*, para. 7). Since the issue of voluntary euthanasia and assisted suicide is referred to in the jurisprudential literature of liberal tradition as a moral and ethical paradox (e.g., Dworkin 1994, 185-186, 215-217, Habermas 2001,46, 52, McMahan 2002, 455-493, Raz 2013, 5-11, Griffin, 2008, 216-224), focusing on *Pretty* will be useful in providing us with an anchor for our reflections. The concern here is not in answering the moral dilemma in an 'applied' manner, but in unpacking the governmental practices surrounding it, especially as far as the question of Article 2 is concerned.

Before reading *Pretty*, however, it is important to look at the way a 'life' is interpreted in a specific way in cases dealing with euthanasia, because it is primarily this prior interpretative praxis which shapes moral paradoxes in kindred cases. We believe that, in such cases, lives/ bodies suffer from the conditions of 'degeneracy and incurability' (*Pretty*, para. 3). However, what we need to analyze is how the conditions of 'degeneracy and incurability' discursively function. Apart from an analysis of the biochemical compositions of bodies, it requires that one measure the overall biological situation in accordance with the biomedical norms. The juxtaposition of a diseased body with such normativity allows knowledge to circulate around the patients that establishes their projected life expectancy and determines the form and the content of possible 'suffering' they will have to confront as time passes by. It is because of this dynamic that it becomes possible to speak of and about pain and suffering of patients on behalf of patients, even in cases where the patients lose their expressive and motor capacities, as can be seen to a large extent in *Pretty* (para. 8).

For legal analysis, it means that, in such cases, the capacities of subject (agency, deliberation, volition, physical integrity) and the force of their claims are primarily

dependent on the observations of the general consultant, neurologist, neonatologist, cardiologist, surgeon, or obstetrician. In order to ensure that consent is rational, law needs to rationalize that consent. Understanding autonomy divorced from such practices would be unintelligible to law. Logically, a change in the variables constituting medical sciences affects what I as a rights-holder can legally claim, such as, for example, those situations where a specific disease becomes curable or where pain suffered becomes bearable through newer palliatives. The scientific binaries concerning pain (useless/ useful, curable/ incurable, sustainable/ gratuitous) influence the social attitudes concerning pain, and affect the legal attitudes concerning their regulation. Such variables however do not stand here in contradistinction to freedom. It is so since they not only sustain a life in the first place but also open up a field of claims expanding rights-holders' range of choices. In order to elaborate the latter point, we can look how law handles the claims of the applicant in *Pretty.*

It is from within that subject position that the applicant posited the counter-claim that she bore a right either to continue her life ('sanctity of life') or to terminate it ('right to die'). The applicant argued that her circumstances and the possible difficulties she would have to face in future necessitated that she approached the question of her life 'autonomously' (*Pretty*, para. 8). Further, in the calculus of pain where her 'life expectancy was poor' vis-à-vis the 'undignified' final stages of disease, a question of Article 3 prohibiting inhuman and degrading suffering also arose (*Pretty*, para. 8, para. 44-46). Reading the text of Article 2, she also argued that it protects the right to life and not 'life' *per se*. Thus, she argued that Article 2 did not protect a life from the threats that may come from that life itself (*Pretty*, para. 35). Political theorists analyze the question of euthanasia in terms of social norms and deliberative practices without appreciating the fact that the variables through which we largely understand the entire problematic are effects of a (e.g., scientific) specialized language with its own norms and practices. It is when one sees life in a specific manner that it becomes possible for one to turn its regulation into a legal question, and to evaluate it in the light of societal objectives. This requires that law measure the claims in question with the legal precedents, national law making concerns, surrounding moralities and sensibilities (the ECtHR drew on observations from Catholic Bishops' Conference of England and Wales and Voluntary Euthanasia Society). This allows law to measure the legal claim to the right to life by contrasting the circumstances the applicant is in (unrelieved and severe pain, weariness of the dying process, loss of control over bodily functions) with concrete objectives (prevention of abusive medical practice, respect of autonomous decisions, end of useless suffering, protection of the vulnerable). The fact that there were sound regulatory standards in place as regards health and medical practice in the United Kingdom and that the national law pursued a legitimate aim of protecting 'life' was in line with Article 2. Further, the ECtHR opined that it would be presumptuous to infer out of Article 2's text a 'right to die' (*Pretty*, para. 39).

In order to observe the differential management of lives, one can look at the regulatory capacity of Article 2. To work itself through the social body, Article 2 matches the meaning of a specific life with surrounding legal rules, moralities, political climate, etc. Given the fact that there is already an inbuilt room to orient the government of lives to such variables, it becomes difficult to see Article 2 as operating like a structural automaton that produces similar results with similar inputs. It is therefore important to look at the fact, also pointed out in *Pretty* (para. 26), that several European countries permit voluntary euthanasia and assisted suicide, such as, for example, Belgium, Switzerland, Germany, France, Finland, Sweden and the Netherlands. Importantly, it is neither the legalization nor the criminalization of assisted suicide that contravenes Article 2. Thus, Article 2 works out to draw broad but strict limits of the permissible within which specific legislating states can operate and within which Article 2 gives those states to orient their law in line with their specific societal evolution without violating the substantive provisions of the right to life.

Thus, Article 2 incorporates difference only by delimiting the prior shape of acceptable differences. In order to look at this point legalistically, we can provide a progressive analysis by noting different practices of managing conduct that function in different legal systems under the Convention framework. In those countries where euthanasia is permitted, the governmental problematic is to supervise closely the medical and hospital practices, determine the form of legally acceptable consents to terminate lives, identify the possible stakeholders that are to be engaged with in the end-of-life decisions, redraw criminal codes, preempt and account for the potential negligence and malpractice, identify in what manner are clinicians to give larger doses to the patients, ensuring slower and painless transition towards death, and draw out the list of diseases where euthanasia is permissible, among others.

In those countries where euthanasia is not permitted, the governmental problematic is to provide psychological care and therapy to incurable patients, determine the way their expenses are to be allotted to hospitals, prevent criminal ‘private’ practices to the contrary, arrange for the methods falling in line with honorable deaths, and insert the prolonged sustenance of lives and their traumatic ends as categories into the health insurance framework, among others. In both instances, Article 2 regulates social practices to ensure that the public authorities do not violate its normative dictates. The strength of the right to life is to turn all those specific variables into a question of Article 2, with which one connects life, such as, for example, life-saving machines, artificial feeding tubes, medical care services, and hospital regulations. Therefore, a rights-holder can contest all these variables in terms of Article 2, even when they do not flow from it.

Therefore, the right to life not only addresses deprivation or protection of lives but also their optimization. Then, the role of Article 2 is appreciable only in an overall ‘politics of life’ that orients government techniques to lives in view of subjects’ human rights. We

can return to *Pretty* for this point. It is correct to say that it is the concern of life itself that cannot allow the ECtHR to interpret Article 2 in a manner that it confers 'on an individual the entitlement to choose death rather than life' (*Pretty*, para. 39). It is correct to discern that the positive obligations of states permitting euthanasia are differently operative. Nonetheless, as far as the case law of Article 2 is concerned, it can become problematic for the positive obligations of states, if they palpably fail to provide life-saving facilities to its populace. Thus, the right to life requires that the public authorities 'take appropriate steps to safeguard the lives of those within its jurisdiction' (*L.C.B. v. the United Kingdom,* para. 36). As such, the prior medico-technological infrastructure works as an enabling condition in *Pretty*. In sum, judicial interpretation cannot problematize its social function, general access, and truth, but only its specific use (c.f., Foucault, 1991, 58).

It means that the right to life requires that there should be an effective system of regulation and control identifying and forestalling dangers posed to life (*Öneryıldız v. Turkey*, para. 90). Even in those cases where the activities are dangerous, such as, for example, nuclear tests, toxic industrial emissions, and urban waste production, Article 2 requires that those 'unpalatable' but permissible activities be constrained through legal rules. Thus, the public authorities are respectively required to forestall in advance through appropriate mechanisms dangers associated with nuclear testing for military purposes (*L.C.B.*, para. 36), release of toxic emissions (*Guerra v. Italy*, para. 58), and aftereffects of large-scale waste disposal sites (*Öneryıldız, para.* 90). Of course, the success with which public authorities are able to guarantee this varies on a case-to-case basis. In any case, what is important to note is the way the possible margin of error in the provision of such positive obligations also forms a part of the jurisprudence of Article 2. As examples, one can note here the cases dealing with the negligent practices of health professionals (*Powell v. the United Kingdom, Vo v. France;* c.f., *RK and AK v. the United Kingdom,* para. 36) or law-enforcing agencies (*Osman v. the United Kingdom, Bubbins v. the UK*).

It is because of this complex interconnection of life and law that the right to life only gives the law-enforcing agencies a room to wage lawful violence, and not to terrorist groups as in *Finogenov* or insurgent networks that British troops faced in the post-Saddam Iraq. Then, the room to wage lawful violence is not only reserved for specific historically established nation-states that are politically recognized, but for those political bodies that bear certain administrative structures, the focus of which is on both protection and optimization of life. Further, given this responsibility, rights-holder can hold states accountable both for inaction (positive obligations) and action (negative obligations). However, given this dynamic, law gives the public authorities a margin of discretion in the implementation of human rights, and gives them a possible margin of

error in certain cases where they legitimately lag lest they be overburdened (*Osman*, para. 116).[32]

If Article 2 orients governmental practices to lives, this means that an application of Article 2 ties life more bindingly to such regulatory frameworks. As can be seen in *Pretty*, the legal decision to permit or prohibit euthanasia turns onto an analysis of 'legislative and administrative framework in place' (*Öneryıldız v. Turkey*, para. 72). It not only means that Article 2 works through such a field, but also that the understanding as to what is to be construed by, for example, unlawful killing is a function of that framework. Thus, Article 2 therefore requires from the legal guarantor that it put in place an effective 'legislative and administrative framework' (say, police, courts, criminal law) that both establishes deterrence protecting life and lays down the conditions of lawful deprivation of life. Importantly, the effectiveness of such a framework does not only entail the internal efficiency of its own mechanism but also its capacity to attune itself accordingly in view of the government of lives, as can be looked at in *Finogenov* and *Al-Skeini* for instance. In sum, the interpretation and application of the right to life produces a differentiated governmental management of life.

§1.3 On biopolitical governmentality of the right to life

I argue in this section that one cannot understand the governmental management of life in legal terms alone (§1.3a). As such, our choice to rely on a specific social theory in order to understand Article 2's case law remains justified. Based on this chapter's discussion so far, I then discuss the conceptual implications of reading governmentality together with biopolitics. I do this by introducing and explicating the concept of 'biopolitical governmentality' (§1.3b). Later, I argue that social theorists working in the tradition of 'thanatopolitics' who simply focus on one aspect of biopower (e.g., deprivation) instead of others, remain vulnerable, like political theorists, to producing a uniform narrative, valid for all circumstances (§1.3c).

§1.3a On the insufficiency of a pure legal lens vis-à-vis the right to life

We have seen that the right to life depends on the meaning of life. Therefore, looking at the social practices is useful to determine the connection of life with the legal context.

[32] Alexy discerns something similar, when he notes an inbuilt mechanism of 'structural discretion' in the architecture of constitutional rights (Alexy 2010, 394-413). Justice MacDonald notes: 'In applying the principle of proportionality, a margin of error is allowed to the public authorities and the Court undertakes neither a strict view nor substitutes its assessment of the most appropriate measures' (MacDonald 1998, 245).

Even if we analyze the government of subjects using law as a vantage point, it is important to note that law interpellates itself only by working through a prior field of praxis. To identify the content of law based on Article 2, we must have recourse to the aforementioned social practices and their focus on human conduct. We cannot infer from legal rules on autonomy or agency what we are to understand by autonomy or agency without such mediation. The function of legal system depends on the way its norms concerning, for example, Article 2 ensure that the public authorities protect lives, optimize lives, and kill them in a permissible manner by developing mechanisms surrounding social practices, e.g., penal and criminal system, the centralization of violence, hospital and health services. To the extent that those social practices rely on legal rules, law's coercive power sustains an overall optimum (Foucault 2003, 266).

However, if there are indeed certain 'risks' inbuilt within these governmental practices (Foucault 2000, 372), then a normative standard like Article 2 which works through them is likewise affected. This is to the extent that the fate of any such normative standard depends on the manner through which it legally regulates these 'risks'. Let us look at the text of Article 2. Article 2 secures the right to life under some conditions and with some exceptions. These conditions and exceptions are what the right to life already finds life to be in. They include the unpredictability of human conduct (Article 2(2a)), the structure of the penal and criminal system (Article 2(2b)), the monopoly of state violence and the challenges to it (and hence to public order) through riot or insurrection thereof (Article 2(2c)), and the necessities of emergencies, including the possible incidence of warfare (Article 15). What Article 2 does is to ensure that the unpredictably of human conduct is tackled with absolute 'care', the penal and criminal system remain within the threshold of the humane, the monopoly of state violence within that of absolute necessity, and the incidence of warfare within the permissible. What makes such a process politically charged is that when these incidences (warfare, emergencies) and processes (penal and criminal system, the political centralization of violence) are constrained within the defined threshold through Article 2 in particular or human rights in general, normative standards give their existence and occurrences, as an effect, a token of legitimacy.[33] Resultantly, Article 2 enables *an apt regulation of violence* to which lives are exposed.

§1.3b *Bios* and *homo*: On the concept of biopolitical governmentality

[33] Some social theorists and legal scholars believe that there is a side effect of putting a certain 'ethic' on these incidences and practices. Rather than 'eliminating' them, they argue that law resultantly regularizes them in, what law itself believes is, a 'constrained' form (e.g., Schmitt 2007, 54, Asad 2003, 116). From a legal perspective, this is not a problem, because European human rights law presume inevitableness of these incidences and does not seek to eliminate them as such.

We have seen how the right to life draws on governmental practices that tease out various values and utilities of life (Foucault, 1978, 144), and connects these with a concrete legal-political guarantor. We have utilized the social theory on biopolitics to analyze how modes of governmentality oriented towards life articulate the formal infrastructure of the right to life. Our analysis of Article 2 shows that it is possible to read biopolitics and governmentality together. In this section, I discuss the conceptual implications of our framework by introducing the concept of 'biopolitical governmentality'. To the extent that other human rights presume a certain life to which we attach those rights, this concept also affects how we understand other human rights.

The concept of 'biopolitical governmentality' emphasizes two aspects when used to analyze Article 2 in particular and human rights in general. First is the biopolitical aspect. The question of *bios* is of interest to human rights as long as one can establish a connection between a human life and any specific *bios*. Think of the political theorists expanding the definition of human rights to include the human right to clean environment in their lists, for example. Obviously, their theoretical narratives rely on this interconnection between a *bios* and human flourishing, because of which their narratives understand the idea of 'environment' – with pressure from scientific discourse's normative orientation to the idea of human – in both non-natural (powerful but malleable) and largely instrumental (necessary and important but not in unconditional categorical) terms. Then, this aspect focuses on 'power over man insofar as man is a living being' (Foucault, 2003, 239). Therefore, our talk of Article 2 presumes those social setups that approach life as an object to make it, say, bearable and productive, support it during vulnerability, or constrain its dangerous potential. Therefore, in order to analyze human rights holistically, we need to study those social setups upon whose rationales and tools human rights rely, and the way those social setups are consequently legitimized through the normative instrument of rights.

Second is the governmental aspect. When we pose the problems of life societally, it is always in terms of government, i.e., how we can manage human conduct by appreciating human conduct's 'own' dynamics (Foucault, 2008, 323). By focusing on human conduct in its various forms, these practices manage subjects (Foucault 1983, 341, Dean 2009, 17-21, Senellart 2007, Foucault 2007, 108-109). Consequently, practices of government 'rationalize' these arts and materialize their objectives (Foucault, 2007, 108). Therefore, human rights function by requiring from a political and legal guarantor that it protect humans out there by putting in place appropriate regulatory frameworks. The concept of biopolitical governmentality enables us to focus on the way normative claims of rights *function*, that is, the way human rights remain sensitive to the differential meanings accorded to lives and the construction of practices around those lives that consequently makes rights effective.

§1.3c Article 2's case law contra the repressive hypothesis of biopower

We have observed that the meaning of lives of is seldom legal *per se* (Esposito 2008, 28). However, their regulation is indeed tie to legal concepts and rules.[34] Therefore, what kind of interpretation law gives to my right depends largely on my subject position, e.g., incarcerated convict or soldier, war prisoner or on-ground combatant, mentally unstable or terminally ill. Similarly, once legal rules constrain those social practices, law backs their regulatory character with legitimate violence. As a rights-holder, law threatens my conduct, which is an object of these practices, with its force: I have to serve in the military when my state makes universal recruitment compulsory, or vaccinated when the public healthcare system requires it. Importantly, it entails that the subjects of those practices are neither simply constituted by law (since the structure, rationale, and function of these practices is not simply localized as law) nor solely governed by it (since controlling mechanisms are diffuse). This fact – certain rationalities articulate law, law regulates social practices – makes any one-dimensional ontological interpretation as to the nature of law untenable.

Further, an influential current in contemporary social theory on biopolitics discerns a common subject paradigm (i.e., bare life, living dead) (Agamben 1998, 117, Mbembe 2003, 40) throughout the entire Western political tradition. Their works study how law removes legal protection without abandoning legal regulation. Thus, they argue that biopolitics is singularly bleak. Let us call their narratives, following Foucault, as 'the repressive hypothesis of biopower' (Foucault 1978, 17-50). We can initially note two major faults with this hypothesis. First, specific biopolitical techniques have undergone transformation (euthanasia is no longer connected to the purification of race through *Genesung* or the improvement of the life-stock of the population, for instance). Second, different rationalities and practices surround specific biopolitical issues now, as we saw in §1.2.

Importantly, the repressive hypothesis of biopower is unable to theorize the way lives are optimized (c.f., Agamben 1998, Mbembe 2003). True, the right to life does not ban all killings per se. True, it only bans those deprivations are seen as 'arbitrary' (*McCann*, para. 161). What is however important to look at is the way these notions (of protection, preservation, and optimization) are seen as non-arbitrary. Thus, one can give a very weak of interpretation of Article 2, when one sees its case law through a technical perspective that explores the argumentative structures whereby law either adjudicates different claims (justiciability) or discerns legal accountability (decisional aspect). In fact, human rights norms consider those social and legal systems as inherently compliant, whose institutional apparatus is oriented towards the question of life in a

[34] Let us give a banal example concerning Article 2. We cannot rely on Article 2 itself to understand how a society should train and monitor its secondary school teachers. However, we can rely on Article 2 to understand how law can force unemployed secondary school teachers to abstain from protesting when their protests turn into a riot.

manner that that apparatus provides for, and intervenes to ensure in a collective manner, the optimization of individual lives. Further, 'the repressive hypothesis' cannot tell us what we should make of the fact that the right to life orients even those conditions where human life meets its limitations (such as those dealing with finitude, illness, suffering, degeneration, and mortality) to a politics of life? In *Pretty*, for instance, the discourse that enables the termination of life to be spoken of is itself oriented to such a politics: the extent of pain (psychological, emotional, physical) and its unbearableness, alleviation of pain through the end of life, increasing degradation of living circumstances, autonomy over life, the quality and the sanctity of life.

At a general level, we can discern this point by glancing through the procedural limb of Article 2's interpretative praxis that requires proper and prompt investigations by the public authorities following deaths possibly occurring in violation of Article 2. As noted in *Finogenov* and *Al-Skeini*, this exercise requires certain institutional assemblages, truth-establishing procedures, techniques and know-how that are oriented to the question of death.[35] In this sense, it is important not to take the signifiers 'life' and 'death' at face value but to focus on their place in particular setups – conceptualized as they are in and through 'discourses, decisions, programs, actions' (Fassin 2009, 48). For example, the procedural limb of Article 2 elevates death from an event situated in an unpredictable temporal domain to a veritable discursive category that then propels certain techniques and practices to come to fore. These include practices with which we can obtain truths, dispense justice, preempt avoidable deaths, and identify efficient mechanisms to end dangerous lives with minimal possible loss to the valuable ones, evaluate the governmental conduct of the state, and design techniques with which we can measure vulnerable social spots and institutional failures.[36]

[35] In *Kaya v. Turkey*, the procedure was ineffective because the prosecutor

> 'had not questioned the soldiers involved in the incident; no tests were carried out on the deceased's hands or clothing for gunpowder traces; the deceased's weapon was not dusted for fingerprints; the corpse was handed over to villagers, which rendered it impossible to conduct any further analyses, including of the bullets lodged in the body; the autopsy report was perfunctory and did not even include any observations on the actual number of bullets which struck the deceased or any estimation of the distance from which the bullets were fired' (para. 86-92).

Similarly, in *Salman v. Turkey*,

> 'there had been crucial failures: there had been no proper forensic photographs of the body; no dissection or histopathological analysis of the injuries had been carried out; an 'unqualified assumption' had been made in the initial forensic report that the broken sternum could have been caused by cardiac massage, without seeking any verification as to whether such massage had been applied, and the assessment of these initial findings by the (State-run) İstanbul Forensic Medical Institute compounded these shortcomings by merely confirming the diagnosis of a heart attack' (para. 106).

[36] Interestingly, after opining that death is outside the power relationship (Foucault, 2003, 248), Foucault acknowledges few passages later in *Society Must be Defended* the political role and sociological function of the discourse which determines 'what must live and what must die' (Foucault 2003, 254), while discussing the phenomenon of modern racism (Foucault 2003, 254-63).

§1.4 Concluding remarks

Political theorists isolate something common in different circumstances to discover the meaning that a society ascribes to life. Lawyers pinpoint the irreducible variability of the circumstances that makes any such isolation futile. In this chapter, I read Article 2's case law by focusing on different circumstances, while exploring how social practices articulate life's meaningfulness in those circumstances. Unlike political theorists, I loosely called this fact as 'politics of life'. Unlike lawyers, I argued that the question of meaning is central in order to analyze Article 2's case law systematically.

If the case law depends on the circumstances that are variable, this is important in terms of legal protection. It means that the right to life applies universally but not uniformly to all rights-holders because the specific interpretation of their right to life depends on their subject position and their conduct. Equal applicability of Article 2 to all rights-holders does not mean a uniformity of legal treatment. Thus, the legal application of the right to life does not mean that law gives everyone a right to live. However, when political theorists analyze human rights-based on a concept like 'dignity', they logically apply related normative concepts, like autonomy and equality, in a derivative and abstract manner.

To the extent that law 'ties' lives more bindingly to those frameworks that rationalize and govern lives (and hence influence the question of their meaning), the question of a life's meaningfulness is not outside legal scholarship's scope. Thus, law has to respect lives except where there are social necessities, and lives have to respect the law and acknowledge the importance of absolute necessities confronted by states (as can be seen in *Finogenov*, for instance). However, when lawyers analyze Article 2 in justiciable terms, they downgrade the importance of Article 2 as a controlling norm. Sociologists of law tell us that in modern societies law is not primarily a dispute-resolution framework but a medium through which different social systems are coordinated. If law is unable to perform this task, and legal rules largely become a matter of judicial interpretation only in cases of violation, not simply a society but also its legal system becomes vulnerable to a systemic breakdown. Therefore, given this chapter's analysis, another more important question comes to the fore: If the right to life functions within and because of a certain praxis oriented to life, how to re-conceptualize not only politics of life or human rights but also their point of coincidence in other human rights?

Chapter 2. *Oikopolitics*, Governmentality, and Privacy: Reading Article 8 on the Right to Respect for Private and Family Life

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> ECHR Article 8: Right to Respect for Private and Family Life

Unlike Article 2(1), Article 8(1) does not give a rights-holder a right to φ. It rather refers to 'respect' for a rights-holder's φ. Unlike Article 2(1), Article 8(1) does not mention φ in singular.[37] As such, Article 8(1) is wide-ranging. However, Article 8(1) does not state: a) to what extent different components of φ overlap; b) to what extent α and ß are part of the same φ; c) whether the sum of α and ß equals the set φ. Further, unlike Article 2(1)'s reference to 'law', Article 8(1) alone does not specify who bears the correlative obligation to respect rights-holders' φ. Importantly, Article 8(2) clarifies that the public authorities bear the obligation to secure Article 8(1) rights through different measures in accordance with the law. Thus, the plural nature of both Article 8(1) and Article 8(2) requires that law respect my φ (e.g., intimacy, data protection, privacy) through legal rules, procedural standards, and regulatory measures. Thus, the connection between Article 8(1) and Article 8(2) is logical. Further, the plural nature of both Article 8(1) and Article 8(2) signifies Article 8's flexibility. To the extent that law understands α1 and ß2 as legitimate manifestations my φ, it can interpret Article 8's respect for φ as protecting α1 and ß2 without presuming that everyone ought to 'value' α1 and ß2. Then, I can justifiably interpret my rights under Article 8(1) as giving me a right to respect for my α1 and ß2 without assuming that the later manifestations narrowly define all that is to my φ. Consequently, in the Convention's framework, Article 8's role is pivotal because the ECtHR has increasingly interpreted rights it protects in autonomy-related senses,

[37] To the extent that I generally refer to what Article 8(1) protects, I mention φ. I only mention a specific aspect, such as privacy, when I am concerned with that component alone. I do this for a twofold reason. First, we cannot reduce Article 8(1)'s protective scope to simply one of its components. In this sense, the ECmHR has noted that Article 8(1) rights are not simply privacy rights, as Anglo-American legal thought would have it (*X v. Iceland*, p. 86). Second, it is hard to conceptualize without radically restructuring Article 8(1) by thinking that different components mentioned in Article 8(1) add up to signify something given. By mentioning φ, I pinpoint this openness. Thus, the ECtHR rather considers the open-endedness, within certain limits, of Article 8(1)'s definition as useful because it allows the Court to apply Article 8 norms on newer situations in the light of social changes (*Peck v. the United Kingdom*, para. 57; *Niemietz v. Germany*, para. 29; *Pretty v. the United Kingdom*, para. 61).

e.g., self-identity, personal development, decisional autonomy (*Ternovszky v. Hungary*, para. 22; *Pretty*, para. 62).

Political theorists usefully pinpoint that our understanding of private life and privacy relies on and is an effect of a complex social discourse (Arendt 1998, 38-57, Habermas, 1989, 164, Griffin 2008, 225-239, Donnelly 2013, 284). Therefore, they tell us that we cannot rely on legal rules alone to determine what qualifies as either our private life or our privacy, even when law determines our right to respect for private and family life. However, to the extent that political theorists understand that social discourse in contrastive terms (my φ is what my –φ is not, my –φ is what my φ is not),[38] their understanding of my φ primarily operates on an exclusionary basis (e.g., limits, realm, boundaries, spheres).[39] Thus, such an analytical framework cannot illuminate Article 8's case law. Consequently, their narratives end up either falling into that of extreme normativity (essence, increase, and decrease of φ and –φ) or that of comparison (comparative analysis of social dynamics relating to φ and –φ through time) (Bauman 2000, 35-39, Benhabib 1992, 112, Castells 2001, 168-187, Nissenbaum 2010, 231). In line with political theorists, sociologists of law identify sociological factors because of which we now understand Article 8 as putting the public authorities at times under positive obligations without compromising autonomy of Article 8's holders. Importantly, they tell us that we cannot interpret the general case law of Article 8 in an exclusionary manner because the role of facilitation, compensation, and regulation of my φ is in line with, for example, the idea of 'respect' mentioned in Article 8(1). Think of social legislation. However, to the degree that sociologists of law find macro-sociological factors at work here (e.g. the interventionist welfare state, the 'social' domain) (Friedman 1994, 45-79, Preuss 1979, 27, 94, 107, 118, 193, Sunstein 1993, 47-73, 165-172), their sociological perspective comments on the macro-level dynamics of φ (e.g., clients of welfare agencies, risk-averse subjects). However, they then fail to provide an analysis of the 'respect' that Article 8's case law accords to φ. Further, what we understand as 'welfare state' or 'the social domain' is a sum-total of different social practices that in themselves do not work uniformly.[40]

Recent advances in feminist theories of law pinpoint the importance of practices through which we attach a meaning to φ and with help of which we then conceptualize the legal respect for φ. Like political theorists, they consider private life and privacy in

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[38] Influential secondary literature in political and sociological theory, relying on this understanding, attempts to understand whether 'authenticity' lies in the public sphere or in the private sphere.

[39] In his *Principles of Political Economy*, Mill notes:

> 'That there is, or ought to be, some space in human existence thus entrenched around, and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question: the point to be determined is, where the limit should be placed; how large a province of human life this reserved territory should include' (Mill 1998, 326).

[40] Weber (1924, 517) himself cautioned against a 'metaphysical' attitude that explains unique phenomena by reference to general laws. Otherwise, he believed, one would impose certain meanings on historical actors, within which one thinks they move, which would however remain different from the way those actors understood themselves and interpreted their actions.

terms of social discourse. However, they do not view φ and –φ in contrastive terms because then, they believe, one cannot theorize the transactions and overlaps between φ and –φ (e.g., Young 1990, 25, Pateman 1989, 118). In agreement with sociologists of law, they tell us that we can understand private life with reference to a sociological lens. This makes private life both individually important and a general 'political' matter. Thus, from their critical perspective, the focus on specific private life issues (e.g., abortion, domestic violence) requires analytical tools with which one can scrutinize both macro-sociological and micro-sociological factors. With this focus, feminist theories study what it means for my φ and for me, when law regulates my φ in view of the respect for my φ. In order to focus on these two points (i.e., meaning of my φ vis-à-vis social practices and the effect of Article 8 on rights-holders), I borrow from this social theory. However, to the extent that the feminist theories of law view the legal discourse from a conflict-oriented perspective (e.g., male power, gender interests, and masculine ideology) (Olsen 1985, 835, 842–844, 862, Mackinnon 1989, 3-4, 112, 114, 170, 219, Rhode 1991, 306, Mackinnon 1987, 46, 48, 489) (O' Donavan 1985, 11), their emancipatory and critical aspects undermine their analytical and holistic strengths. The first two aspects cause feminist theory to produce a uniform explanation for a variety of social phenomena (Rose 1987, 75). Consequently, in this chapter, I introduce a concept (i.e., *oikopolitics*) with the help of which I draw on the insights from feminist theory in a manner consistent with our governmentality perspective. I explain this concept (i.e., *oikopolitics*) later (i.e., in §2.3).

In this chapter, I argue that the right to respect for private and family life connects the question of protection of φ with the problematic of management of φ. The universal application of Article 8 to all legal subjects determines the margin of governability of their social encounters. However, 'interferences' as per Article 8(2) do not lead to 'normalizing' processes. In fact, these 'interferences' manage differences.

I begin by analyzing how law interprets 'respect' in the light of which Article 8(1) works. I argue that Article 8 functions in relation to a discourse on privacy and private life, legal codes, regulatory procedures, and practices of government. As such, while analyzing Article 8's case law, we cannot understand φ simply in terms of what it is not (§2.1). Later, I focus on the interrelation of Article 8 with social practices and norms. I argue that without developing an equation between protection and management of my φ, Article 8 cannot see my φ in terms of autonomy. Thus, Article 8's holders are autonomous to the extent that laws 'respect' their φ, and not in a 'pre-political' sense where we might expect legal rules to protect an already autonomous φ (§2.2). Then, I discuss some conceptual implications of reading Article 8 from the perspective of governmentality. I comment on the structure of Article 8 and the way it imposes obligations on the public authorities on the one hand, and duties on the rights-holders and the others on the other hand. I argue that Article 8 operates in a social context (*oikopolitics*) where practices are already oriented to φ. I later pinpoint some

shortcomings in the tradition of feminist theories of law in the light of our discussion (§2.3). Our discussion ends with brief concluding remarks (§2.4).

§2.1 On the body politic of Article 8: Reading *Halford* and *Brüggemann*

Article 8 respects φ. However, it specific circumstances when the public authorities can interfere into my φ without undermining its respect. Article 8(2) mentions various social objectives that define the manner authorities secure my Article 8(1). The obligations owed by the public authorities, in the light of respect for my φ, define the importance of 'interferences' mentioned in Article 8(2). Thus, unlike Article 2, the ECtHR conducts balancing exercises in the cases dealing with Article 8. Consequently, legal protection varies with the reach and scope of those social objectives. Second, even in the case of rights-holders, legal protection attaches itself to the idea of respect. Thus, when we look at the text of Article 8 itself, it is difficult to see whether my 'disrespect' of my own φ qualifies for legal protection under Article 8 (c.f., *Laskey, Jaggard, and Brown v. the United Kingdom*, para. 36).

In this section, I read two case laws. My first example is a surveillance related case. In it, the ECtHR found violation of Article 8 at workplace but not at home: *Halford v. the UK*. By reading *Halford*, I observe how Article 8's case law makes sense in the light of certain practices and rationalities. My second example is an abortion related case where the former Commission explored the principled scope of a pregnant woman's private life: *Brüggemann and Scheuten v. Germany*. By reading *Brüggemann*, I observe how law interprets the meaning of a rights-holder's private life and how this determines the idea of its legal respect. I advance two arguments in this section. First, Article 8 determines the way social practices are oriented to my φ in order to see: 1) whether law 'respects' my φ or not; 2) whether respect lies in an interference into my φ or in non-interference. Second, a proper application of Article 8 orients rationalities of government to my φ in a way that there are no 'normalizing' social effects, even in the case of a justifiable interference.

§2.1a *Halford v. the UK*

I begin by reading *Halford*. In it, the applicant claimed that her department intercepted her home and office telephones, while she was working as a police officer. Given surveillance, the ECtHR found violation of Article 8 at the workplace but not at home. For political theorists identifying different 'spheres' (family, workplace, and marketplace) with specific 'patterns of regularized conduct' (Martin 2003, 40, Walzer 1984, 7, Nissenbaum 2010, 132), this judgment appears counter-intuitive. In order to

make sense of *Halford*, we need to see how practices and legal rules are oriented to a norm and how the protectable scope of that norm varies with those practices and prior legal rules.

If the applicant served the police department in an official capacity and if her department provided her with phones, can there be a violation of her privacy and private life in her office during the office timings while she was serving officially? Citing its precedents, the ECtHR replied affirmatively (*Halford*, para. 44). However, how can one disassociate official life from private life, especially at a workplace like the police? In this case, it was easy because the applicant's employer had given her two telephones, out of which one was 'designated for her private use' (*Halford*, para. 45).

As per the case law of the ECtHR, the respect that law accords to my privacy depends on how norms protect social transformations of my privacy and how norms manage regulations that specify interferences into my privacy. In *Halford*, the then in place Act that allowed for monitoring under certain conditions did not apply to the internal communications systems maintained by the public authorities. Thus, this legal lacuna opened up the possibility of an act of surveillance outside the fold of law (*Halford*, para. 51). However, such a legal understanding of this case, i.e., the ECtHR found violation of Article 8 in this instance only because of a lacuna in the national law, is correct but insufficient.

The idea of 'reasonable expectation of privacy' used by the ECtHR in *Halford* is important. Primarily, it connects a norm to legal facts. Thus, it becomes possible to apply that norm to those legal facts that did not apply it before and to view a norm in terms of legal facts when law is already oriented to that norm. In the first case, law sees whether an expectation itself is reasonable. In the second case, law sees whether something is reasonable for a rights-holder to expect. Importantly, in both cases, what judicial rules interpret as 'reasonable expectation' depends on the ensemble it deals with. In *Halford*, the idea of 'reasonable expectation' depends on objects (two phones, privacy as empirically identifiable), norms (the importance of privacy vis-à-vis mobility presupposed in modern labor markets), societal objectives (confidentiality, checks, workplace order), social practices (workplace rules, professional ethical codes like prohibition concerning use of official facilities for private gains) and legal-technological arrangements (networking systems, internal communications systems). Like probability, 'reasonable expectation' is compatible both with frequency of certain judicial outcomes and with their uncertainty. Unlike probability, 'reasonable expectation' is an intermediary concept; it is neither a logic of effects nor a principle of causality.

Meanwhile, the ECtHR opined that there was no violation of Article 8 at home. To the extent that her privacy became a matter of interest in an official setup, it was up to the applicant to justify that her privacy remained of an equal interest for the concerned officials in a private setup. Therefore, in order to establish likelihood of interception of

her home telephones, the burden of proof fell on the applicant (*Halford*, paras. 55, 59). Further, domestic law covered interception for home telephones connected to the public communication system. In this instance, law already respected her privacy, even when it specified rules concerning interception of her private communications. Albeit one may intuitively find 'reasonable expectation of privacy' as well-founded when the applicant was in her home, the specific interrelationship of law and facts remained consistent in finding no violation of Article 8 in this instance.

Two points are important. First, the case law of Article 8 makes sense in the light of broader social practices and the objects used. In fact, technology both extends exercises of my privacy and increases its vulnerability to interferences. Both these dimensions involve law. Largely, the medium itself has a certain 'agency' that forges my private life and redefines what is to be understood by my privacy in a particular case. Second, the idea of 'reasonable expectation' is neither solely legal nor solely normative. If seen in legal terms alone, we cannot understand changes in law in the light of changing definitions of φ. If seen in normative terms alone, we cannot understand those Article 8 case laws where 'reasonable expectation' exceeds 'reality'. In the first case, the governmental aspect of Article 8 tailors social practices in the light of Article 8's normative scope. In the second case, it uses judicial interpretation to reorient expectations and conduct in line with the changes in rules, facts, and habits. Therefore, the respect, compatible with the possibility of interference, accorded to my privacy depends on the way social practices are normatively oriented to my privacy.

§2.1b *Brüggemann and Scheuten v. Germany*

One can object that generally our Article 8 claims as rights-holders are not primarily dependent on such an interpretative context, when our claims touch our own life trajectories or our own bodies. Is there anything more securely shielded, Arendt believes, 'against the visibility and audibility of the public realm than what goes on within the confines of the body' (Arendt 1998, 112; c.f., Mill [1859] 1992, 13)? In this subsection, I explore a case law concerning abortion. It is an appeal submitted to the former Commission: *Brüggemann*. The idea underlying the reasoning of the Commission – i.e., pregnancy and abortion are not 'solely a matter of the private life of the mother' (para. 61) – is important. While reading *Brüggemann*, I observe how law interprets the meaning of private life and what this means for Article 8 claims.

In *Brüggemann*, the applicants challenged the decision of the Constitutional Court of Germany that put a blanket ban on abortion. The Constitutional Court reasoned that this prohibition protected the right to life of fetus. Thus, the Court believed that another life grew in the womb of a pregnant woman that was an 'independent property protected by the law' (*Brüggemann*, p. 107). The applicants held that this violated their rights under Article 8 because law interfered with their sexuality and forced them to do

something ‘against their will’ (*Brüggemann*, p. 105). The ECmHR agreed with the reasoning that body of pregnant woman imposed certain imperatives on her in a ‘wholesome’ manner because her body is a gestational carrier of another life. Thus, it opined that pregnancy and its induced termination were not ‘solely a matter of the private life of the mother’ (*Brüggemann*, 3 EHRR 244). True, changes in European law have removed such bans.[41] However, I shall argue that the rationale guiding this judgment – i.e., pregnant women cannot decide matters of abortion on their own because it involves something more than their φ or their Article 8 claims – is still valid.

Normally, we understand abortion as a clash between Article 2 of fetus and Article 8 of a pregnant woman. However, this understanding cannot help us in analyzing different cases concerning abortion. Let us look at the 1976 Fifteenth Criminal Law Amendment Act that came into effect because of the Constitutional Court’s decision appealed against by the applicants. In some situations, the Act itself approached abortion differently and permitted it under certain conditions. First, where serious health issues rose for the mother in the continuation of pregnancy, abortion was allowable (c.f., *Tysiąc v. Poland*). Here, abortion took place as per Section 218a Para 1 without invoking a pregnant woman’s rights under Article 8. Second, in those cases of pregnancy where a fetus was gravelly damaged – either physically or mentally – the meaning attached to this inchoate life became different. Among others, scientific understandings of a livable life and bodily normality are important here. Here, abortion took place as per Section 218a Para 2 without confronting the rights of fetus under Article 2. Third, certain indicators altered what law defined as protectable. These included cases where the conception of fetus took place after a criminal act of rape or incest, or where there were indications of psychological complexities signifying a decrease in mental soundness of a pregnant woman. Here, abortion took place as per Section 218a Para 3 without relying on the narrative of a clash between Article 2 and Article 8.

Two points are important. First, feminist theory rightly argues that we cannot discern the meaning of my φ by looking at my φ alone. Thus, as we can see in *Brüggemann*, bodies indeed receive their meaning from the discourses that study them (e.g., reproduction) and the objects they encounter (e.g., technologies). However, in contrast to feminist theory’s critical observation, we cannot find in *Brüggemann* a unique ‘ideological’ motivation underpinning different governmental notions relating to health, safety, and hygiene. Further, rights-holders participate in the way law should manage privacies: narrating their sexual pleasures (*Brüggemann*, pp. 105, 114), pregnancy possibilities (pp. 106, 113-14), future identities as mothers or girlfriends (pp. 106, 109), financial concerns (p. 114), and marriage difficulties (pp. 109, 114). Second, the fact that even a law that put blanket ban on abortion made room for certain ‘exceptional’

[41] In a 2010 judgment, the ECtHR notes that ‘there is indeed a consensus amongst a substantial majority of the Contracting states of the Council of Europe towards allowing abortion on broader grounds’ (*A, B and C v. Ireland*, para 235).

situations points to the fact that privacy law remains sensitive to the meanings we attach to private lives. In fact, the meaning attached to fetus makes it a certain subject whose concerns law can address; this comes into view without the requirement that the subject should be either existentially present or alive. Thus, law attempts to manage conduct in line with the dynamics that inhere in those meanings. Importantly, in certain cases, respect lies in interference. In certain others, it lies in non-interference.

In order to look at the formulation that abortion is 'not solely the matter of private life' of a pregnant woman, let us now read the amended German Criminal Code that permits abortion. The functional medical norm of the first trimester as a determinative threshold where the fetus becomes viable is important. Section 219 Para 1(3) permits abortion within the first trimester. Additional rules involving psychological counselling and therapy attached to abortion even in the first trimester are relaxed 'if according to medical opinion an unlawful act has been committed'. After the lapse of normal trimester period, Section 219 Para 2 permits abortion when it is 'medically necessary to avert a danger' to the life or health of mother. How judicial standards interpret what merits respect as far as my φ is concerned depends on the interrelation of variables that give meaning to my φ. As such, these variables influence how judicial rules interpret a rights-holder's capacities of choice and deliberation. Importantly, the reason that management of privacies through Article 8 remains sensitive to the differential meaning accorded to privacies does not produce (in Foucault's sense of the term) 'normalizing' social effects. Thus, the variability associated with medico-biological and social notions (before trimester, before trimester in exceptional form, after trimester, after trimester in exceptional form) influence Article 8. As such, the claims of rights-holders remain variable (in abortion: with claim, with an unconditional claim, with no claim, with conditioned claim). Consequently, Article 8 governs these subjects as rights-holders *through* difference (respecting free private choice, respecting free choice in the background of coercion, respecting the right to life, respecting an exceptional situation). The rationale guiding ECmHR's judgment remains pertinent, when we look at the degree to which legal protection in the cases of abortion is something that neither law nor a pregnant woman can decide on their own.

§2.1c On Article 8's case law and the ∪ of φ and -φ

Two related points are notable. First is the obvious point that Article 8 claims do not make sense when we read them in strict abstraction from social practices, objects used, and legal tools. The strength of Article 8 lies in the way it orients these variables to its normative framework. Thus, the idea of 'reasonable expectation of my privacy' is probable not because of being a 'subjective' notion, but because of the way my privacy is connected with the variables that influence me but that I myself do not control. Thus, when political theorists understand φ in terms of –φ, their analytical narratives cannot

illuminate Article 8's case law. For example, the question of privacy-related data management relates to an interface between user-technology-law-regulations that is constitutive of privacy – things do not simply 'enter' into my private sphere (*Rotaru v. Romania*, para 43; *P.G. and J.H. v. the UK*, para 59; c.f., *Hewitt and Harman v. the UK* and *Peck v. the UK*). Thus, as in *Halford* and *Brüggemann*, conceptualizing the case law does not require us to conceptually disentangle φ from –φ.

Second, Article 8 operates by legally regulating a broader field of social practices. This includes, for example, adequate national laws concerning interception of communication, access to ultrasound facilities and technologies. It also means that when legal rules regulate these social practices, they consequently manage my φ, i.e., regulate interferences and non-interferences. Thus, Article 8 governs conduct by allowing law to determine the meaning of specific privacies and their subsequent legal respect. Consequently, those legal systems whose privacy regulations and laws respect rights-holder's subject positions are the ones whose interferences with the rights under Article 8(1) are generally justifiable. In sum, a priori knowledge (e.g., spatial, corporeal, psychological) does not underpin a society's idea of private life; the way a society governs specific expressions of privacies structure its idea of private life.

However, the interrelation of φ and –φ in Article 8's case law neither creates a union set nor simply collapses the one into another. In the first case, we cannot discern any prior normative structure shaping our social understanding, e.g., the welfare state. Even in *Brüggemann*, the ideas of safety, bodily normativity, livability, or healthiness worked differently in different instances. In the second case, we cannot talk of any social determination of φ. Indeed, Article 8(2) mentions social objectives justifying interferences with my rights under Article 8(1). However, when the ECtHR balances rights under Article 8 with the social objectives, it assumes ineliminability of both notions. Indeed, these social objectives pinpoint what it means for me to hold rights, e.g., Article 8. Thus, presuming a society promoting autonomy (e.g., economically advanced society), law later interprets these rights in an autonomy-related sense. Importantly, despite understanding my autonomy contextually, the evolving interpretation of Article 8's case law has proceeded in a different direction than a 'communitarian' one. For example, it is unimaginable from the perspective of Article 8 for the ECtHR to even consider a complaint from a single middle-aged aunt that law prevent her unmarried pregnant niece from undergoing abortion because her niece's possible abortion in the light of law respecting her niece's autonomy nevertheless violates that aunt's rights under Article 8(1).[42]

It means that when we talk about Article 8, we talk about those regulatory frameworks with which our privacies are bound. Broadly, this means two things. First, I have human

[42] In fact, in an international conference when an audience member asked him what he thought of abortion, Alasdair Macintyre remarked that 'abortion fails to understand the importance of aunts' (Tollefsen 2017, 13).

rights because there are governmental practices structuring my conduct. For example, abortion law permits a woman to distance herself from the discourse of motherhood that an anti-abortion law imposes on her. However, abortion law situates a pregnant woman's decisional autonomy with respect to the particular interpretation of the ideas concerning livable lives, fetal viability, or psychological health and safety.[43] Second, governmental practices are oriented to my life and conduct because I, as a rights-holder, can make Article 8 claims. The next section explores the second proposition.

§2.2 On the governmental status of the idea of 'autonomy' in Article 8

I argue two points in this section. 1) The 'respect' accorded to privacy works between the poles of non-interference and interference. As such, Article 8 considers neither total non-interference nor thorough interference ideal. Thus, the worth of privacy as a social value depends on how law structures 'respect' accorded to its specific expressions. 2) When law interprets 'respect' accorded to privacy from the perspective of autonomy, Article 8's case law equates the idea of protection of φ with the

[43] Article 8's normative structure protects φ by managing φ. What reasons a society considers valid concerning the legal protection of φ interrelate with the way a society manages φ. Consequently, a change in the managerial dimension influences what and how law protects φ. For example, abortion law presumes technological advancement because of which – to roughly mention the basic ones – medical institutions can analyze fetuses and terminate pregnancies. To put it banally, a society that does not possess such a technological infrastructure lacks resources with which to guarantee women such rights. Likewise, any further technological advance that radically separates coital sex from gestational motherhood may affect the idea of autonomy as it underlies abortion law. Think of a technology that enables doctors to transfer fetuses to artificial womb-like carriers for development. Such a possibility would *both* respect women's decisional autonomy and preserve the fetus. In simple terms, a woman would get rid of her pregnancy without aborting the fetus. In such a case, the idea of livable lives would gain further institutional importance. Whereas such a technological advance alone will not affect the idea of fetal viability, other related ideas like psychological health of the pregnant woman and her safety would lose much of their interpretive force, as they are used in the existing abortion law. Three dynamics need unpacking here. First, law respects abortion by seeing the social field that structures the possibilities of abortion. Thus, by transforming underlying variables informing abortion law, such a hypothetical technological change unsettles the rationale of abortion law that negotiates such variables. Second, law permits abortion contextually, e.g., health, safety, livability. Thus, there are narratives of autonomy and practices of autonomy. Whereas narratives of autonomy (e.g., decisional autonomy) refer to the practices (e.g., one does not kill the fetus, the procedure is safe, the fetus was not livable), the latter, as conditions rationalizing autonomy, do not refer to the former. Third, law enables abortion, i.e., positioning it aptly, by regulating governmental practices, e.g., access to abortion facilities, expert involvement, or insurance coverage. Thus, by transforming the possibility of abortion, such a hypothetical technological change gives birth to a new set of social questions and governmental problems, e.g., child coverage and rearing costs, adoption issues, identity questions, state and motherhood (quite literally). For example, if a woman conceives the fetus after a criminal act of rape, shall laws imprison the rapist and transfer the conceived fetus to an artificial womb? If a woman uses artificial insemination to conceive a fetus, but later, after the fetus becomes viable, changes her mind as to motherhood, would law both cover her costs to transfer the fetus to the artificial womb and protect her choice? In other words, whereas such a technological change introduces certain new governmental problems, the idea that governmental attention correlates the protection of φ with its management remains intact.

problematic of management of φ. Consequently, Article 8's holders are autonomous to the extent that laws 'respect' their φ; they are not autonomous in a 'pre-political' sense, that is, where we might expect legal rules to protect an already autonomous φ. Thus, the case law of Article 8 does not simply prohibit or permit acts. In fact, in a certain crucial sense, it 'enables' them. The argument offered in this section selectively focuses on the case law concerning care orders, access, and custody.

Care, access, and custody proceedings deal with children. Children's status as rights-holders is interesting in both political and legal senses. A strong current in liberal political theory – with its emphasis on consent, rationality, responsibility, and full consciousness – considers children as limit-figures.[44] On the other hand, albeit the Convention assumes that everyone holds human rights, when it refers to children, it rather mentions them in 'exceptional' terms. For example, Article 5(1) both guarantees liberty and security and makes provision for the detention of minors. Similarly, Article 6(1) both guarantees fair and public trial and makes exceptions in cases of juveniles. Therefore, looking at the care proceedings would help us explore how law approaches children as subjects and what it means for their status as Article 8 rights holders. By looking at care proceedings, I only remain interested in understanding the way Article 8 interrelates with social practices and norms. We cannot appreciate this aspect, when we approach the question of care proceedings from abstract theoretical or textual perspectives.

Care orders involve local authorities, welfare services, children, and child's parents or other family members. In care proceedings, Article 8 rights of the parties refer to practices through which a society rationalizes health and hygiene, neglect, behavioral irregularities, educational markers, anxiety or emotional stability, among others (e.g., *K and T v. Finland*, paras. 154-155 160, 169, 182; *Scozzari and Giunta v. Italy*, paras. 151, 169, 175, 201-216; *Margareta and Roger Andersson v. Sweden*, paras. 9, 14, 45, 86, 94, 96). Thus, albeit local authorities have decision-making power, the involvement of relevant expert and professional bodies in care proceedings entails that local authorities do not decide abstractly.[45] Establishing factual circumstances is at least as important as the application of relevant law. Consequently, a genuine dispute between experts has legal consequences, as it increases legal indeterminacy. Further,

[44] Take few examples. Kant: '[Parents] have the right to [*manage* and develop the child] until the time of [child's] emancipation (*emancipatio*)' (Kant 1991a, 65). Hayek: 'With regard to children, the important fact is that they are not responsible individuals to whom the argument of freedom completely applies' (Hayek 2011a, 499). Mill: '[Liberty applies] only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood' (Mill [1859] 1992, 13). Griffin: 'We should see children as acquiring rights in stages – the stages in which they acquire agency' (Griffin 2008, 95; c.f., 165). Those theorists that do not deal with children nevertheless do not mention in what sense the idea of freedom applies to children without presuming any kind of tutelage.

[45] Thus, the ECtHR noted in *Olsson v. Sweden (no. 1)*: 'The circumstances in which it may be necessary to take a child into public care and in which a care decision may fall to be implemented are so variable that it would scarcely be possible to formulate a law to cover every eventuality' (para. 62, c.f., *Amanalachioai v. Romania*, paras. 76-77).

decisions concerning care revolve around parental compliance and capacity, desirability of changing guardianship, or parties' needs and vulnerability (e.g., *K and T v. Finland*, paras. 10, 67, 101, 169; *Scozzari and Giunta v. Italy*, paras. 30, 58, 150, 175; *Margareta and Roger Andersson v. Sweden*, paras. 69, 79). Conceptualizing specific aspects related to parties' φ defines the content of their legal claims as per Article 8. Consequently, Article 8 manages privacies in the light of practices and rationalities (understanding norms with reference to facts), and influences factual circumstances in the light of norms (tailoring facts with reference to norms, e.g., openness between parents and agencies, confidentiality between relevant parties and the general public).

Therefore, the scope of parenthood that Article 8 guarantees depends on how social practices and norms construct the discourse on parenthood; it is not the grounds of their 'jurisdiction' on their children as parents.[46] More, in care proceedings, the powers of local and legal authorities indeed work with reference to the duties, wishes, and rights of parents. However, authorities' powers are not limited to these variables because it involves respecting rights and interests of all in a family life setup. Thus, in care proceedings, authorities can deny biological parents custody, override parents' wishes, redefine parental responsibilities, and evaluate parents' competence. Consequently, procedural protections do not allow parents to sue officials, care professionals, or experts either for making decisions unacceptable/ unfavorable to them or, to an extent, for professional negligence (*M.B. and G.B. v. the United Kingdom*, 'The Court's Assessment'). In sum, legal rules guide social practices, norms, and regulatory standards that structure family life. Consequently, it is with reference to these then that judicial bodies conceptualize the value of privacy in a family life context.

Further, the idea that Article 8's rights-holders are legal persons and that the relationships they enter into are status-like relationships enables law to interpret 'respect' accorded to their privacy from the perspective of autonomy. Let us look at custody proceedings to observe this point. In custody or access, legal decisions rely on a number of variables. Think of the passage of time and the presence of a contact, emotional bond, impact of actions on child's psychology, child's overall wellbeing including health and development, among others (e.g., *M and M v. Croatia*, paras. 23, 25, 34, 65; *Hokkanen v. Finland*, paras. 56, 58; *Johansen v. Norway*, paras. 65, 77, 78, 80). Thus, ideals relating to proper upbringing, apt socialization, sound childhood, self-identification, emotional proximity, and psychological health guide legal ideas concerning custody. Consequently, law understands the capacities of children

[46] We can find the influence of this social transformation on philosophical discourse concerning conjugal society as early as Locke's accounts. In the *First Treatise*, Locke finds the basis of parents' 'natural' jurisdiction on their children in the fact that they have begotten them (Locke [1689] 1988 , 186). However, Locke argues that the scope of parents' jurisdiction varies with their 'unnatural' carelessness (Locke [1689] 1988 , 214). In the *Second Treatise*, Locke further argues that the obligation on children to honor their parents – in particular, the father – corresponds with 'care, cost, and kindness' invested in their upbringing by parents (Locke [1689] 1988 , 312). In other words, parental authority deserves as much respect as it respects obligations imposed on it by parenthood.

(personhood, self-development, deliberation) with reference to the larger social practices and their normative ideals. These practices rationalize children's capacities in the double sense, i.e., conceptualizing what those capacities are and 'rationally' nurturing them. Unsurprisingly, in Article 8's case law (e.g., *Elsholz v. Germany*, para. 50; *Yousef v. The Netherlands*, para. 66; *Sahin v. Germany*, paras. 40, 42), the idea of child's 'best interests' works as an important interpretive prism through which the ECtHR conceptualizes children's rights (Keller und Heri 2015, 273). Thus, it becomes possible to speak of the applicability of different norms to children, even when they themselves can neither appreciate them nor articulate them. As such, the reconstruction of children as subjects allows legal norms to respect the claims of privacy in the cases dealing with children.

Importantly, the reason that Article 8 refers to right to respect for φ and not to right to φ enables law to apply rules concerning privacy even to those who may lack the reflective capacity to either isolate their private selves or make a distinction between public and private aspects of their lives. Think of babies and minors (e.g., *M and M v. Croati, Scozzari and Giunta v. Italy*), mentally ill (e.g., *X and Y v. Netherlands*), patients with extreme senile dementia or those suffering from psychological disorders (e.g., *Storck v. Germany*, *Martin v. the UK*), dead bodies (e.g., *Sabanchiyeva and Others v. Russia*, *Girard v. France*), or, perhaps, even comatose and gravely handicapped or diseased. Then, as law primarily approaches the rights of children from the perspective of their interests, it respects their Article 8 rights. However, it also limits our general understanding concerning their status as rights-holders. For example, the case law relating to the right to freedom of expression simply appears inapplicable, while dealing with children or understanding their status as rights-holders or handling claims on their behalf. As such, this process arguably has certain 'tutelary' effects.[47]

When law interprets Article 8(1) from the perspective of autonomy, it imposes certain obligations on public authorities. States owe these obligations – and to develop governmental practices accordingly – because subjects hold human rights. Thus, in care or access matters, this requires constant supervisions by authorities of the matter, basing their decisions on expert feedback concerning parental visits, prevention of individual and systemic abuse, and developing therapy-related mechanisms that compensate the effects of separation shock on a child's psychology, for example. Thus, the case law of Article 8 equates the idea of protection of φ with the problematic of management of φ. As such, the 'enabling' aspect of privacy law constructs autonomous subjects. Importantly, what we see here is autonomy that may not

[47] With its focus on practices, interests, and agency, this 'tutelary' form of relationship is however different from the sovereignty-oriented idea of *parens patriae*. The Court of Chancery defined *parens patriae* as the Crown's guardianship of those of its subjects that were unable to look after themselves (Seymour 1994, Custer 1978). However, the case law of Article 8 imposes obligations on the public authorities in the light of subjects' rights-holding capacity. It does this with reference to their interests and with attention to the broader social practices. Consequently, the respect accorded to their 'agency' does not make them simple objects of political power or properties of the state.

necessarily stem from free choices of the concerned subjects.[48] In this sense, care matters deal with parents as subjects in a twofold manner. On the one hand, law relies on diagnostic and prognostic markers rationalizing their conduct. Think of individual's behavioral patterns, availability of time, financial situation, past and present behavior vis-à-vis other family members, commitment and attachment with other parties. On the other hand, law assumes their self-restraint (e.g., absence of abuse and violence) and self-management (e.g., constant self-improvement). This fact of structuration and self-management allows law to govern private life 'at a distance' (Foucault 1977, 11, Rose and Miller 1992, 173, 181, Foucault 2007, 46). Thus, the case law of Article 8 stands in between the extremes of interference and non-interference. As such, it primarily revolves around analyzing the *justifiability* of interfering measures.

Therefore, to believe matrimonial law in general activates itself only in the cases of failure of contractual relationships (Waldron 1993a, 382) is equivalent to believing, rather hastily, that matrimonial law presumes the ultimate vulnerability of those relationships to failure. One ignores an entire problematic of management. Rather, matrimonial law structures relationships and expectations, guides the terms of contract concerning rights, duties, interests, and conditions, and backs norms and practices – concerning hygiene, proper intra-family conduct, and the sound development of the children – with the force of law. In this sense, Article 8 both protects and respects privacy by relating the case law to practices that manage privacy related concerns. For instance, custody proceedings that involve disabled parents work differently. In them, legal rules rely on practices concerning apt support services and professional representation in order to conceptualize parents' privacy and to apply the case law of Article 8 accordingly.

Without reference to any practice or norm, legal rules cannot protect family life because they would then remain unable to conceptualize autonomy in the context of family life in the first place. In sum, the idea of respect as per Article 8(1) presumes a certain shape of privacies and formulates legitimate ways through which private life works as an object of governmental attention.

§2.3 On *oikopolitics*, freedom, and the structure of Article 8

This section frames our discussion. It argues three points. 1) Article 8 operates in a social context where practices are already oriented to φ. Therefore, law interprets the claims of Article 8 with respect to the way those practices elaborate the meaning and

[48] Consider compulsory schooling. In *Costello-Roberts v. the United Kingdom*, the ECtHR noted that compulsory schooling indeed constitutes interference with a child's private life. However, not every interference that adversely affects physical or moral integrity of subjects violates Article 8(1) rights. Thus, in certain cases, absence of subjects' consent, remains compatible, in view of their agency, with upholding the 'respect' of their private lives (para. 36).

value of specific expressions of φ. I call this aspect as *oikopolitics* (§2.3a). 2) The discourse concerning the respect for φ and the legal tools of balancing and proportionality relating to privacy claims assume illegitimacy of those social mechanisms that may try to 'determine' privacy in a thoroughgoing manner. Thus, the context in which Article 8 claims emerge as problems presumes involvement of free individuals. I call this aspect as *oikolegitimacy* (§2.3b). 3) The issue of respect of a privacy matter is a question that concerns the 'form' of privacy. In this light, the structure of Article 8 imposes duties both on rights-holders and the others, and imposes obligations on the public authorities. However, *pace* feminist social theory, this reflexive interplay varies with the form of specific expression of privacy without there being a unique ideological base underlying all expressions of privacy. I call this aspect as *oikology* (§2.3c).

§2.3a φ and *oikopolitics*

We have seen how the formal infrastructure of Article 8 draws on practices and norms that are already oriented towards φ. Analyzing regressively, one can see that the characteristic form of legal protection with respect to Article 8 is neither permission nor prohibition. Rather, these binary codes are one among many elements in the process of legal regulation and are primarily the points of reference for judicial decision-making. In fact, law backs social practices that shape, organize, and optimize φ. Think of the structure of expectations in *Halford*, the idea of difference in *Brüggemann*, importance of education and psychological stability in care proceedings, and health, wellbeing, and safety in custody matters. In other words, to the extent that law operates via such social practices, law's authority appears both 'rational' and 'good'. To the extent that this interconnection of law and governmentality circumscribes a role for the ideas of 'good', legal rules can absorb an idea of good without affecting law's overall quality of 'rationality' and 'goodness'.

True, these practices and norms are not reductively concerned with φ. True, diverse set of institutions utilize them, e.g., networking systems, medical and hygienic institutions, schools, and foster homes. However, Article 8 claims concretize the legal base of subjects' privacy claims by identifying the way those practices elaborate the meaning and value of φ. Thus, albeit Article 8 itself may not directly address those social setups, our talk of Article 8 presumes those social setups that approach φ as an object to make it 'autonomous', e.g., consensual, non-violent, non-abusive, respectful of bodily integrity. Two points are important. First, φ does not represent a stable point of reference, e.g. spatial as in *Halford*, bodily as in *Brüggemann*. Second, the respect accorded to privacy in the light of Article 8(1) functions as the point of reference for interventions guided by the logics of calculation and administration. To the extent that

these interventions align themselves with the variability of meaning and value associated with φ, law prevents collapsing φ into –φ.

Consequently, on the one hand, φ is not external to the domain of practices and history. We cannot understand Article 8's case law either with reference to law alone or by referring back those claims intuitively to φ. On the other hand, the increasing governmental attention given to φ in the light of its 'own' dynamics reveals φ as manageable to an increasing degree. In a number of important judgments, the ECtHR has acknowledged the fact that the exercise of freedom in private life takes place within certain social conditions and among certain social relations. Therefore, an effective guarantee of freedom legally requires from the governmental authorities to regulate those conditions and relationships in order to enhance autonomy (*X and Y v. Netherlands*, para 23; *Plattform Ärzte für das Leben v. Austria*, para 32). Thus, we can discern *oikopolitics* here,[49] where the interpretation of privacy reaches out to broader social practices and norms, and where the status of rights-holders as legal subjects having privacies makes them objects of governmental attention whose actions law can structure and whose aspects of relationships law can codify.

§2.3b *Oikolegitimacy* and freedom

Thus, interferences with Article 8(1) rights are legitimate to the extent that they refer to the objectives that these aforementioned social practices and norms presuppose. Consequently, it appears increasingly difficult – to the point of being almost unimaginable – in the discourse of human rights for a state to justify interference with Article 8 rights only by invoking political necessity or by considering it a matter of its 'sovereign' right. Thus, in human rights compliant societies, an entire problematic relating to privacy operates, e.g. balanced regulation, undesirability of complete non-involvement, dangers of too much interferences, development of privacy laws in the light of new practices and technology, introduction of legal rules that both respect privacies and prescribe criteria concerning justifiable interferences. In such societies, the idea of privacy becomes an independent normative signifier, where business models respect it, surveillance strategists analyze it, law streamlines authorized

[49] Reviewing Classical Greece's use of the term *oikos*, Liddell and Scott (1966) identify three major senses of the term: house (*oikia*), household goods, and domestic relations. In his *Politics*, Aristotle describes *oikos* as a 'natural association for everyday purposes' (1252^{b}, 12-14). He defines relationships in *oikos* as that involving husband, wife, children, and slaves (1253^{b} 4-7). Thus, Aristotle defines *oikos* as the smallest unit of *polis* (1254^{a}). My use of the term of *oikopolitics* does not mean that presently the affairs of the city (*politika*) primarily entail the management of *oikos* nor that *oikos* does not have any normative standing apart from broader general affairs. By speaking of *oikopolitics*, I intend to pinpoint the epistemological and social conditions that allow a society to address private life and privacy issues in a manner that law structures actions without being oppressive, governs conduct without eliminating freedoms, and guarantees freedoms without being equating them with license.

access to privacy data sets, and regulations develop procedural safeguards concerning the use and the storage of private information.

Thus, we can speak of *oikolegitimacy* here, where justifiable interferences occur only in a legal system that regulates privacy in an immanent manner by referring to corresponding social practices and norms,[50] and where legal rules prevent those social mechanisms that simply 'determine' privacy and reduce Article 8 to a nominal status (see, Article 8's preparatory notes). In the first sense, the legal requirement that Article 8 imposes on the public authorities is that their acts of interferences remain non-arbitrary from a legal perspective. Further, 'transcendental' references to state interests (e.g., national loyalty), overall efficiency (e.g., crime prevention), or legal effectiveness (e.g., law-abidingness) to justify interferences with Article 8 rights remain legally unacceptable and normatively unsound. In the second sense, the question of privacy remains a certain problematic, where legal rules presume involvement of individuals. Thus, the scandal is always 'too much government' that, even when it may be 'efficient', denies, prevents, or hinders individuals' autonomy. The risks and costs associated with this normative stance emerge from the respect that a human rights compliant legal system accords to privacy. For example, in totalitarian societies, an individual cannot give harsh opinions in its private life against political leaders without facing possible legal consequences of a harsh sort. However, societies respecting human rights do not either legally problematize private opinions or sanction the public power prying into them even when such opinions stand in contradistinction to the norms of human rights (e.g., discriminatory in the sense of being racist or xenophobic). This principled stance is because of individuals' freedom. Similarly, in certain cases, freedom granted to rights-holders may lead to systemic failures (e.g., in foster homes) or misuses (e.g., confinement of a child in home for the purpose of a long-term incestuous contact). However, these failures or misuses neither affect Article 8's overall normative role in a society nor lead to a fundamental reevaluation of both the legal rules and governmental regulations that would decisively preempt such instances at the cost of Article 8's norms.

[50] To insist simply on the form of legal system without identifying the way it refers to institutional sites, rationalities of government, and legal interpretation collapses the distinction between despotism and constitutional democracy. Kelsen argues: 'Vollends sinnlos ist die Behauptung dass in der Despotie keine Rechtsordnung bestehe, sondern Willkür des Despoten herrsche … stellt doch auch der despotisch regierte Staat irgendeine Ordnung menschlichen Verhaltens dar. Diese Ordnung ist eben die Rechtsordnung … Was als Willkür gedeutet wird ist nur die rechtliche Möglichkeit des Autokraten, jede Entscheidung an sich zu ziehen, die Tätigkeit der untergeordneten Organe bedingungslos zu bestimmen und einmal gesetzte Normen jederzeit mit allgemeiner oder nur besondere Geltung aufzuheben oder abzuändern. Ein solcher Zustand ist ein Rechtszustand, auch wenn er als nachteilig empfunden wird. Doch hat er auch seine guten Seiten' (Kelsen 1925, 325-26). (My translation: 'It is completely meaningless to opine that in despotism there exists no order of law, [and that] only the capricious will of the despot reigns. The despotically governed state also represents an order of human behavior. This order is the order of law. What is interpreted as the capricious will is only the legal possibility that an autocrat has, to take every decision onto himself, to determine unconditionally the activities of subordinate organs, to repeal or alter legal norms any time in general or specific instances. Such a condition is a condition of law, even when it is felt as disadvantageous').

§2.3c The structure of Article 8, *oikology*, and feminist theory

While analyzing the question of respect as per Article 8(1), we have already seen in this chapter how law operates with reference to specific rationalities and norms. Thus, to use Wittgenstein's phrase (i.e., *Lebensform*, 'form of life') (Wittgenstein 2009, 19, 23, 241), the issue of respect of a specific Article 8 case law depends on the 'form' of the specific expression of privacy, where the abstract matter of privacy itself is less important than the shape its understanding assumes in a certain context. Thus, the question of respect of private life in the light of harm to bodily integrity works differently for a pregnant woman than a cadet undergoing military training. Legitimate application of Article 8 to a situation relies on such a justifiable discrimination in according respect to rights-holders' private lives based on the corresponding 'form' of their private lives. To the extent that this 'respect' imposes positive and negative obligations on the public authorities, Article 8(1) itself imposes certain limitations on the rights-holders in view of the respect of their private lives – and we cannot simply equate these limitations with those later mentioned in Article 8(2).

Consequently, Article 8 imposes obligations on the public authorities in a twofold manner. First, it requires that they develop legal rules in the light of Article 8 rights ensuring the presence of practices that respect rights-holders' privacies. Second, it operates by legally requiring from the public authorities that they put in place regulatory frameworks that guarantee Article 8 rights. Further, by looking at the concept of 'respect' and its role in the structure of Article 8, it appears that the directive duties imposed on the rights-holders of Article 8 rather have greater normative significance than holding the right as a 'privilege'. We saw how Article 8 imposes certain duties relating to self-management on its rights-holders. As such, the degree to which Article 8(1) protects my 'disrespect' of my own φ and the degree to which the public authorities have no legal powers in preventing any such related 'disrespect' is equivocal. For example, in trouble cases where there is an incidence of violence or grievous harm to bodily integrity, the consent of the respective parties becomes irrelevant. It is because in such cases harm to bodily integrity, abuse, injury, mistreatment, or occurrence of harmful domination will become lawful. Think of bestiality, necrophilia, extreme forms of sadomasochism, or consensual cannibalism.

Thus, as feminist theory importantly pinpoints, the structure of φ remains connected with a certain discursive logic. We can call this *oikology*, where logics of interventions into privacies correspond to the form of privacy, and where the discourse on privacy articulates respect concerning privacies through these rationalities. However, unlike feminist theory, there is no fixed substance attributable to this logic. In abortion matters, the idea of difference does not see pregnant woman as a pregnant female body tout court but conceptualizes both her pregnancy (before trimester, before trimester in

exceptional form, after trimester, after trimester in exceptional form) and feminine agency (sexuality without procreation, coerced sexuality, impregnated with a healthy baby, impregnated with an abnormal baby). Similarly, in care proceedings, reports concerning psychological bond, emotional stability, and behavioral impact on child do not approach their subjects primarily as men or women. Instead, they focus on the way they fulfill roles, duties, and responsibilities with respect to the discourse on parenthood. Certainly, judicial decisions may frequently fall in favor of one gender.[51] However, this effect is consequential to the logics of interventions, and is not something that exists as a matter of principle. Alternatively, to the extent that experts, authorities, and professionals see themselves as primarily men or women (which, of course, remains a possibility), the discourse itself problematizes their 'subjective' knowledge and expertise. Crucially, the involvement of free individuals themselves in exercising their Article 8 rights assumes their self-regulation and internalization of norms (Donzelot 1979, 23, 58). Projects concerning health and hygiene in a family setup rely on endorsement of and compliance from parents, for example (Rose 1987, 73, Donzelot 1979, xxii). This is not simply a matter of 'false consciousness' but – from the perspective of the family members – of doing the best (Donzelot 1979, 189-191). To argue that the logics of intervention in the case law of Article 8 follow a binary (i.e., 'gendered') understanding through which we can conceptualize these logics rather renders our analytical lens blunt.

§2.4 Concluding remarks

Political theorists pinpoint that our understanding of the meaning of φ works as an effect of a complex social discourse. This discourse primarily distinguishes itself by articulating what it is not. Thus, the other of φ remains of greater normative and conceptual significance. Sociologists of law pinpoint the difficulty of relying on such exclusionary models because management of φ refers to social variables without that referral undermining its respect as per Article 8(1) or contradicting a society's normative self-understanding of the way the protection of privacies works. In this chapter, I read Article 8's case law by focusing on the importance of practices through which we attach a meaning to φ and determine its legal respect. Unlike political theorists, I argued that there is no a priori knowledge (i.e., bodily, spatial, psychological, intuitive) underpinning φ. Unlike sociologists of law focusing on macro-level factors, I argued that the way specific social practices and norms elaborate the meaning and

[51] Donzelot notes that at least from late nineteenth century to the mid twentieth century, the discourse on family life consciously oriented itself to the question of freeing 'women and children from patriarchal tutelage … on behalf of greater public control over reproduction and a pre-eminence of the mother' (Donzelot 1979, 181). Thus, Elster argues that in the twentieth century 'the maternal preference rule gradually emerged as the dominant doctrine in most Western countries' (Elster 1987, 8).

value of specific expressions of φ remains important in order to understand Article 8's case law.

If Article 8 operates in a context that functions by linking itself to social practices and knowledge, this is important in terms of theorizing the normative status of Article 8. It means that Article 8 is not to be construed as a 'natural' right, where we see freedom as an individual property or a capacity subsequently protected by law. Rather, as a rights-holder, I am free to the extent that laws respect my φ. This includes justifiable legal interferences into my φ, structuration of conduct relating to my φ, and enabling certain conduct through legal rules. Consequently, Article 8 does not allow legal rules to evaluate wills and preferences of rights-holders with reference to a static normative lens.

If Article 8 operates with reference to specific rationalities and norms, it entails that its regulatory arm connects φ with those frameworks. Thus, the question of 'form' of specific expression of privacy (structure, value, and meaning) remains important for legal scholarship exploring Article 8's case law. Further, this chapter argued that without grounding 'legal intuitions' within social setups, Article 8's case law would remain anything but coherent. Additionally, this entails that rights' talk, with its peculiar functions and working, attempts to configure governmental relations differently, and does not abolish it.

By mentioning *oikopolitics*, we analyzed how we cannot dissociate Article 8 from a social context that problematizes our conduct. If the dream of totalitarian societies is the complete regulation of privacies (Arendt 1973, 473-78, Habermas 1996, 369), it is because of this social dynamic that already approaches privacies as an object of governmental attention. This led us to consider the importance of *oikology*, where logics of intervention into privacies correspond with social practices and norms rationalizing that specific private life aspect. Thus, there is a certain ethic of interferences. This led us to introduce the idea of *oikolegitimacy*, where justifiable interferences with Article 8(1) rights work in an immanent manner with reference to the idea of autonomy. Thus, Article 8(1) rights 'trump' those interferences that solely work in the light of transcendental references. Therefore, with this chapter's analysis, our inquiry now moves forward by posing another relevant question: If Article 8 in particular and human rights in general work in a context where conduct is problematized, then how to understand those human rights that rather focus on our 'inner' capacities like belief and thought (Article 9) or 'expressive' capacities like speech (Article 10)? The next two chapters respectively perform this task.

Chapter 3. Religiosity, 'this-worldliness', and regulation: Reading Article 9 on the Right to Freedom of Thought, Conscience, and Religion

> 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
> 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
>
> ECHR Article 9: Freedom of Thought, Conscience and Religion

Like Article 8(1), Article 9(1) does not mention what it protects in singular. It refers to 'thought, conscience, and religion' in the first clause. Like Article 8(1), neither the preparatory notes nor the text of Article 9(1) state the extent to which thought, conscience, and religion (or, 'belief or religion' in the second clause) overlap or remain conceptually distinct. Nevertheless, Article 9's case law is different from that of Article 8. Article 8's case law applies different interpretive tools and norms when, as per Article 8(1), legal rules deal with α (e.g., family life) than ß (e.g., home). Alternatively, despite important variations concerning the margin of legal protection that Article 9 accords to different components, Article 9's case law applies broadly similar interpretive tools and norms when it deals with any of the component mentioned in Article 9(1). Thus, even when, for example, 'religion or belief' may not be exactly similar, Article 9 pinpoints their structural equivalency: a) religion or belief themselves;[52] b) their particular or collective manifestations; and, c) their susceptibility to legal regulation in terms of (b) alone, as per the broader social practices and legal norms.

Despite the reason that Article 9(2) limits Article 9(1) rights and that a state can derogate from Article 9's guarantee in times of emergency as per Article 15, Article 9 remains normatively significant in the Convention's structure. True, not every belief involves Article 9(1) and not every practice falls within the scope of Article 9(2) (*Pretty*, para. 82; *Kalaç v. Turkey*, para. 27). However, Article 9 crucially prevents the public authorities from 'controlling [rights-holders'] intellectual faculties and conscience' (Article 9's preparatory notes, §4; c.f., Mill [1859] 1992, 15-16). Simply put, Article 9's case law protects various ideas associated with self-reflection. These include, for example, self-identification (converting to and preaching a religion), self-interpretation

[52] To the extent that it remains possible for one to consider 'thought and conscience' as aspects of one's belief – a possibility that the text itself opens by substituting 'thought, conscience, and religion' in the first clause with 'religion or belief' in the second clause – one can say by implication that 'thought and conscience' mentioned in Article 9 display certain equivalence.

(choosing and interpreting a religion), self-development (maintaining and living a religion), or self-determination (criticizing or leaving a religion).

In this chapter, I only focus on Article 9's case law that deals with religion. This is because of two related reason. The ECtHR has handled a number of complaints concerning the classification of a belief system by national governments as being religious or otherwise, especially those dealing with New Religious Movements, e.g., Scientology (e.g., *Kimlya and others v. Russia*; *Church of Scientology of Moscow v. Russia*). Thus, despite the fact that Article 9 equally protects 'thought, conscience and religion' and applies broadly similar interpretive tools to each component, the classification of a belief system as religious gives rights-holders, in a number of national contexts, additional 'rights'. Importantly, however, these later rights may stem from Article 9, e.g., separate schooling structure, state funding of central religious councils, permission to own media channels. However, their provision is not an Article 9 question per se.

Further, by focusing on religion, this chapter intervenes into the debates on rights and religion. Political theorists usefully pinpoint a certain normative disjunction between human rights and religion. Indeed, ECHR does not mention any right way of life or righteous ends of human lives. Thus, it does not take any recourse to moral appeal.[53] Alternatively, it is hard to imagine a religion that does not speak of virtue or good life, or, relies on 'self-enlightenment' alone to propagate its truth. Thus, political theorists follow two paths. On the one hand, some theorists of constitutional studies remain wary of the fact that religion influences the positive basis of human rights law (e.g., AnNaim 2008, 24, 39, 84-5, 96, 111, Eisgruber and Sager 2007, 6, 13, 313). Thus, the right to freedom of religion itself becomes rather value-laden: To what extent should law respect a specific practice that a religion considers essential for its self-understanding? If legal protection is stronger in this instance, how can law remain value-neutral? However, law approaches religion neither in an abstract nor in self-referential manner. The fact that law interprets Article 9 rights with reference to social practices is important, because it allows law to identify the situational aspect of a religiosity.

On the other hand, some political theorists and sociologists focus on the case law to address general questions of structural nature dealing with religion and politics, i.e., secularism, secularization, post-traditional society. Albeit Article 9's case law follows a certain tendency, the specific form of a political society vis-à-vis religion is evident neither from Article 9's case law nor from its text. Rather, Article 9 is applicable to a variety of political and legal contexts. Think of Russia, France, Malta, or the UK. However, what remains common among ECHR's signatory states is a dynamic of addressing religiosity in a certain way. Consequently, if we do not focus on the

[53] Human rights protect humans without having an image of the good human (c.f., Forst 2010, 719). Thus, if only by implication, good humans would be, circularly speaking, those humans who respect human rights.

management of human conduct and its interrelation with the idea of legal protection, we would rather construct any broader theoretical narrative about rights, religion, and politics on weak foundations.

Unlike political theorists concerned about the nature of positive law or the form of state, lawyers remain aware of the situational diversity when analyzing Article 9. Lawyers usefully pinpoint the fact that the definition of religion in Article 9's case law is open-ended. Thus, they believe that, from a legal viewpoint, attributing a fixed content to the category religion is unnecessary.[54] Consequently, even if there might be a normative disjunction between human rights and religion, the ECtHR's use of constructivist tools such as margin of appreciation/ discretion, proportionality, and balancing means that judicial interpretation reconciles non-approximation, decidability, and regulation. However, to the extent that lawyers only focus on the peculiar circumstances of different cases concerning Article 9, they seldom speak about the effects of Article 9 on the conduct of subjects. The reason that that effect is due to legal decision-making but cannot become a question of legal determination rather makes such a question less interesting for legal scholarship. Consequently, when lawyers approach Article 9 from this perspective, it appears that religion only becomes a question for rights when trouble cases emerge. Thus, one gets the idea that perhaps a legal system that decides on those claims that have religious basis and a social system that produces religious subjects interact with each other occasionally. At a theoretical level, this might remain consistent with one's models. However, as we shall later see in §3.3, human rights (esp., the right to freedom of religion) precisely work against such a social imaginary.

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[54] Thus, the ECtHR noted in *Kimlya and others v. Russia*: 'It is clearly not the Court's task to decide *in abstracto* whether or not a body of beliefs and related practices may be considered a "religion"' (para. 79). A notable exception in this regard is the Qualification Directive 2004/83/EC of 29 April 2004 that for the purpose of asylum defines religion as

> 'the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief'.

Such a broad demarcation has problems of its own. In a useful article originally prepared as a report for the UN High Commissioner for Refugees, Karen Musalo identifies the difficulties adjudicators face as to how the persecuted may 'prove' that there was a religious rationale behind their persecution in the cases of asylum and refuge (Musalo 2004). In the European context, Carrera and Parkin note: 'The *undefined* categories used at EU policy level to deal with religion are hugely diverse, heterogeneous and contested as regards both their material and personal scope' (Carrera und Parkin 2010, 3). In another context, the same authors note: 'There are no commonly agreed definitions around any of the key terms which are currently being used when ''dealing with'' the religious dimension in EU policies' (ibid, 35). Among philosophers, Derrida most explicitly acknowledges a lack of decisive understanding concerning the category of religion. He notes:

> 'We act as though we had some common sense of what 'religion' means through the languages that we believe. We believe in the minimal trustworthiness of this word . . . Well, nothing is less pre-assured than such a *Faktum* and the entire question of religion comes down, perhaps, to this lack of assurance' (Derrida 2001, 44).

Recent advances in critical social theory on religion view religion as a specific social knowledge construct, and not as one that would exist apart from a certain discursive structure (Asad 1993, Mahmood 2011, Agrama 2012). In agreement with political theorists, it views religion as a social and political issue. Unlike political theorists, it argues that the basis of preferring one conflicting concept (i.e., politics) to another (i.e., religious) remains slippery. This is so not because the opposing concepts presuppose each other in a deconstructive manner but because both concepts share a common frame of social understanding, i.e., analytical identification, functional separation, structural differentiation, conceptual permanence. Like lawyers, it argues that one requires not firm knowledge but certain appreciation of the ethos of religion to distinguish religious from areligious pronunciations (Danchin 2011, 675-6, Gunn 2003, 191, Sullivan 2007, 151). However, it extends lawyers' argument. Courts can rule against rights-holders' legal claims either because their religious claims are not religious per se or because a negative decision is seen not to alter rights-holders' status as autonomous religious subjects. Either religion is uninfluenced or religion and autonomy go hand in hand. In both cases, the case law approaches 'religion' in a way that does not remain equivalent with the self-interpretation of religious subjects. I analyze Article 9 from the perspective of this social theory in order to address two related concerns: How does law manage conduct through an analytical identification of religion? What does this mean for the apt social place of religion in societies that European human rights law addresses?

In this chapter, I argue that Article 9 protects religion by managing religiosity. To the extent that law interprets Article 9 rights with reference to rationalities, legal rules decide on thick value-based questions without compromising their positive form. In identifying what merits legal protection and what not, the universal application of Article 9 to all legal subjects delimits the proper scope of the government of their religiosity. I begin by analyzing how law understands Article 9 claims with reference to certain practices and rationalities, and how Article 9 claims connect the question of protection with that of management. I argue that the legal system within which Article 9 works requires social practices to address religiosity in a manner that social reproduction of religion remains in line with subjects' autonomy. Thus, Article 9's holders are autonomous to the extent that their religiosity functions as an object of social practices and norms, and not to the extent that social practices and norms defer to their religious narratives and emotions (§3.1). Then, I focus on Article 9's context. I argue that the context of Article 9 imposes certain constraints on religious subjects in order to ensure apt social reproduction of religion. Albeit such a discipline does not flow from Article 9 per se, it is difficult to imagine whether a society manifestly failing in performing this task can guarantee Article 9 either effectively or sustainably (§3.2). Finally, I argue how a legal system that protects religion but fails to manage religiosity consequently fails to guarantee Article 9. I see how a narrative that understands religion in an a priori manner does not merit Article 9's protection, even when that narrative might indeed be religious in motivation (§3.3). The chapter ends with brief concluding remarks (§3.4).

§ 3.1 On religion as a governmental fold

Article 9 protects religion. However, to the extent that we cannot evaluate the necessity of social practices and legal norms mentioned in Article 9(2) using what Article 9(1) protects (i.e., religion), or using the rights mentioned in Article 9(1), there exists non-reciprocity in Article 9's textual structure. It entails that not all legal norms flow from religious considerations and not all social practices require religious justifications. Thus, even a right like Article 9 that protects religion cannot, on religious grounds, either legitimize state coercion or justify limitation on itself (i.e., the rights it mentions) or on other rights. Crucially, this entails that laws based on Article 9 do not protect religious claims with reference to religious reasons alone. Otherwise, Article 9(2) would collapse into Article 9(1).

In this section, I read two case laws. Both cases deal with the headscarf claims: *Leyla Şahin v. Turkey* and *Dahlab v. Switzerland*. These cases are important because the headscarf issue has polarized scholarly debates on Article 9's case law. I advance two arguments in this section. First, Article 9 determines the way social practices are oriented to rights-holders' religiosity in order to: a) interpret their claims; b) decide whether legal rules manage their religiosity aptly. Second, by doing (a) and (b), Article 9 neither defers simply to rights-holders' self-interpretation nor makes law necessarily value-laden in thick moral terms. Thus, what Article 9's jurisprudence protects as being religious does not exist as something prior to, but as something nested with, this social and governmental context.

§3.1a *Leyla Şahin v. Turkey*

First occurrence: The applicant, a medical student, lodged a complaint that İstanbul University violated her Article 9 rights by banning the headscarf on campus. The Medical Faculty denied her admission to the written exams and cancelled her enrollment for two further subjects. Instead of looking at the ruling, I focus on the structure of Article 9's legal interpretation.

First, rights-holders are already located in certain social setups. Thus, Article 9 sees rights-holders' religious claims with reference to those setups. In *Leyla Şahin*, this occurs in a two-way manner. First, law looks at the act alone. Thus, scientific narratives, health measures, and hygienic standards relating to the dress code of medical staff evaluate the use of the headscarf. For example, wearing the headscarf in a maternity ward or in an operation theatre would not be conducive to the performance of one's professional tasks (paras. 43, 119). The focus on the practice

itself already distinguishes scientific from the 'mere' arbitrary. Second, law looks at the religious nature of the act. Importantly, it looks at the manner in which social practices legitimately address religiosity. Thus, to the extent that higher education institutions impart education in an objective manner and seek to regulate relations among students pluralistically,[55] they can permit specific religious expressions and ban others, if they are able to rationalize those permissions and restrictions with reference to the social objectives and the institutional necessities (paras. 44, 111).

Second, to the extent that religion might be one component among others in such social setups, if at all, Article 9 already presupposes a social delimitation of religion. In this crucial sense too, Article 9 is a limited right because of the social delimitation of the very object it protects. Thus, Article 9 sees the apt place of rights-holders' religious claims within and with respect to certain social practices. In *Leyla Şahin*, this occurs in a three-way manner. 1) Law looks at the way practices and certain institutional sites secure freedom and the room that those practices make for religiosity. Thus, as a medical practitioner, the applicant has a duty to perform medical tasks in a way that respects rights of the patients, because modern societies understand patients with reference to scientific knowledge and believe that patients' treatment should be in accord with it (para. 44). Whereas the scientific discourse can justifiably mold the conduct of those working within those institutionalized setups that are based on scientific professionalism, such strong justifications allowing government of conduct remain closed to that which is, from the methodological perspective of the sciences, arbitrary. Thus, religiosity works with reference to its place in such social setups, and not in a categorical, a priori manner. Consequently, a rights-holder can use Article 9 in a limited manner. It would rather be ludicrous for a rights-holder to use Article 9 in order to reevaluate scientific discourse, institutional rationale, or educational discipline tout court with reference to its religious claims.

2) Then, law considers the extent to which certain practices rationalizing autonomy delineate how legal rules may not protect certain religious practices without violating Article 9. Law interprets workplace discrimination or gender inequality with respect to the workplace ethics or standards. To the extent that a certain religious practice clashes with gender equality or promotes social discrimination, it remains possible for a legal system to use Article 9 in order to prohibit that religious subject from doing the religious practice in question (para. 111). At such moments, it seldom matters whether

[55] For Cover, the question of education in terms of social effects is one that is decisive for any community. Importantly, this includes the interpretive question concerning the world communities live in, would live in, inhabit, and look to inhabit. The question then is the specific manner through which institutionalized education mandated by state regulations influences how communities sustain themselves, with what effects and means, and using what forms. Cover notes: 'The bond between group and individual is by definition paideic, and disputes over educational issues raise the question of the character of the paideia that will constitute the child's world' (Cover 1995, 164).

consent or free choice grounds that specific religious act. In this way, Article 9 as freedom of religion equates freedom and religion.

3) In a reflexive manner, law sees whether religiosity itself remains in line with certain rationalities of government. Thus, to the extent that the cumulative effects of a certain permissible religious practice affect institutional efficacy, exert pressure on others within shared social setups, or negatively influence public order (i.e., public interests, political culture) (paras. 101, 111, 115), legal rules may use Article 9 to permit what was previously prohibited and may prohibit what was previously permitted. In other words, Article 9's case law does not remain interested in the content and causes of a religious practice (or, with ontological questions relating to the involvement of a religious subject with that religious practice) but primarily in its form and its effects.

Third, Article 9 considers the apt location of rights-holders' religious claims vis-à-vis a broader field of social practices, such as, provision of universal education, adequate national laws concerning access to education, regulatory protocols concerning social behavior. Thus, a positive legal system with procedural safeguards whose form remains in line with Article 9(2) can more easily justify the way it handles religiosity by prohibiting, limiting, allowing, or recognizing religious practices. The Convention itself rather leaves open how a specific legal system in fact systemically balances Article 9(1) and Article 9(2). However, Article 9 permits structural difference only to the extent that the formal infrastructure that correlates positive legal rules with the management of religious conduct functions effectively (paras. 55-65). Consequently, the member states of the Convention guaranteeing Article 9 vary in the way they structurally interrelate religion and politics. Mindful of an underlying normative convergence, these states might be, without violating Article 9, secular (e.g., Austria, Ireland), secularist (e.g., Turkey, France), or have an official state Church (e.g., the UK, Georgia). Thus, without appreciating how the ECtHR locates the margin of appreciation doctrine at the friction of uniformity and difference, one would rather mistakenly find Article 9's case law (e.g., by contrasting *Lautsi v. Italy* with *Leyla Şahin*) as relying on a fractured understanding, if not a downright biased one.[56]

§3.1b *Dahlab v. Switzerland*

Second occurrence: The applicant, a primary school teacher, lodged a complaint that the Director General of Primary Education in Geneva violated her Article 9(1) rights by requiring her 'stop wearing the headscarf while carrying out her professional duties' (*Dahlab*, The law). As in §3.1a, I focus on the structure of legal interpretation, and touch the decision itself cursorily.

[56] E.g., The 2014 special issue of *South Atlantic Quarterly* on 'Politics of Religious Freedom'.

First, law interprets rights and freedoms with reference to social setups. In *Dahlab*, this occurs in a two-way manner. First, legal decision remains cognizant of the fact that the public education system in Geneva defines itself as non-denominational. More, the applicant freely entered the public service. As such, the contract assumed compliance with employment regulations, roles, and objectives. Article 9 rights-holder cannot ask that law instead limit those regulations, roles, and objectives in view of its Article 9(1) rights (*Dahlab*, The circumstances of the case). Consequently, the case law analyzes how the guarantee of Article 9(1) rights does not effectively hamper the functioning of those institutions that deliver social goods. Both the case law and the respective parties share this assumption. Second, the public education system remains nested with broader set of social practices, i.e., civil service, the provision of collective goods. Thus, the applicant had other career options available (Article 11's rights-holder), expressed herself on media (Article 10's rights-holder), and was not forced to change her religious belief concerning the headscarf (Article 9's rights-holder). Despite preventing the applicant from wearing the headscarf as a schoolteacher, the legal system did not affect her status as an autonomous being because of two reasons. First, the limitations that a rights friendly society puts on rights rather define that society as free (see, Ch. 6). Second, the interpretation of her Article 9 rights takes place in a context that variously approaches her as a rights-holder. Importantly, the idea of autonomy contextually varies because different social practices articulate it and the rights protecting different capacities underlie it. Thus, understanding human rights in general terms is analytically hasty because specific human rights do not simply fit into and with each other like the pieces of a jigsaw puzzle.

Second, law interprets interests and duties with respect to the subjectification processes underpinning social practices. Thus, albeit it remains difficult to understand minors as holders of Article 9, their interests relating to denominational neutrality, impartial education, harmonious socialization, and psychological vulnerability allow law to view them as certain subjects (*Dahlab*, The law). Thus, in *Dahlab*, the national authorities and the ECtHR do not need to know from children themselves what they want or whether they consent to the regime of schooling in the first place. Instead, they articulate children's perspective in a justifiable way that resultantly influences how social institutions interpret rights of those (e.g., teachers) that deal with children. Similarly, albeit parents themselves do not complain in this case, their interests relating to non-denominational schooling, maintenance of sound schooling environment, bringing their children up in line with their beliefs, and their trust in educational authorities allow law to view them as certain affected subjects (*Dahlab*, The law). Further, as a teacher, one works in a hierarchical structure, imparts knowledge and skills, maintains close contact with young minds, and evaluates and corrects children's behavior and conduct (*Dahlab*, The law, and the circumstances of the case). In *Dahlab*, the interpretation of the applicant's rights takes place with a view to the duties that the discourse on teaching imposes on her, not in an a priori manner where one's rights disregard such imperatives. The reason that law analyzes her subject-position from

the perspective of social facts, and not from the perspective of her religious truths, allows law to maintain its positive basis. Importantly, the fact that subjectification processes for Article 9 rights-holders do not lie in religion itself remains crucial in making this right applicable to the fact of social complexity, and in not making this right either morally perfectionist or theological. It is because of the reason that Article 9 does not necessarily draw on the subjectification processes generated by religious traditions that its case law finds religion somewhat tenuous (so that the freedom to or for religion is also always freedom from religion) in contrast to other social imperatives (for instance, one's legal status as a citizen living in a constitutional democracy).

Further, the ideas of internal aspect (*forum internum*) and external aspect (*forum externum*) that Article 9's case law uses to interpret claims likewise vary depending on the fact that who Article 9 addresses. It would be strange to argue that law respect internal aspect unconditionally. Think of children. The idea of necessarily imparting broadly common skills and communicative capabilities at a tender age remains connected to a general outlook that both views, and resultantly constructs, the social world in a certain way. Thus, the case law cannot approach children using such an interpretive tool (i.e., *forum internum*/ *forum externum*). This remains valid even when children's interests influence the interpretation of Article 9 rights of those (e.g., teachers) that deal with them. Similarly, the discourse on teaching rationalizes how a teacher can mold a child's conduct. However, those aspects of behavior that do not logically fall in line with the imperatives of teaching appear extraneous, not intrinsic, to the institutional norms and professional tasks. Of course, a teacher may theoretically consider it her religious duty to take a step further and interact with her pupils in an engaging manner. Nevertheless, if the teacher's external behavior does not generate 'additional' significations, and instead motivates her to fulfill her teaching obligations optimally, the question of using Article 9(2) to prevent such manifestations of religious belief does not come to the fore, even in the context of non-denominational schools.

§3.1c On the disclosure of a practice as religious

Lest we overlook the wood for the trees, we shall reductively focus on one basic assumption guiding Article 9's case law: the idea that law can analytically identify religion. In this subsection, I see how this legal intuition remains contextual and what this means for Article 9's rights-holders.

There is more to the headscarf being religious than the apparent reason that Quran imposes it on women by laying down a precept (24:30, 24:31, 33:59) (*Dahlab*, The circumstances of the case). Positive law cannot see many other imperatives that Quran explicitly mentions as religious. For example, Quran also mentions principles relating to trade-related transactions and business ethics (e.g., 2:188, 3:161, 24:19, 5:90), or

sympathy and counseling (e.g., 2:178, 3:104, 3:110, 16:91), or consultation and war ethics (e.g., 3:159, 2:190, 8:61, 23:96). Respectively, modern social thought understands them as practices that are economic, societal, or political in nature. Consequently, not every precept simply stated in the Quran, itself a 'religious' text, by default means religious, and is legally protectable as per Article 9. It does not mean that Article 9(2) limits such claims. In fact, Article 9(1) does not even apply to them. It means that as the Word relates to the World, the 'religious' text itself splits up into religious and non-religious folds. The legal intuition concerning religion feeds on this split. Thus, the legal intuition presupposes an interpretive correspondence between broader social practices and the conceptual categories structuring the social world.[57] To the extent that a rights-holder interprets religious sources and principles likewise, Article 9(1) appears applicable.

In *Şahin* and *Dahlab*, the application of Article 9 presupposes that law can mark out the headscarf as religious – and not, for instance, as 'aesthetic', 'national', 'ethnic', 'cultural', or 'hygienic'. As such, the headscarf has particular effects: religious message for the onlookers or religious effects on the social body. Law tailors solution accordingly. It means that instead of being an effect of discursive formations, religion becomes a causal principle in its own right and conveys its essence as such onto the headscarf. Consequently, Article 9's jurisprudence considers specific religious practices it handles neither in an ahistorical nor in a natural manner. In *Leyla Şahin*, the detailed understanding of the headscarf as a religious practice looks at its context from a constructivist perspective. In *Dahlab*, law approaches the headscarf in immanent manner in order to view rights-holder as a free being. Rights allow their holders, within certain conditions, to satisfy their different needs and fulfill interests, and to use laws and legal protections to achieve this end. Crucially, one can see that Article 9's case law does not develop any transcendental ground between a religious practice and a religious subject. This is understandable because this would rather arrest the subject 'determinatively' (see, §3.3). Thus, Article 9 remains open to the displaceability of religious practices and signs (c.f., Asad 2006b, 501).

§3.1d On the government of religiosity

On surface, one can object that in order to understand what religion is and what religion is not, Article 9's case law depends on a certain understanding of religion. Thus, this idea affects Article 9's case law. Legal rules based on Article 9 may not talk about

[57] The pre-modern world did not know of the universal right to freedom of religion because of the obvious reason that it lacked an analytically differentiated and universally applicable category of religion. Gadamer notes: 'Concepts such as "art," "history," "the creative," "worldview," "experience," "genius," "external world," "interiority," "expression," "style," "symbol," which we take to be self-evident, contain a wealth of history' (1960, 9).

‘spurious’ religion. However, one can say that they do apparently have an idea of what a legitimate religion is. Thus, one may argue that Article 9’s interpretive scheme by necessity forces the ECtHR to take a certain moral stance because its case law handles what is primarily moralistic. Thus, to use Nietzsche’s phrase, the abyss gazes back into the one who gazes into it. However, things remain different. From Article 9’s viewpoint, the idea of distinguishing between religion and non-religion and between belief and non-belief is immaterial because Article 9 applies both to non-religion and to non-belief. Thus, the important question guiding the case law is not the content of some Ω; the question is its place. Logically, Article 9’s interpretive scheme sees the apt place of rights-holders’ claims to Ω, i.e., claims touching matters of (non-)religion and (non-)belief, both within and with respect to certain social practices. Thus, Article 9 places Ω claims without regard to their intrinsic moral worth in an immanent frame of understanding to determine the place a legally protected (non-)religion or (non-)belief has to have. Importantly, the connection between Article 9(2) and Article 9(1) is logical because without Article 9(2) it is hard to see how laws protecting Article 9(1) rights would remain positive.

Two related points are important. First, Article 9 distances itself from moral considerations by being pragmatically committed to regulating religious practices. Article 9 does not concern itself with the question whether rights-holders worship or bribe gods, let alone whether gods are true or false, genuine or despicable. Thus, law cannot rely on Article 9 to condemn a moral view based on a false premise. Consequently, Article 9 protects different religious ideas and abstains from developing tailored legal rules in line with specific moral content of those religious ideas. However, by focusing on the ‘external’ aspects of behavior, Article 9 requires that the individuals performing protected religious practices comply with certain conditions in order to enjoy continued legal protection. Resultantly, the optimization of freedom by absolutely protecting *forum internum* requires unique and tailored techniques that both open (e.g., recognition, registration, approval) and manage (e.g., exemptions, incentives, restrictions) *forum externum*. Then, one has two diverging projects. On the one hand, there is the circulation of difference (JHA 2007). On the other hand, there is formulation of strategies and regulation of conditions that accommodate difference (JHA 2004). In sum, law cannot use Article 9 to rank different preferences in terms of their different value structures. Nevertheless, Article 9’s effectiveness in any society depends on the extent to which it helps laws to make these two projects coincide.

Second, the analytic that places religious practices in a social and government context generates two important effects. First, as we saw in both *Dahlab* and *Şahin*, it does not require equivalence with the self-interpretation of religious traditions. One requires from rights-holders a reflexive attitude. In fact, the success of one’s claims crucially depends on the degree to which a rights-holder can convince the judiciary that its religious practices do not inhibit the working of such a governmental field (*Şahin*, paras. 100-101; *Dahlab*, The law). Thus, albeit Article 9 leaves internal aspects of one’s belief

untouched, tailoring governmental practices in view of handling the external aspects of religious beliefs generates effects that help religious subjects to become civil, not to say 'civilized'. Second, it involves law. The changing dynamics of the background context require construction of apt legal rules guiding those governmental practices that are oriented to rights-holders' religiosity.[58] Consequently, Article 9 leaves open the question as to the apt political form of a state only by seeing whether legal rules manage religious practices with respect to those practices' legitimate social space (Asad 2006a, 209). However, when law prohibits what it previously permitted and permits what it previously prohibits, it presumes that the limits of religion remain contingent – without presuming that the essence of religion is likewise contingent.

§3.2 On the apt governmental constitution of the religious subjects

I now focus on the context of Article 9. I argue two points in this section. 1) In order that social practices and norms do not remain hermetically sealed off from religion, Article 9 determines their interrelationship in the background context of their apt structural interaction. 2) The context of Article 9 imposes certain constraints on religious subjects in order to ensure apt social reproduction of religion. Albeit such a discipline does not flow from Article 9 per se, it is difficult to imagine whether a society manifestly failing in performing this task can guarantee Article 9 either effectively or sustainably. I argue these points by critically reading a lecture delivered by Habermas.

We noted two points in §3.1. 1) Not all precepts mentioned in the religious sources merit legal protection as per Article 9 because not everything in them is by default 'religious' for the purposes of Article 9's case law. 2) Law does not consider self-understanding of religious practices as the sufficient condition in order to protect those practices. This dynamic does not include a religious practice within law's protective scope without explicitly outlawing it and enables law to protect a religious practice without necessarily affirming its inner moral worth. In this sense, Article 9's case law relies on a certain 'patterning' of religious practices that, albeit connected to law,

[58] What place a legally protected religion is to have in a rights friendly society depends on the way law manages specific expressions of religiosity. Thus, Article 9 constructs legal rules to aptly place religiosity in the context of taxation (*Darby v. Sweden*), social security (*Reformed Church of X v. the Netherlands*), military discipline and decorum (*Larissis v. Greece*), health insurance (*X v. the United Kingdom 1978*), farming and rearing (X v. Netherlands 1962), employment obligations (*Arrowsmith v. the United Kingdom*), photography and biometrics (*Karaduman v. Turkey*), planning concerns (*Manoussakis and others v. Greece*), prison regulations (*X v. Austria 1963*), physical education (*Doğru v. France*), agriculture and animal welfare (*Cha'are Shalom Ve Tsedek v. France*), medicinal and technological innovations (*Hoffman v. Austria*), or broadcasting and media (*Brook v. the United Kingdom*). The fact that there is an 'ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power' (Foucault 2007, 144), which is oriented towards the status of religion that takes religiosity as its problem, and its management as its main task, rather makes religion itself a governmental tool.

includes something more than the legal domain alone. This fact of 'patterning' necessitates focusing on the social context within which Article 9 works. I focus on it in a twofold manner. First, I look at the extent to which Article 9's context requires an investment into an apt constitution of religious subjects. Second, I look at the manner in which Article 9's context develops certain normative constraints that remain relevant in legally determining the way religious practices and ideas circulate in a human rights friendly society. In both the cases, however, Article 9's context does not take an explicit value-based stance or take it upon itself to restructure religious values. In order to identify an aspect of this twofold issue, I read a lecture by Habermas: 'What is meant by a 'post-secular society'?' I underline the governmental undertones of this text – the lecture itself is a theoretically sophisticated attempt to clarify the social place of religion (its subtitle is 'A Discussion of Islam in Europe').

The lecture, despite perhaps being a 'minor' text in Habermas' subtle oeuvre, is of utility. First, the text identifies religion as a social fact by delimiting its proper scope. To the extent that broader practices approach religion likewise, such a descriptive narrative generates important prescriptive effects (Habermas 2009, 59). Such a delimitation of religion remains analytically, legally, and philosophically necessary, lest religious subjects use their rights to include those religious practices within law's scope of protection that disturbs the careful interaction of norms and social facts by posing systemic threats (see the next section, §3.3). Second, the text pinpoints the paradoxical nature of contemporary constitutional democracies (esp. European) vis-à-vis their religious traditions. In them, the social fabric based on 'religious bonds' loosen up, while leaving 'religious habits and convictions' somewhat intact (Habermas 2009, 59).

Normatively, one can neither equate an entire society with religion nor do away with religion completely. First, Article 9(1) is a limited right. Albeit it may be related to other rights, it does not 'ground' any other right. Obviously, from a functionalist perspective, what Article 9(1) protects (i.e., religion) is limited. Second, Article 9 cannot legitimize immense violence associated with completely eradicating religion, even when historians can sufficiently substantiate the thesis that a certain historical violence that limited the social role of religion works as an enabling condition for autonomous living in the contemporary European context. Consequently, Habermas argues for delimiting the role of religion to an area where it performs its 'proper function' (Habermas 2009, 60): 'pastoral care' (Habermas 2009, 63). How can law identify this? In specific cases, legal standards and rules identify the proper substance of this 'core' and changes in its content by contrasting it with the 'other social domains' (Habermas 2009, 63). These include, for Habermas, 'politics, public welfare, culture, education, and science' (Habermas 2009, 60). This has two important governmental effects. First, despite obvious repercussions of one domain on the other,[59] law makes room for religious

[59] The medicalization of the knowledge of the human body is an obvious example here, which, despite occurring within the scientific field, has had obvious repercussions on the other domains as well (law,

practices because they perform this unique function of pastoral care. The disciplinary effects of those social practices that do not deal with the questions of pastoral care are beyond Article 9 reckoning. Similarly, those traditions that consider pastoral care a part of their overall concern find that the human rights law does not protect the whole but only that specific part. In other words, if an Article 9's rights-holder fails to establish the connection between the functioning of those social practices and the question of pastoral care, the function and the rationale of the former theoretically remain unchallengeable through the instrument of Article 9. This point remains valid even if the influence of those social practices on religion may lead to a reinterpretation, but not eradication of, religion's core function. Second, despite presence of certain social practices that intermingle (e.g., religious education, religious welfare), law considers it possible to determine the form of their apt combination. Thus, in such cases, religious narratives alone, or Article 9(1) for that matter, cannot logically challenge the way those limits are drawn. Consequently, despite its structural differentiation and functional uniqueness, religion logically depends on the other, i.e., on what it is not.[60]

Now, of course, even if religion is identifiable, it surely does interact with the other domains to produce 'murkier' forms. What shape may such an interaction then have? Let us look at the suggestions of a working report coming from an EU-funded research project to explore this point. The report assumes that functional differentiability allows one to approach religion as a 'policy issue' (Carrera and Parkin 2010, 3). Albeit religion's core function evades quantification and remains generally uninteresting from a policy-based perspective, designing policies concerning religion qualitatively looks at the way religion interacts with its other. Thus, one is told, religions gain social weight, when their societal contribution expands into the somewhat preferable domains of 'poverty reduction or questions related to social inclusion' (Carerra and Parkin 2010, 24). However, before religion functions in such a manner, religious subjects need social communication skills, proper training and educational upbringing, and self-awareness concerning the apt form of both their religious roles and the appropriate workings of social practices. Thus, religion contributes in the matters relating to economic disadvantage or social integration without overwhelming the economy or the society with its religious bearing, when legal rules already inscribe religiosity in a governmental frame. In other words, when functional differentiation does not function of itself as a social fact, falling back on focused strategies becomes necessary. Consequently,

religion, society) (Foucault 1994, Rose 2006a). Of course, functional differentiation does not entail that the functionally differentiated domain remains cut off from the social environment or from the other functionally differentiated domains (Walzer 1984, 10). The point I argue is that functional differentiation in the case of religion is an effect of the broader systemic process (and hence something that functions both as a given and as an ideal) that does not simply unravel itself or evolve on its own. More, the fact that functionally differentiated domains 'observe themselves in relation to others' (Luhmann 2014, 282) does not entail that the background social picture allows each to operate in equal terms. As such, the terms of interaction and observation remain differently structured – a dynamic that gets politically charged when legal rules begin to intervene to define the terms of such structural interactions.

[60] Gadamer notes: 'The concept of the profane and its cognate, profanation, always presuppose the sacred ... There is no such thing as profaneness in itself' (Gadamer [1960] 2003, 150).

determining the appropriate form of interrelationship of religion and its other does not emerge 'naturally'.

Coming back to Habermas. Habermas suggests that the public contribution from religious communities in the rule of law based legal systems should occur in a 'translated' manner (Habermas 2009, 68). By translation, he means, to put it banally, that the contribution to public deliberation coming from those religious communities should not contradict or challenge norms associated with human rights, even if the structural and normative organization of those religious communities may not necessarily be in line with those norms (Habermas 2009, 76). This act of translation is not required for all the truths and values circulating in a society. Think of the scientific discourse. For religious narratives, a 'post-secular' society requires this in order that specificity (i.e., religiosity, religious affiliation) and generality (i.e., public policies, citizenship, public discourse) accurately correspond. Further, as Scott notes (Scott 1992, 333), the politically important question is which specific guarantor is qualified to ensure Article 9 rights and to repel transgressions, under what conditions, with what methods, and what effects this process has on the guarantor itself. In the context of 'firmly entrenched nation-states' (Habermas 2009, 69), Habermas thinks that the rationale behind the requirement of translation is of crucial political weight. Consequently, religious subjects do not simply have to address but must also identify the others '*as citizens* … [of] *one and the same* political community' (Habermas 2009, 68). The reason that different practices govern conduct and that religious subjects adhere to different faiths entails that the recognition of each other as citizens provides an important political medium through which the legal system could then legitimately address different social domains in terms of a common normative vocabulary.

Importantly, this context imposes certain restraints on religious subjects.[61] To this minimal extent at least, Habermas argues, law presumes that religious communities '[should loosen their hold] on individual members' (Habermas 2009, 68) and undergo certain 'painful learning processes' (Habermas 2009, 75). However, how can those religious communities whose self-understanding may possibly differ from the normative vocabulary of human rights, citizenship, and the rule of law ensure that they remain committed to them (Habermas 2009, 75)? The relevant governmental problem therefore is to constitute subjects whose posture extends 'beyond mere obedience to the law' (Habermas 2009, 75). Thus, the effectiveness of law in any society depends on the extent to which a proper investment into subjects takes place, which remains irreducible to law later dealing with their legal claims in justiciable terms. This includes, among others, 'full integration in kindergarten, schools, and universities … and equal access to the labor market' (Habermas 2009, 69). It is only when a subject has been

[61] Taylor (1998) notes that 'a rights friendly society has to substitute for despotic enforcement a certain degree of self-enforcement. Where this fails, the system is in danger' (p. 43).

made (to uses Rose's (1989) term) 'free in specific ways' that it generally becomes possible for it to exercise agency in the most suitable way.

This makes a twofold dynamic possible. It allows rights-holders to construe their freedoms in sight of the legal field as humans or citizens, and not simply as co-religionists or believers. Alternatively, it makes it possible that those subjects bring corresponding subjectification processes that begin to 'resonate with their life history' (Habermas 1996, 365-66) into the fold of religion as religious subjects. In an important sense, Habermas thus reverses Hobbes' dictum that a sovereign can oblige its subjects to obedience only by asking that their actions conform to his commands (Hobbes [1651] 1998, 248, 296). Habermas' sociological imagination remains aware of a governmental investment into subjects' freedom at present that allows rights-holders to simultaneously appreciate that what law commands is true, correct, or, at least, valid.

It means that one has to rely on political and governmental arrangements, apart from the legal ones, in order to ensure that religion operates within its social space.[62] Thus, Article 9 as a legal standard works in the context where a society aptly interrelates social practices and norms with subjects' religiosity. Given that religiosity is not something outside the scope of law and governmentality, a non-reciprocal formula operates in Article 9, i.e., a rights-holder can disavow its religious being based on freedom but a religious subject cannot disavow its legal being/ freedom based on religion. As a legal standard, the strength of Article 9 consists in its 'tactical polyvalence' (to use Foucault's phrase) that allows it to exhibit, with respect to the specific context, 'different combinations of practices, discourses, expertise, and institutions in which the different elements vary in their role and significance' (Hunt 2014, 80). This not only transforms the sovereign power of nation-state, but also alters the workings of the concept of sovereignty itself, since sovereignty now requires that population be governed in the best way, and governmentality requires that there be a sovereign capacity ensuring the continuance of operative rules.

§3.3 On the limits of religion as an analytical category

In this section, I look at what Article 9 does not protect and what kind of understanding one cannot ascribe to Article 9. I argue two points. 1) A legal system that fails to manage religiosity resultantly fails to guarantee Article 9. 2) A narrative that understands religion in an a priori manner does not merit Article 9's protection. This remains valid even when that specific narrative might be religious in motivation and

[62] Habermas concedes that 'with the cognitive preconditions of an ethics of democratic citizenship [one] runs up against the limits of normative political theory which can justify only rights and duties' (p. 75).

respectful towards other religious communities and traditions. To establish my points, I read a case law: *Refah Partisi v. Turkey*.

In §3.1 and §3.2, we saw that Article 9's jurisprudence places religiosity in a certain social context. However, if a legal system uses Article 9 to focus on the aspect of protection while disregarding the aspect of management, its use of Article 9 contradicts the norms and principles that ground Article 9's interpretative context. In order to explore this point, I look at *Refah*. This case pinpoints an important dynamic, i.e., a legal system that protects religiosity but does not manage it is not in line with Article 9.

Refah ('the Welfare') Party was a Turkish political party that had obtained 22 per cent of votes in the general elections of December 1995 and had formed a coalition government in June 1996 (para. 11). On Jan 16 1998, the Constitutional Court of Turkey dissolved Refah on the ground that it had become a 'center of activities contrary to the principle of secularism' (para. 23). Refah was subsequently banned, its government removed, and its leadership suspended. Two concerns propelled this measure. First, Refah intended to set up a 'plurality of legal systems' based on the plurality of religious denominations. That is, Refah intended to apply Sharia over the Muslim community and to apply communal law of religious nature over the non-Muslim communities. This meant that in contrast to the specific formulations subsumed under the category of religion, national law understands a society communally. In the said context, it would mean that specific religious communities would derive their ideas of legality and legitimacy from their religious traditions. Second, Refah invoked the use of jihad (glossed over as 'force') both as a possible political method and as a concept legitimizing politics (para. 116). As in §3.1a and §3.1b, I only try to explicate assumptions guiding the legal argument. I do not analyze the decision itself.

We noted in §3.1 that, in order to maintain its positive basis, laws based on Article 9 do not understand the subjectification processes of rights-holders solely in terms of their religion. Consequently, law deals with religion without elevating religion to the status of law. We noted in §3.2 that whereas law may rely on rights' vocabulary to restructure religious communities, religious communities cannot rely on their Article 9 rights to deny their members their Article 9 (or other) rights. Consequently, Article 9 remains largely open as to the specific political form of positive legal system guaranteeing it. However, Article 9's normative framework remains tied to a certain kind and form of coercive structures and rules. Consequently, a positive legal system guaranteeing Article 9 rights accords the state institutions enforcing its norms a relationship of transcendence vis-à-vis other kinds of collective associations and 'informal' coercive structures. By implication, then, Article 9 does not give the latter a room to limit rights as per Article 9(2) and, consequently, constrains their functioning as per Article 9(1) rights of their members.

However, Refah argued in favor of religious communities (e.g., established churches, church leaders, or community elders) possessing legal autonomy with respect to the

application of their divine laws over their communities (paras. 90, 91, 93-4, 119). Whereas national legal systems in Europe only give rights-holders, or, by implication, religious communities, Article 9(1) rights and determine how laws can legitimately limit their rights using Article 9(2), Refah's position remained anomalous. Refah understood religious communities as holders of *both* Article 9(1) rights and as enforcer of Article 9(2) limitations. This particular viewpoint has a specific ontological understanding of both legal systems and the religious subjects. This understanding radically differs from what Article 9's case law establishes. I focus on legal system first, and then on religious subjects.

First, when Refah argued in favor of such a position, it assumed that the legal system only functions as an instrument mediating other communal identities or the collective moral goods, or that a legitimate legal system is one that justifies itself according to the way it protects communal identities or the different collective moral goods. Resultantly, the legal system performing such a perfectionist task remains unable to: a) address different social domains in terms of a common vocabulary; b) derive norms of universal applicability delimiting the proper scope of subjects' conduct; c) apply those standards to everyone that enjoy universal legitimacy (para. 30). From ECHR's perspective, there are limits as to who can hold rights. As the Convention espouses it, in a 'democratic society', even an intermediary such as a 'majority' cannot be a legal subject holding all human rights. Further, from an epistemological perspective, Refah's position failed to consider the important role of scientific knowledge, or at least the knowledge one obtains using the scientific method. Such knowledge provides the public authorities with more or less universally applicable rules to govern a pluralist society without being necessarily committed to a particular idea of the moral good, the good life, or true happiness (para. 40, 72). Thus, in a certain important sense, the methodological limits of science, or, the limits of scientific methodology, determine the limits of universally applicable rules within which positive legal rules then respect different moral ideas.

Second, when Refah argued in favor of a perfectionist position that understands pluralism in a certain way, it understood different subjects with respect to their metaphysical standpoints. Thus, the subjects would always be one, even before their acts. True, this can cause traditional affiliations to become 'consequential to the distribution of civil and political rights' (Mahmood und Danchin 2014, 145). The crucial thing however is that if one is a doer before the deed, then the subject always precedes itself before its acts. Given this ontological determination, law would not be able to apply norms to facts because there would be no point where the definition that social practices ascribe to individuals and the definition that those individuals ascribe to themselves converge. This affects the interpretation of rights because positive legal rules refer to certain practices in order to both rationalize norms and apply those norms to those practices. At a time when complex government practices govern the conduct of all, the use of law to give unconditional priority to subjectification processes generated by religious traditions would only produce serious governmental puzzles: Is

my religious affiliation to work as the sole point of reference for my other social distinctions, subject positions, and institutional roles? Do I have to serve in the military, write an exam, trade in shares, join labor union, teach, or work in an assembly line only as a Sunni Muslim, a Catholic Christian, or an Orthodox Jew? Religiosity therefore would not be the concern of law – not because there is no 'positive' law corresponding to it, but – because there is no specifically delineable religion as such. Socially, religion overspills. When Refah lobbied in favor of such an arrangement, it in fact denied the substance of religion, as Article 9 presumes and protects it (para. 40).

Further, what is problematic in Refah's case is that there is government of religious subjects but not through freedom, and a constitution of subjects but not within those practices that rationalize freedom (para. 40). Logically, this ontological understanding legally protects religious subjects' ethical choices but without legally considering those subjects as autonomous moral agents. Thus, such a legal system would not consider as its task to, for example, orient social practices and legal norms to subjects' ethical choices in order to optimize their autonomous status.[63] In sum, Refah's stance would accentuate religious difference by conserving it (paras. 28, 82, 119). To the extent that such a system permitted religious difference, the interpretive limits of religious traditions themselves determined the limits of such a difference. Contrarily, Article 9's application requires that legal rules both promote and judiciously regulate social difference (paras. 86, 91; see, §3.1d).[64] As such, if legal system would enforce the suggestions made by Refah, Article 9's guarantor would then only protect religiosity but would lack any capacity or legitimacy to manage it. Thus, Refah could not reasonably rely on legal protection of its rights when the Turkish Constitutional Court dissolved its government, because Refah interpreted its rights by divorcing them from their contextual background – and understood religion, legal protection, and political participation in an abstract manner.[65]

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[63] Therefore, the ECtHR observed in *Refah*: '[Sharia is] incompatible with the fundamental principles of democracy as set forth in the Convention … [particularly] its criminal law and criminal procedure, its rule on the legal status of women, and the way it intervenes in all spheres of public and private life' (para. 123). In the context of Ottoman millet reforms, Will Kymlicka perceptively notes (Kymlicka 1996) that this 'non-liberal mode of pluralism' has remained 'antithetical to the ideals of personal liberty endorsed by liberals' (pp. 81, 83) including 'those within each community [of the Ottoman Empire that had] pushed for constitutional restrictions on the power of millet's leaders' (p. 84). Thus, Lewis and Braude observe that non-liberal toleration creates a 'willingness to coexist' but 'not the separate principle of individual freedom of conscience' (Braude und Lewis 1982, 22-23). Donnelly notes:

> 'There is a real loss when a community dies out, but if its members freely choose another way of life we must be prepared to accept that loss. If a group's survival requires the systematic denial of the internationally recognized human rights of its members, it is unlikely to deserve even our toleration' (2013, 54).

This leads Asad to remark that 'the process of mediation enacted in "pre-modern" societies includes the ways in which the state mediates local identities without aiming at transcendence' (Asad 2003, 5).

[64] Is it surprising then that in a large body of jurisprudential literature pluralism is an ideal that law should realize, a social fact that law should protect, and a political problem that law should address?

[65] This is in contrast to a similar case law, *Gündüz v. Turkey*, where the ECtHR held that defending Sharia without invoking violence in effective pursuit of political aims could not be labeled as 'hate speech' and may be protected under the Convention's Article 10 on freedom of expression. However, in *Refah*,

§3.4 Concluding remarks

To the extent that political theorists focus on Article 9's case law, they remain interested in exploring general questions concerning the structural interrelation of religion and political/ legal power. Lawyers argues that such overall narratives cannot be decisively argued out on the basis of Article 9's case law that rather considers it unnecessary to even base itself on a precise definition of religion. In this chapter, I read Article 9's case law to see how Article 9 permits structural difference, only if positive legal rules aptly correlate with the management of religiosity. Unlike political theorists, I explored the way Article 9 rather manages religious conduct. I argued that divorcing protective aspect of Article 9 from its regulative aspect in fact violates Article 9. Unlike lawyers, I argued that the social context in which Article 9 works remains important. I argued that it is only by determining the apt location of religious claims vis-à-vis a broader field of social practices that Article 9 protects this or that religious practice without needing to define religion.

If Article 9's case law protects different religious claims without evaluating their content, it obviously does not mean that it treats all religious expressions similarly. In fact, Article 9 maintains its positive legal basis by protecting religious practices in terms of their form (not content) and effects (not causes), and not by looking at how they self-referentially conform to religious necessities.[66] However, when political theorists speak of religion in the context of Article 9, they divorce the understanding of religion from this context, as if what one can understand by religion works in a self-referential manner without focusing on its other. Further, to the extent that law positions rights-holders' religiosity in a certain social context (and ties the former with the latter), the influence of law on both religious subjects and social system remains relevant for legal scholarship. In fact, it is difficult to see whether one can make sense of the case law without looking at the way governmental practices are oriented to religiosity or the way rights-holders' religious claims remain intelligible only when articulated from such an interpretive field.

By talking of government of religiosity, we saw how Article 9 protects religion by managing religiosity. In sum, this chapter argued that the interconnection between

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the very fact that a political party moved away from speech into the domain of action and 'had the real potential to seize political power' (para. 108) meant that the expression had moved beyond the domain of speech.

[66] This, of course, does not entail that positive law that guarantees the right to freedom of expression is without any influence on the way moral ideas circulate in a society (see, §3.2; c.f., Hart 1994, 176-7). The fact that this right does not base itself on explicit exploration of holders' inner conscience allows it to put the question of inner conscience out of judicial picture, even when the consequences of a judicial decision for rights-holders' inner conscience wreaks havoc on their personal identities (c.f., Luhmann, 2014, 167-174) .

religion and power is close not because law always wants to maintain an apt balance between the two, but because the disclosure of something as religious allows power to make religious subjects both freer and more governable ‘in *this* world’ (Asad 2003, 157).

Chapter 4. On the Governmentality of Free Speech: Reading Article 10 on the Right to Freedom of Expression

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
>
> ECHR Article 10: Right to Freedom of Expression

Like Articles 8(1) and 9(1), Article 10(1) specifies in its second sentence what it protects in apparently plural terms: opinions, information, and ideas. However, Article 10(1) elaborates the second sentence in the light of the first sentence. Thus, unlike Article 9(1), and definitely unlike Article 8(1), Article 10(1)'s text itself clarifies that opinions, information and ideas are all different instances of expression. To the extent that Article 10(1) may give its reader an impression that, say, holding opinion, receiving information, or imparting ideas operates by itself like an automaton, the third sentence offers a quick clarification, with important normative effects. Albeit everyone has the rights mentioned in the first two sentences of Article 10(1), certain forms of regulating communication media sculpts the context within which these rights largely work and within which such exchanges largely occur. Even on its own terms, Article 10(1) does not need to refer to Article 10(2) to pinpoint a legal restraint (even if, initially, in wide-ranging but weak sense) at work vis-à-vis the rights that Article 10(1) protects. Then, Article 10(2) further gestures to the context of the rights mentioned in Article 10(1).

Importantly, Article 10(2) is unique in two general respects. First, in the entire Convention, only Article 10(2) expressly refers to 'duties and responsibilities' that a rights-holder bears because of its rights.[67] The text itself explicitly pinpoints – what is in fact obvious in its case law and in legal theory – that expressions are not free of

[67] I do not deny the contextualization of rights in the light of specific duties and responsibilities that exists in the ECtHR's case law. In the context of applying Article 6(1) to civil service employment disputes, the ECtHR noted the necessity of adopting 'a functional criterion based on the nature of the employee's duties and responsibilities' (*Pellegrin v. France*, para. 63). Albeit the case law may speak of 'duties and responsibilities', only the text of Article 9(2) explicitly mentions it. Thus, it remains unique in the framework of the Convention.

legal consequences and concerns. Second, among all the express limitations to rights mentioned from Articles 8 to 11, Article 10(2) is unique in a dual sense. First, Article 10(2) refers to 'formalities, conditions, restrictions, or penalties'. Contrastively, other articles only refer to limitations in one sense, i.e., 'interferences' (Article 8(2)), 'limitations' (Article 9(2)), or 'restrictions' (Articles 11(2)). Second, as one can see from its text, Article 10(2)'s list of reasons in the light of which the public authorities can legitimately limit Article 10(1) rights is the most extensive (see, Table 6.1). To the extent that the list of restrictions and limitations rather make it possible for us to discern by implication the centrality of that thing one restricts and limits, Article 10 stands out in an important sense. In fact, we can argue that both the graded possibilities through which the public authorities regulate the exercise of Article 10(1) rights and the extensive reasons because of which the public authorities limit the exercise of Article 10(1) rights pinpoint something important. That is, this fact helps us discern the centrality of Article 10 rights vis-à-vis all the other related rights that contain express limitations, i.e., Articles 8, 9, and 11.

Further, both the preparatory notes of Article 10 and Article 10's case law pinpoint the fact that the right to freedom of expression underpins a democracy as envisioned by the Convention (e.g., *Handyside v. the UK*, para. 49). That is, the rights and freedoms that Article 10 protects act as a pillar whereby a democracy (procedural, electoral) becomes a 'democratic society'. Thus, albeit related articles remain fundamental to a democratic society, the point on which Article 10(1) (i.e., the right) and Article 10(2) (i.e., its limitations) overlap possesses the same normative understanding and priorities, at least, as far as the idea of 'necessary in a democratic society' is concerned. Thus, not only the legal system of democratic society can subject the right to freedom of expression to limitations, but also a legal system that guarantees the right to freedom of expression makes the democratic society possible which the Convention envisions.[68] Consequently, to a pronounced sense in Article 10, the relation between the right (i.e., in the light of the act it protects) and the law (i.e., in the light of the social system it serves) is co-constitutive. That is, law protects expressions whose form and content respect the limitations that are necessary in a democratic society. Alternatively, such legal and normative constraints allow expressions to forge and strengthen a democratic society. Thus, Article 10 is not a negative right of a rather 'natural' sort. In the sense that one would understand the communicative exchanges to occur in a society by themselves and law would ex post facto construct rules that

[68] Thus, what law protects (and how) is as important as what law limits (and how). For example, it is obvious that totalitarian societies do not substantively guarantee the right to freedom of expression. However, generally speaking, they also do not explicitly outlaw it, i.e., by inserting a rule akin to an antithesis of Article 10 in their basic laws (e.g., 'No one, or only the select few, have the right to freedom of expression'). Nevertheless, the way they limit expression allows bureaucratic and judicial authorities to more thoroughly regulate expressions. Thus, the way legal systems construct rules concerning limitations and the way it interprets them also allow us to discern whether a legal system guarantees freedom of expression or not. Consequently, in the ECtHR jurisprudence, the case law of Article 10 is largely the case law of Article 10(2).

prevent the public authorities and certain social actors to interfere into such exchanges unjustifiably (and where the former domain always has a fundamental normative priority).

Given the aforementioned overlap between act and context underlying Article 10's normative structure, legal and political theorists consider the guarantee of the right to freedom of expression as a guarantee of political freedom tout court (Waldron 2012, 173, Dworkin 2009, v–ix, Norris 2008, 186, Raz, 1994, 39, Mill [1859] 1992, 53-54). Consequently, legal and political theorists, aware of the legal landscape within which Article 10 works, usefully argue that the rights protected by Article 10 operate in a certain context, e.g., open and public deliberation, public debates (e.g., Griffin 2008, 49-50, Buchanan 2013, 62). Albeit not simply a matter of right per se, they tell us that the context remains a matter of legal attention and regulation. Indeed, the ECtHR has considered Article 10's case law important in three senses. First, Article 10 positively obliges the public authorities in certain situations. Second, Article 10 remains helpful in constructing broader rules and regulations concerning the optimum circulation of expression. Third, Article 10 is important not only in analyzing the specific uses of expression but also in helping the legal system strengthen a milieu within which such exercises of rights and freedoms occur. Consequently, legal and political theorists focus on Article 10 either to rationalize judicial interpretation, or to develop normative benchmarks to evaluate the case law, or to explore the general role of interpretation in the context of a democratic political system. However, to the extent that legal and political theorists ignore the influence of the context on the rights-holders' expressions or ignore the fact that the context remains more than the cumulative discursive inputs of rights-holders, their narratives either remain incomplete at best or contradict their initial insights at worst. The later (i.e., contradiction) in the sense that they tell us that Article 10 works as an effective right only in a context (i.e., a positive right in substance), albeit the regulation of rights-holders' expression does not affect their status as expressing subjects and leaves them in the same way as it found them (i.e., a natural right in effect).

In this chapter, I argue that the right to freedom of expression protects expression by opening up language to legal regulation. I begin by seeing how the case law correlates the problematic of legal protection of an expression: a) with those legal methods that conceptualize and interpret the meaning of an expression; b) with those normative principles that underlie a democratic society. Consequently, Article 10(1) maintains its independent normative basis by allowing Article 10(2) to regulate expressions differently (§4.1). Then, I focus on the dynamic that rationalizes 'formalities, conditions, restrictions, or penalties'. I argue that only when rights tailor the context in a certain way can we then see a 'natural' exercise of Article 10 rights to take place in a rights friendly society. Thus, the structure of Article 10 imposes both positive and negative obligations on the public authorities. Additionally, it conceptualizes rights-holders' duties contextually (§4.2). Finally, I discuss how the context of Article 10 presupposes

a legal and political system, wherein freedom is both the reference point and the result of governmental practices. As such, one can say that the legal decision for or against an exercise of the right to freedom of expression turns onto the question of expressing subjects, and hence to their appropriate management (§4.3). Finally, the chapter ends with some concluding remarks. The conclusion pushes this inquiry in the direction of the questions related to law and organized social power, i.e., Part II (§4.4).

In order to argue out my points, I draw on the insights of legal and political theorists to see how legal rules based on Article 10 correlate the problematic of legal protection of an expression with certain legal methods, contextual and normative issues, and interpretative tools. To the extent that the meaning of one's expression constructs certain tailored legal responses and to the extent that the context of legal regulation influences one's exercises of rights, I see how the impact of Article 10 on managing the conduct of rights-holders remains relevant to legal and political scholarship. More, I draw on contributions from a well-established tradition of linguistic theory that considers communicative exchanges as peculiar kinds of social actions.[69] In fact, without considering expression as a certain kind of social action, it is impossible to see how Article 10 rights could be justiciable, open to judicial interpretation, or analyzable in terms of expressions' societal effects. Hence, the case law of Article 10 deals more thoroughly with interpretation – not simply that of precedents but also of the expression itself (e.g., hate speech, artistic, propaganda, obscene) – because it handles social actions that remain embedded with their linguistic form. Consequently, Article 10 is basic because it focuses on the question of language, which, as influential currents in linguistic theory and philosophical hermeneutics now tell us, is an important medium that partakes in the constitution of linguistic beings by enabling them to express themselves.[70]

§ 4.1 A tale of two forces: The force of language and the force of law

In this section, I see how Article 10's case law interprets language uses in order to apply legal norms. Broadly, I argue two points. 1) Legal rules based on Article 10 determine whether law should protect communicative exchanges depending on the

[69] By this, I mean the tradition in linguistic theory that explores the performative aspect of language by focusing on speech acts. The word performative is that of J L Austin. In *How to do things with words*, Austin notes that some sentences perform acts. Think of a priest saying 'I hereby declare you man and wife'. This speech act does not pinpoint something as being either true or false, in the sense that truth or falsehood did not pre-exist this assertion. In fact, given appropriate circumstances (e.g., the Church is not a sham one in Las Vegas), this speech achieves something; it acts. Other examples include naming or promising. We do something when we say something. Austin's initial insights have inspired a number of philosophers of language, who have explored the relation of language, context, and meaning in their different ways.

[70] E.g., 'Insofar as one wants to be literally correct, it would be more appropriate to say that language speaks us than that we speak it' (Gadamer [1960] 2003, 459).

context that gives those exchanges and expressions their social meaning and significance. Consequently, even when Article 10's case law deems specific uses of rights as protectable or non-protectable, Article 10 influences the context through its norms. 2) Albeit Article 10(2) variously limits Article 10(1) rights, it does not entail that Article 10(1) by itself remains inherently limited or that it applies the limitations to all rights-holders in a similar manner. Thus, it is only by correlating legal protection and regulation with legal/ linguistic interpretation that Article 10's case law does not generate any normalizing social effects.

In order to do this, I read in this section a set of cases brought before the ECtHR that dealt with a single applicant: *Sürek v. Turkey*. In two cases, the Court granted the applicant's request (*No. 1*, *No. 3*). While in the other two, it did not (*No. 2*, *No. 4*). This set of cases involved a major shareholder in a Turkish limited liability company owning an İstanbul-based weekly review *Haberde Yorumda Gerçek* ('The Truth of News and Comments'). All the four applications submitted by the applicant dealt with the actions of Turkish government against the review's coverage of the Kurdish situation in southeast Turkey. What is crucial to note is the way the use of language reconstructs the one who expresses it, and the way legal rules relate the addressee with the world that those expressions produce. I first analyze three of the applications: *No. 1* (§4.1a), *No. 2* (§4.1b), and *No. 4* (§4.1c). Then, I discuss some conceptual implications of our readings of the case law (§4.1d).

§4.1a *Sürek v. Turkey (No. 1)*

On August 1992, the review published two letters by its readers: 'Weapons cannot win against freedom' and 'It is our fault'. The first letter commented on the 'war of national liberation of Kurdistan' against the 'fascist Turkish army' (para. 11). The second letter advocated the idea that 'if they won't give, then we'll take by force' (para. 11). The national courts sentenced the applicant to a fine for the 'propaganda aimed at the destruction of the territorial integrity' and for publishing racist speech (paras. 15, 18). The applicant appealed to the ECtHR alleging a violation of its Article 10 rights.

The applicant claimed that the specific legal regime, i.e., anti-terror law, itself interfered with its Article 10 rights because it exempted itself from any criticism. More, the applicant argued that the said law drew out a vague linguistic domain into which an expression cannot enter lest it, through that very performative, 'threaten the indivisible unity of the nation' (paras. 45-47). However, Article 10(2) itself speaks about limiting Article 10(1) rights in the interests of 'territorial integrity'. Given the procedural form adopted by the national authorities, the ECtHR deemed the measure as being 'prescribed by law'. Consequently, the specific legal context importantly clarifies the scope, as per Article 10(2), of rights-holders' 'duties and responsibilities'. Further, the

said law (i.e., the anti-terror law) tackled a violent situation. It was in the light of rights and freedoms, duties and responsibilities that the national law screened those expressions, whose violence would deteriorate the already violent situation (para. 52). Thus, the question turned onto the way expression operated in such a light and within such a legal context. As such, law then interprets expression analyzing: 1) the form and content of the expression (Set α); 2) the effects and normative consequences of the expression (Set β). Only by interpreting expressions does law reconstruct the status of Article 10's rights-holder as a matter of immediate legal interest. To the extent that rights-holder's capacity to express something correlates the status of expressing person both with the context within which that person expresses something and with the world that that person's expressions create, the legal regulation of expression sustains a context (i.e., rights friendly society) that places things in their proper positions.

In *No. 1*, such a two-pronged analysis of expression occurs. First: α. Given its use of phrases like "the fascist Turkish army", "the Turkish republic murder gang", "the hired killers of imperialism", "massacres", "brutalities" and "slaughter", the letter stigmatized 'the other side' (para. 62). Given the fact that the letter communicated to its readers that the 'recourse to violence' was 'a necessary and justified measure of self-defense' (para. 62), the letter 'stirred up base emotions' (para. 62). Second: β. By naming the persons (i.e., military personnel), the second letter increased the vulnerability of the figures named to 'physical violence' (para. 62). Given this performative, the letters constituted the named military officers as vulnerable and addressed in general an audience at a time when one can reasonably assume that there exist individuals with violent tendencies willing to direct their violent energies against the named military officers. Consequently, law can enforce norms based on Article 10 not only within the communicative context of publicity and generality but can normatively constrain what enters into that context in the first place. It is because of this reason that 'the public' is both a normative idea and a concept that is normatively constrained. As such, 'the public' is something that one cannot naïvely equate with the literate population in general (para. 59) (c.f., Habermas 1996, 378).[71] Thus, Article 10 remains mindful of the potential violations of human rights, while bringing such considerations pre-emptively onto the legal plane. Hence, in *No. 1*, the ECtHR discerned no violation of Article 10.

Lest we miss the focal point, we need to see how α converges with β. The identity of the speaker (Set γ) acts as an enabling condition because of which the analyses of α

[71] From the perspective of Article 10, proper limitations on what communication media can say or publicize do not amount to censorship. Think of child pornography or personal threats. In this sense, the agentive transition to 'the public' is both normative (i.e., it presumes certain ideas befitting a collection of people) and positive (i.e., it does not come of its own as if 'naturally' and requires certain selection, effort, and strategies). In *Fuentes Bobo v. Spain*, the ECtHR emphasized that 'Article 10 of the Convention [does] not guarantee unrestricted freedom of expression, even in press reports on serious questions of general interest' (para. 45).

and β do not appear disjointed from each other. In fact, it is difficult to see how law can avoid interpreting rights-holders' expression with respect to their identity and nevertheless protect different expressions differently. In *No. 1*, in a legally relevant sense, the rights-holder is a citizen (γ_a) of a democratic society (γ_b) and an owner of a communication media (γ_c). This entails that the rights-holder's expression has to: 1) respect those legal rules and standards that are enacted with due process and in view of legitimate interests and necessities (γ_a^1); 2) respect the delicacy of a national security situation, and remain mindful of those whom it addresses (γ_b^1); 3) circulate in view of the communication rules and protocols, and contribute to the social discourse in a normatively constrained (e.g., non-violent) way (γ_c^1). In fact, the set γ allows the ECtHR to interpret 'duties and responsibilities' mentioned in Article 10(2) not simply with reference to Article 10(1) rights, but also with reference to the various social objectives that Article 10(2) later mentions.[72] Thus, the interpretation of an expression, and its legal protection, crucially hinges on such a fit between world and word. What law protects as a legitimate exercise of Article 10(1) rights does not precede those normative constraints that law attempts to elaborate in a specific case (α, β, γ).

Table 4.1: Interpretive scheme of the judgment in *No. 1*

Legal analysis of the context	A	γ	B
Factual aspects	(α1) Form: Descriptive/ Prescriptive	(γ1) Identity: Owner of communication media, citizen	(β1) Effects: Increase in vulnerability of law-enforcement personnel *Negative*
Substantive aspects	(α2) Content: Violent *Negative*	(γ2) Expression: Incompliance with social responsibilities *Negative*	(β2) Norms: Incompliance with the norms of social discourse *Negative*

Table 4.1 tells us that Article 10's protection stands or falls with the evaluation of the substantive aspects of an expression's context. Albeit this observation remains valid

[72] Indeed, the text of Article 10(2) importantly mentions 'duties and responsibilities' with respect to the *exercise* of Article 10(1) rights.

in general, the next subsections looks at an important variation on – including, in §4.1c, an exception to – this general interpretive structure.

§4.1b *Sürek v. Turkey (No. 2)*

On April 1992, the review covered a press conference. The delegates disclosed it to the journalists that the public authorities had allowed the local police chief to open fire on people. Additionally, the delegates told that the Gendarme Commander threatened them by saying 'Your blood would not quench my thirst' (para. 10). The national courts sentenced the review to a fine for publishing 'an allegation' and 'rendering officials mandated to fight terrorism target of terrorist attacks' (para. 11, 13). The applicant alleged a violation of its Article 10 rights.

On substantive terms alone, the applicant's claim in *No. 2* remained somewhat weak. First, like *No. 1*, it named certain individuals. As such, it did not respect the 'rights of the others'. This, under those circumstances, sat uncomfortably with the norms of appropriate social discourse (para. 29) (β2). Further, by extensively covering such a press conference, the report published a language use that remained insensitive to the situation of conflict and tension (para. 36) (γ2). More, in Article 10(2) terms, one may consider in *No. 2* an interference with the applicant's Article 10(1) rights as operating in pursuit of legitimate aims, i.e., national security, territorial integrity (para. 29).

However, the factual situation surrounding the context within which the language use occurred remained complex. In some important manners, it influenced the substantive aspects. First, the report covered a press conference. Thus, the information was out there, copyable (para. 30). Consequently, legal consistency required that, if the language use in question was incriminatory per se, the national government should have proceeded with the charges against everyone copying and circulating those statements. In fact, the factual circumstances made it rather difficult for the public authorities to use legal constraints to roll back the context. Hence, the 'potential damage had already been done' (para. 40). More, the report was descriptive. It covered a press conference by a visiting delegate to a southeastern city. Thus, the review covered a matter of public concern (para. 41). This fact meant that the language use in *No. 2* informed 'the public' of the suitable concerns in order to make those matters discussable. Hence, in *No. 2*, the ECtHR discerned a violation of the applicant's Article 10(1) rights.

Consequently, the interpretive structure of the judgment in *No. 2* looks both at the world narrated by the language use and at the world that that language use sustains. First: α. The report covered statements that the delegates made public by using media platforms. Further, the published words did not praise terrorism (para. 30). Second: β. Albeit aggravating the security situation to an extent, the review's coverage of the press

conference only circulated what was specifically tailored for media consumption. Thus, the rights of the others do not only include those officials that the delegates named but also those in the public that the delegates wanted to address (para. 29). Therefore, even if the performative in question interpellated the reported officials as both 'acting unlawfully' and as the 'targets for terrorism', the context already trivialized these costs and added something important to the overall economy of expression. Third: γ. Analyses of α and β put γ1 onto – to use a Gadamerian term ([1960] 2003) – 'the scales of words' (398). In *No. 2*, in a legally relevant sense, the rights-holder: 1) is a citizen (γ_a) of a democratic society (γ_b); 2) is one whose review covered a press conference (γ_d); and, 3) is one who lives in a society that faces an emergency condition (γ_c).

This entails four important points for the rights-holder's expression. First, it has to respect the 'formalities, conditions, or restrictions' that the national authorities impose on its Article 10(1) rights in the light of legitimate aims (γ_a^1). Second, it has to contribute to the public discourse in way that resultantly (in)forms the public and adds a matter of general importance to the public discourse (γ_b^1). Third, it has to respect the necessities related to the overall situation and pinpoint whether officials themselves are violating the law with impunity (γ_c^1). Fourth, it has to cover events as per the professional and objective standards for those news items that have become non-rival information goods (γ_d^1).

Table 4.2: Interpretive scheme of the judgment in *No. 2*

Legal analysis of the context	α	γ	β
Factual aspects	(α1) Form: Descriptive	(γ1) Identity: Owner of a review covering a press conference, citizen	(β1) Effects: Circulating an already existing information provided in a press conference *Positive and negative dimensions cancel each other out*
Substantive aspects	(α2) Content: Informative *Positive*	(γ2) Expression: Contributing, non-subjective *Positive*	(β2) Norms: Rights of media, public interest *Positive*

Table 4.2 tells us that factual aspects occasionally affect the way we read substantive aspects, especially when facts form a part of the context in such a way that rolling back both those facts and the context through legal arm would require more energies and generate more costs and resistance than any possible benefits accrued.

§4.1c *Sürek v. Turkey (No. 4)*

On March 1993, the review published a news commentary. It opined that the upcoming Spring Festival would rekindle a legendary battle.[73] This alluded to the increased tensions between the Turkish military and the separatist militants in the southeast. Further, that issue also contained an interview of a representative of a banned political wing of the Kurdistan Workers' Party (PKK). The interviewee defined the Turkish state as 'the real terrorist' (para. 13). The national courts sentenced the review to a fine, after ordering seizure of all copies of the issue, because it disseminated 'propaganda against the indivisibility of state' (para. 12). The applicant alleged a violation of its Article 10 rights.

When one focuses only on the words used, the review indeed contained expressions that aggravated a difficult situation (para. 51). Further, to an extent, the words glorified an increase in the violent confrontation. Apparently, the use of labels 'Kurds', 'Kurdistan', 'terrorist state', and 'liberation struggle' questioned the territorial integrity of the Turkish state. When the public authorities refuse to protect such exercises of Article 10(1) rights, they attempt to govern such a constitutive power of language. The question for Article 10's case law in general, and for Article 10(2)'s standard in particular, is the extent to which such a government remains justified.

However, in contrast to *No. 2*, and clearly unlike *No. 1*, the form in which the news commentary communicated to its readers had an independent existence vis-à-vis its content. Thus, the news commentary inserted these words in a narrative that 'romanticized the Kurdish cause' by 'drawing on the names of legendary figures of the past' (para. 58). These literary overtones meant that the exaggerations were rather metaphorical devices, such as, the use of phrase 'it is time to settle accounts' (para. 58). The Court found that the aesthetic undertones of the news commentary meant that its effect was merely one of a metaphorical description of an awakening of a collective sentiment. Unlike other forms of expression, the form of aesthetic expression is not primarily the question of legal interest; its effects, which may amount to an 'effective' appeal to violence, could be. One cannot subject what exists in art to correspond rather mechanistically with what exists in fact, because, one cannot

[73] These characters are Kawa and Dehak. Both are from Kurdish folklore. As narrated by Kurdish nationalists, the Spring Festival/ New Year (i.e., Noruz) marks the overthrow of the oppressive Assyrian King Dehak by a popular uprising led by the legendary hero Kawa.

disassociate what exists in art with the way an artwork makes it exist. Similarly, the published interview contained indications that the interviewee remained open to non-violent alternatives (para. 58). Therefore, the interviewee's tone swayed between a hardened and a conciliatory one. In *No. 4*, both the news commentary (identified as artistic) and the interview (identified as political and partially conciliatory) could neither be construed as obviously emanating from violent individuals nor utilizing a media platform to effectively promote violence (para. 58). Resultantly, there was a violation of Article 10 rights.

Consequently, when it comes to α in *No. 4*, law interprets α2 rather in the light of α1. Significantly, this influences how law interprets both γ and β. For example, in the case of news commentary that borders the political and the aesthetic, its aesthetic undertones absorb its metaphorical portrayal of violence (β1) and its fictitious side tones down its expressive substance (γ2). Thus, albeit the news commentary did not portray militant violence in a negative light and albeit the review interviewed someone from a banned organization, the unsavory opinions published did not amount to an explicit incitement to violence. Resultantly, the review's coverage fit in with the norms of pluralism and openness, which the Article 10's case law contextually presupposes (c.f., *Handyside v. the United Kingdom,* para. 49; *Otto-Preminger Institüt v. Austria*, para. 49). Thus, through such a performative, the rights-holder's expression in *No. 4* contributed aptly to matters of public interest by informing, and not endorsing, matters subject to divisive opinions.

Table 4.3: Interpretive scheme of the judgment in *No. 4*

Legal analysis of the context	α	γ	β
Factual aspects	(α1) Form: Metaphorical, conciliatory *In itself neither positive nor negative*	(γ1) Identity: Owner of a review not opining himself but publishing news items, citizen	(β1) Effects: Publishing unsavory opinions *Positive*
Substantive aspects	(α2) Content: Figurative, open to non-violence	(γ2) Expression: Contributing to public discussion, subject to standard editing policy	(β2) Norms: Pluralism, openness

	Positive	*Positive*	*Positive*

Table 4.3 tells us that there are instances when the message communicated remains tied with the form within which one communicates it. Consequently, in the cases of artistic expressions, the legal interpretation of the context defers to the form in which the expression occurs, which is one of the important reasons that artistic expressions hold a somewhat 'exceptional' status in Article 10's case law, i.e., artistic expressions generally enjoy relatively higher levels of legal protection.

§4.1d An addendum on the context and its transformations

Law applies Article 10 by virtue of interpreting an expression (ε) in a contextual manner. The explicit intention of the rights-holders, though important, is less a matter of legal interest, because law remains more interested in the way the contribution of that expression affects the context and how the addressees understand it. Thus, legally speaking, one cannot simply equate the meaning and the function of an expression with the intention of the one who expresses it.[74]

Consequently, even when Article 10's case law handles only specific language uses, it influences the context within which expressions occur by implication. If we designate an expression as ε that occurs in a certain context Ω, then the constitutive power of ε affects (Δ) the context to an extent (Ω').

$$\Omega + \varepsilon = \Omega'$$

Hence,

$$\varepsilon = \Delta\Omega = \Omega' - \Omega$$

The contextual application of Article 10 norms, however, has certain important normative limits. For example, Article 10's case law does not aim for justice in abstract, detached terms, because the case law cannot apply norms to situations on such terms and conditions. Thus, wholesome justice, in the sense of fundamentally reviewing the context itself, remains outside the scope of Article 10 norms. For example, a legal analysis in *Sürek* that would rather begin by evaluating the historical establishment of

[74] Crucially, this fact points to a certain disconnect between meaning and intentionality. Thus, it critically intervenes into the philosophical constructions of communication theorists that believe that the context shaping communication remains equivalent with the cumulative discursive inputs of rights-holders. I focus on this point in §4.2.

the Turkish state in line with the rights-based norms whose territorial integrity now the laws based on Article 10(2) respect remains outside Article 10's scope (see, §4.3). As such, when law interprets ε in the light of Ω, it focuses on certain legally relevant aspects to see how ε adds something (Δ) to Ω to make it Ω'.[75]

$$\Omega + \varepsilon \approx \alpha + \beta + \gamma \approx \Omega'$$

By focusing on α + β + γ, law sees the extent to which Ω' requires a legal response, and the extent to which the transformed context complies with the normative standards. The effect of Article 10's case law is not incremental in a linear sense because, in certain cases, legal norms respect factual circumstances (*No. 2*), may not be strictly applied when a component (e.g., α1) creates a gap between Ω and Ω' (*No. 4*), and, rarely, Ω' may pinpoint the need to legally restructure Ω. Thus, law understands norms in a context and shapes the context through norms. Given that both Ω' and Ω remain objects of legal deliberation, law constrains ε in a way that correlates the uses of Article 10(1) rights with the contextual questions. Resultantly, a rights friendly society sustains itself on non-contingent basis.[76]

Moreover, at the level of language, the idea of 'the essential separateness of persons' that some liberal political theorists influentially consider a key one underpinning Article 10 rights does not strictly hold. From a descriptive perspective alone, it is not possible to opine this banally for a phenomenon (i.e., language) which remains socially determined, shared, understood, and inherited. Inevitably, legal decision making looks at rights-holders' expression contextually, i.e., how ε affects Ω'. However, the assumption underlying the case law is that the rights-holders can make distinct, and different, *uses* of language. Thus, an important difference remains between different expressions of one person, which the interpretive structure of Article 10 then focuses on. This closes off any intuitive trade-offs not only between two different rights-holders but also between two different expressions.

For the case law purposes, the specific identity of the rights-holder (γ1) becomes an object of legal determination in the light of that ε that emerges as a matter of immediate justiciable interest. Thus, law focuses on ε1, fully aware that it differs from ε2, even when γ1 from whom both ε1 and ε2 emerge involve a similar chain of language users.[77]

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[75] This interpretive act attempts to approximate the 'total [speech] situation' (J. L. Austin 1962, 52). However, this can never completely be an appropriation. Austin himself notes that 'it is inherent in the nature of any procedure that the limits of its applicability, and therewith, of course, the "precise" definition of the procedure, will remain vague' (J. L. Austin 1962, 31).

[76] On procedural terms alone, legal systems can protect rights related to Article 10 in a more expansive manner. However, the sustenance of such legal systems remains somewhat contingent, depending on the extent to which groups opposed to the normative framework of those legal systems do not threaten the legal system using their rights or to the extent that their increase in social influence does not require violent legal response that delegitimize or destabilize law. Thus, Article 17 ECHR explicitly reads Article 10 rights in systemic terms (see, Chap. 6).

[77] In *Sürek No. 4*, for instance, this primarily includes the journalist who interviews a PKK member, the reporter who composes the interview, the content editor who edits, the person writing the news

Given that law focuses on interpreting distinct language uses and interprets them within a context, the case law, say in *Sürek*, does not develop any thick value-based analysis that may limit/ terminate one's rights-based status or render this status inherently dispensable. Thus, Article 10's jurisprudence only utilizes norms to constrain the context Ω↔Ω' largely in the light of further instances of language use.[78] Consequently, interpretation contextualizes expressions and regulates contexts without generating normalizing social effects, i.e., considering ε1 and ε2 as equivalent, putting uniform constraints on all without paying any heed to the difference between ε1 and ε2, legally problematizing all expressions coming from γ1, or narrowing down uses of expressions by collapsing ε1 and ε2 into one ε.

§4.2 The economy of expression: On the government of expressivity

I argue two points in this section. 1) Albeit Article 10(1) norms apply universally, Article 10(2) limitations – with respect to which law explores Article 10(1) rights – vary. Thus, formalities, conditions, restrictions, or the threat of penalties structure discourses and institutional sites differently, which, in a legally relevant sense, regulate the uses of Article 10(1) rights. Thus, the normative constraints that Article 10 imposes on discourses and institutional sites constitute a regulative principle of governmental reason. 2) To the extent that these constraints involve normative, legal, and societal considerations, and to the extent that law presupposes rights-holders' self-limitation, it becomes possible for one to discern a 'natural' exercise of Article 10 rights as taking place in a rights friendly society. The argument offered in this section branches out from *Sürek* to the broader case law of Article 10.

Article 10(2) classifies limitations under four different headings: formalities, conditions, restrictions, and penalties. Albeit these limitations obviously overlap in practice, we can somewhat schematically differentiate them based on their broader functions for the sake of analytical convenience. 1) Formalities involve formal (α1), identity-related (γ1), and normative considerations (β2). Thus, as an owner of TV channel, I need to own a specific license in line with the particular kind of channel I own (e.g., news, adult entertainment) and comply with the procedural and normative requirements that constrain how, what, and when my channel is to air something. 2) Restrictions involve considerations that largely relate to broader social, political, and economic necessities.

commentary, the editorial manager publishing the news commentary, the major shareholder of the limited liability company owning the review.

[78] Thus, the contemporary communicative structures that allow expressions to utilize communication media in order to address a larger audience also allow law to impose justifiable restrictions on media and to analyze certain expressions before media allows them to reach their targeted recipients. In Article 10's case law, there are notable examples where the ECtHR has determined what impact ε would have on the society, before an expression took the form of a communicative exchange (where the case law considers Ω' that ε forms, which nevertheless may remain socially inexistent).

Consequently, in the case law, they primarily influence questions concerning effects (β1) and content (α2). Thus, for example, law can place certain additional limitations on expressions, when the social system it serves faces problems of disorder. 3) Conditions involve formal (α1) and normative (β2) considerations. Thus, for example, as an owner of a TV channel that airs entertainment items, I have copyrights and can use my trademarks, and have to respect copyrights and trademarks of others. Notice a certain overlap of formalities and conditions. 4) Only penalties, or the questions concerning the application of specific penalty, remain largely based on the case law itself, and consequently on legal interpretation. Penalties include fines, confiscations, disciplinary sanctions, revocations of license and permission, compensations, temporary bans, permanent closures, or, exceptionally, imprisonment. Albeit there is no penalty without specific expression (ε), law understands what kind of penalty befits what kind of expression with reference to the way rights-based norms and limitations structure the communicative contexts. For example, the penalty (p) imposed on an online TV-channel live streaming child pornography (ε1) would certainly be severer than when it publishes compromising photos of a vacationing celebrity (ε2); i.e., p1 for ε1 > p2 for ε2. In the case law, it is only the force – or, perhaps, the violence – of penalties that falls squarely on the rights-holders and their expressions; formalities, conditions, and restrictions, though important, remain in the background, and hence rights-holder experiences them somewhat distantly. Importantly, however, all these limitations pinpoint that it is not my specific expression but the context within which my expression occurs that is constrained. Thus, the prior context (Ω) remains legally shaped with reference to formalities, conditions, restrictions, and the threat of penalties, and the transformed context (Ω + ε = Ω') functions as an object of legal attention.

Importantly, Article 10's case law assumes, or tests, the extent to which law imposes these limitations in a procedurally correct manner, develops procedural safeguards, and the extent to which such limitations comply with the norms of a rights friendly society. Thus, Article 10 not only interprets expressions in the light of legal rules on, say, media privileges and responsibilities, advertisement protocols, content display, commercial secrecy, among others, but also pulls those very laws and policies within the normative purview of rights. Then, these limitations shape the settings within which public discourse and deliberation occur in a rights friendly society. To the extent that certain influential political theorists speak about prior normative constraints imposed on the actually occurring discursive contributions in their models of public deliberation, their theoretical narratives presuppose such a prior regulatory mechanism that shapes the formal aspect of rights with a view to the societal effects and the substance of rights.

How does law draw such limitations? Albeit law limits, it primarily applies norms in a way that respects what those specific discourses are, and not in a discourse-blind way. In *Sürek (No. 4)*, for example, the interpretive structure of the judicial argument focuses

on media's role, legitimate necessities relating to counter-terrorism, and the place of art in a society. Thus, in *Sürek (No. 4)*, for example, legal rules already structure communication media in line with the media's purposes and ends (e.g., commercial, informational), restrict the kinds of ε that specific legal regime protects given the surrounding necessities, and orient themselves to the specific form of expression (e.g., artistic). To comment on the last dimension. The context (Ω) within which the case law problematizes an expression ε assumes that laws already structure institutional sites (film studios, TV channels, universities, political parties) from which ε emerges. Crucially, laws constrain those institutional sites with reference to the function (creative, economically efficient, innovate, deliberative) and the essential core (roughly speaking: artistic, commercial, scientific, or political)[79] of the discourses that those institutional sites enable. Accordingly, legal norms attempt to optimize their expressive inputs, i.e., creative not hateful, competitive not inefficient, innovative not useless, deliberative not conflictual. Law's ability to optimize expressive inputs allows the ECtHR to interpret Article 10 norms in terms that impose both negative and positive obligations on the public authorities. It imposes positive obligations especially in the case of communication media, e.g., limitations on the state monopolies on media, protection of journalistic sources, or protection of whistleblowers from attacks.

Be as it may, albeit Article 10(1) norms apply universally, they do not apply to all ε equally, because Article 10(2) limitations – with respect to which the breadth and scope of Article 10(1) rights becomes clear – importantly structure institutional sites and discourses differently. For example, albeit both may involve Article 10 questions in theory, racist remarks during an electoral campaign merit a different legal response than the scientific classification of physical, mental, and sexual prowess of individuals according to their racial profiles (that resultantly accentuates racial difference) in a genetic study of a scientific nature. In sum, formalities, conditions, restrictions, and the threat of penalties correlate factual and substantive aspects with normative and regulatory concerns.

In what manner does law draw such limitations? Let us selectively focus on the visual communication media that Article 10 mentions in the first paragraph right after mentioning rights, rather than in the second paragraph largely mentioning limitations. Licensing, copyrights, regulations, rules on subscription methods, policies concerning

[79] In *X and Church of Scientology v. Sweden* the Commission stated that 'the level of protection [accorded to 'commercial' speech] must be less than that accorded to the expression of "political" ideas, in the broadest sense, with which the values underpinning the concept of freedom of expression in the Convention [were] chiefly concerned' (p. 73). A textbook notes: 'The indications are that commercial expression is not regarded as so worthy of protection as political or even artistic expression and that some considerations which make expression value in the political context may not apply in quite the same way in the commercial environment' (Harris, O'Boyle und Bates 1995, 402). The same authors thus discern 'different categories of expression' (Harris, O'Boyle und Bates 1995, 396). Importantly, Hart notices that even when one discerns legal and social categorizations of phenomena as 'open textured' (Hart, 1994, pp. 126, 128; c.f., Alexy, 2010, pp. 33-34), it should not detract one from their practical usefulness (Hart 1994, 126-130).

allocation of television frequencies, among others, structure the organizational form of the visual media. Importantly, the ECtHR notes that the visual media has an immediate and powerful effect on its viewers. Consequently, the public authorities can put in place regulatory standards that constrain what visual media airs. Albeit viewers have peculiar sensibilities (c.f., *Pedersen and Baadsgaard v. Denmark*, para. 79; *Murphy v. Ireland*, para. 74), the aforementioned regulatory standards do not equate the permissible for Article 10(1) purposes simply with the viewers' sensibilities. In plain terms, albeit Article 10(2) limitations constrain what visual media airs based on its effect on the viewers (violent, inciting), Article 10 norms measure the extent to which what visual media airs contributes to the public discourse and deliberation in a normatively preferable way (*Giniewski v. France*, para. 43, *Markt Intern v. Germany,* paras. 32-36). This remains valid even when the viewers may find the content (α2) provocative or shocking. Obviously, these regulatory standards themselves are primarily ex ante, and we cannot reductively see them as one that only wait for an actual ε to penalize the rights-holders ex post – in the same way as human rights law does not need to rely on explicit rights claims in order to make a society rights friendly (see, the Postface).

Notably, Article 10(2) limitations do not only emerge on a case law basis; they also impose normative and factual constraints on the visual media in an a priori manner. Thus, for example, statistical projections that study the impact (β1) of various instances of the visual media content (α2) on viewers over time remain relevant in order to refine such regulatory standards. Albeit such regulatory standards presuppose viewers, they do not require the actual presence of the viewers in order to upgrade, implement, or justify themselves. Thus, even when a legislature approves these limits, the specific way normative rules constrain the visual media involves expert knowledge, professional and scientific knowhow, policy preferences and calculations, bureaucratic elaboration, and legal interpretation. In fact, when a legislature legislates, it cannot but draw on the broader knowledge and policy field that involves corresponding discourses, sites, and other relevant actors. Thus, there is a two-way road (see, §6.1).

Consequently, the manner law draws these limits considers language uses analyzable, at a time when the speaker and the addressee themselves may not necessarily be present. Policy formulations, bureaucratic documentation, official statistical accounts, and quantitative representation, for example, approach both the speaker and the addressee as certain subjects. For the purposes of drawing such limitations, law, as a matter of necessity, does not equate the process of constitutions of subjects with the acts of justifications that those subjects put forward.[80]

[80] However, when one proceeds with a theoretical assumption prioritizing justification in moral terms (c.f., Forst, 2011), one confronts paradoxes. 1) One can either opine that justification precedes the process of subject formation. I am a person with equal moral worth before the bureaucracy considers me as a specific subject in its policy formulations. However, the process of drawing limitations works primarily with reference to my subject positions. In this first sense, the process of justification remains ineffective. 2) One can either say that the process of justification happens with a view to my subject

More, a society guarantees Article 10 effectively to the extent that Article 10 norms and limitations shape the institutional sites and discourses. To put it another way, once laws develop regulatory structures in the light of institutional, legal, and societal considerations, legal standards protect expressions emerging from those institutional sites and discourses in a way that that protection remains mindful of these constraints. To the extent that such standards remain both justifiable and effective, not every language use, without any regard to its form and content, becomes a matter of immediate justiciable interest in Article 10's case law terms.

Broadly speaking, these limitations engage the rights-holders both in a factual and in a substantive manner. Factual: some formal (α1) and identity-related (γ1) constraints limit one's subject position. The fact that Article 10(2) limitations structure institutional sites and discourses differently entails that different ε coming from different speaking positions merit a different legal response. Albeit Article 10 applies equally to all rights-holders, one cannot understand Article 10's case law through the ideal of social equality. This fact makes Article 10 vulnerable to the influential objections against human rights advanced by certain social theorists. These arguments tell us that Article 10 hands over everyone a formally equal right to express themselves (*isegoria*), but given the variance of speaking positions, the effect of speaking freely (*parrhêsia*) remains unequal (e.g., Marx, 1994; Brown, 1995, 114). From a societal perspective, these arguments are valid. For example, an owner of a TV channel indeed possesses better opportunities to exercise its Article 10(1) rights than the ordinary people that that media interviews. Importantly, Article 10 subjects the former 'vicariously to the duties and responsibilities that the editorial and journalistic staff undertakes in the collection and dissemination of information to the public' (*Sürek No. 1*, para. 63). Thus, occupying certain speaking position does not make everything freely sayable and, for that matter, legally protectable. Such a regulation of asymmetry – one that appreciates social

position. One understands my equal moral worth with reference to my subject position. What I find justifiable depends on my position as a convict in a prison. Then, the process of justification remains connected to something that determines justification, and which justification remains unable to evaluate in its entirety. In this second sense, justification remains effective but largely redundant because what specific justification I find compelling already assumes that a specific kind of justification remains decisive because of my subject position. A vicious circle. 3) One can either say that the process of justification occurs as a process, i.e., it precedes the process of subject formation, occurs within and during it, and comes after such a process. Is it what participants find rational, effective, sustainable, or worthy? Is it the concept of the rational, with which one can ensure subjects' compliance? Does it stand for the practices that explicate rational principles to govern a society? However, it remains difficult to see in what manner can one reduce the process of drawing limitations to a meta-principle, or in what sense such a meta-principle illuminates the process in the first place. The fact that the participants engaged in the human rights discourse do not feel the need to refer to any moral meta-right in the first place entails that it is presumptuous to discern one (i.e., the right to justification, integral human fulfilment, equal moral concern and respect) that seeks to illuminate the practice of the participants. In this third sense, justification describes things, while becoming somewhat tautological. Article 10(1) holders are justified Article 10(1) rights when law constitutes them as Article 10(1) subjects. The exclusionary implications of such a stance are however more, not less. Those subjects who can neither justify themselves in line with Article 10(1) norms nor accept from others justifications that utilize Article 10(1) norms may not enjoy the full set of rights associated with Article 10(1).

difference – optimizes freedom. In other words, the mode of regulation draws out formal limits concerning social inequality because the structure of social inequality remains connected with the internal logic of freedom.

Substantive: Some legal and normative (not to mention, linguistic) limits pre-exist my ε. Consequently, either norms (β2) constrain what I say by looking at the effects of what I say (β1), or they may constrain ε itself by outlawing some kinds of content in the first place (α2). In the second case, given European experience and the purpose behind the creation of the Convention, Article 10's case law explicitly prohibits the denial of Holocaust or its various aspects thereof (e.g., *D.I. v. Germany*, *Garaudy v. France*) and refuses to protect symbolism or rhetoric associated with Nazism (e.g., *Kühnen v. Germany*, *Schimanek v. Austria*). Such prior normative limitations do not allow even a specific expression to transform the context (Ω'). From Article 10's perspective, such limitations play two related functions. First is immediate. It prevents uses of Article 10(1) rights that slowly feed on Article 10's, and the Convention's, normative context. From a human rights perspective, it would in fact be quite strange to argue that legal systems respect Article 10 freedoms of such liberticidal expressions, and then to worry about the way a legal system should devise appropriate legal responses when such expressions become the social norm and threaten the normative basis of the Convention (see, §6.2a). In fact, as Chapter 6 sees, systemic questions related to the protection of the Convention system generally require, among others, legitimately limiting Article 10(1) rights of those holders that express such opinions. Second is ontological. Given the fact that language allows linguistic beings to create, sustain, and transfer a certain social context, such bans not only limit the public participation of those groups and individuals sharing kindred opinions and ideas, they additionally put pressures on the way those groups and individuals socially reproduce themselves.

In general, the protective reach of law increases to the extent that a language use respects surrounding legalities and standards, and complies with Article 10 norms. Thus, Article 10 laws presume a certain self-limitation from the rights-holders. In other words, the interpretative structure of Article 10's case law focuses on the manner the language use functions, say, as an exercise in 'self-fulfillment' (*Giniewski*, para. 43). As such, we can understand the freedom that Article 10 rights-holders have – that is, to make different, and distinctive, language uses – primarily with reference to the legal, factual, and normative constraints. In the light of these constraints, it becomes possible for us to discern a 'natural' exercise of Article 10 rights as taking place in a rights friendly society.[81]

[81] Many political and legal theorists see Article 10 as guaranteeing the principle of laissez-faire in 'the economy of expression' in the same way as the legal protections surrounding private property and private economic exchanges guarantee laissez-faire in the market economy. Think of arguments in favor of the right to freedom of expression based on idea of 'the marketplace of ideas' popularized by Law and Economics School. However, like economic activities that take place within a legal framework, legal

§4.3 The powers of freedom: On the logics of governing expression

So far, I have discussed how Article 10 as a right – and, consequently, the freedom that Article 10 guarantees – works within a certain context. In this section, I look at what Article 10 does not protect and against what kind of 'breaches' it fails to find any corresponding duty. I argue two points. 1) The context of Article 10 presupposes a legal and political system wherein freedom is both the reference point and the result of governmental practices. Freedom outside any governmental frame does not raise the question of Article 10(1). 2) Article 10(2) limitations presuppose a context of legitimate violence. As such, it presumes the existence of, and the necessities relating to, a legal and political system. Consequently, law may understand any other form or source of violence in Article 10(1) terms and balance it against Article 10(2) limitations, but does not understand that violence in terms of Article 10(2) limitations that would rather give legitimacy to acts of illegitimate violence. To establish my points, I selectively refer to Article 10's case law.

The case law problematizes language uses to see the manner performativity relates to permissibility. Consequently, the regulation of institutional sites and discourses, the structure of legal interpretation, and the limitations imposed in line with Article 10 norms draw out the limits of the legally protectable by focusing on language. Outside such a context, there is no legal protection because the right claims remain inapplicable. For example, in *Sürek*, the question before the ECtHR was the legitimate containment of expressions as being hate speech when directed towards the ethnic Turks, or as being disrespectful of 'the reputation or rights of others' when directed towards the civil servants. However, such legal safeguards against misuses of Article 10(1) rights (e.g., defamation, insult, libel, intimidation) are not available in the same manner to the rebels. The question of Article 10(1) rights remains inapplicable to their case because there is no freedom to protect in the first place. Legal remedy does not presuppose freedom in abstract sense. Consequently, law does not understand how Article 10(2) limitations limit rebels' Article 10(1) rights. In other words, rebels' freedom cannot function as an object of any governmental protection, and, consequently, is one that Article 10 norms do not protect as being an exercise of/ in freedom. Rebels cannot use

rules and intervention, administrative protocols, policy rationales, and regulatory standards develop the space in which the proper exercise of Article 10(1) rights could function. Consequently, one cannot say that the idea, or perhaps the ideal, of an 'expressive laissez-faire' that one opines law ought to respect is something that exists naturally and is one that is not already a legal artifice. For example, different ideas concerning truth, utility, circulation of expression, meaningfulness, or acceptability work in the scientific domain as compared to the commercial one. To the extent that one may speak of a certain 'expressive laissez-faire', it works differently in both domains by constructing different forms and standards of legal intervention. To the extent that one may speak of an 'expressive laissez-faire' in natural terms, its emergence is natural only to the degree that laws shape the concrete space in which this idea could function by developing prior limitations and to the degree that laws intervene into social discourses in ways that fosters their natural capacities.

legal protections against such misuses of their rights because through their actions they violate 'duties and responsibilities' that Article 10(2) imposes on all Article 10 rights-holders. Thus, they cannot make Article 10(1) claims and cannot say that others have violated duties owed to them. Importantly, a legal system that cannot regulate uses of Article 10(1) rights is unable to protect itself, when the cumulative effect of expressions threatens its existence. Consequently, the ontological disclosure of a specific life goes on to shape the politico-moral question that determines the manner and the extent law can legitimately expose that life to certain kinds of violence.

Further, Article 10(2) requires apt legal procedure through which law imposes limitations. In this sense, the context of legitimate violence – which exists as a capacity of a political entity – connects the various limitations that Article 10(2) mentions. Consequently, laws structuring Article 10 rights see how the force of ε interacts with the force of law. The question then becomes the apt interrelation of these two forces. For example, Article 10's case law does not allow for calls that effectively incite others to violence within a specific nation-state, e.g., calls that present violence as both 'necessary and justified' (*Sürek v. Turkey (No. 3)*, para. 40). For example, with largely such an understanding in mind, 'the Venice Commission Guidelines on Prohibition or Dissolution of Political Parties' allow national laws to restrict Article 10 and 11 rights of those political parties that have connections with internally operative militant groups who 'advocate the use of violence' (VC 1999, 4). Similarly, in *Herri Batasuna v. Spain* and *Etxeberria v. Spain*, the ECtHR upheld, given the possible links of the applicants with the banned ETA, the cancellation of the applicants' electoral candidacy in Basque country. However, Article 10(2) limitations, as the case law exists to date, do not problematize calls for explicit violence in another nation-state, directed towards those 'others' that are members of a different political organization, in an equally stringent way.[82] As such, as an Article 10 matter, demanding tougher economic and political sanctions against another nation-state or protesting peacefully and lobbying in favor of participation in a war on foreign soil (that may respectively threaten the livelihood and the very being of the humans out there) remains largely allowable. *Sürek* is also a useful case in point. In it, it is not the overall milieu of violence, along with its objectives, necessities, and rationale, which law tests with respect to Article 10 norms in particular or human rights in general. Law tests only specific acts within such a bracketed situation (c.f., *Ireland v. the United Kingdom,* para. 149). Law brackets the present not simply in the sense that it does not evaluate the entire historical situation of nation building and republicanism through norms. Law also brackets the present in a way that it allows only the public authorities to channel the directionality of violence away from

[82] Even if one may rightly argue that human rights itself do not produce a human-other because of their universal aspirations, human rights vocabulary alone does not provide one with sufficient resources to forcefully combat such notion. We have seen how human rights remains interwoven with institutional structures and legal interpretation. Therefore, when a polity projects an other based on politics or territoriality, human rights norms only work to regulate the relation between this citizen-human within and the non-citizen-human without.

the legitimately established political entity in a way that caters to that state's capacity of legitimate violence.

Within this context, freedom stands in between the circumscription of subjectivities and the circumspection of language. The domain within which law protects ε does not eliminate violence, broadly construed. In fact, it is itself related through complex transactions to violence. One needs to study here how the interpretive structure enables law to *order* violence in a threefold manner. First, the manner it helps frame violence (in *Sürek:* the violence of ε1, ε2, and ε4). Second, the manner it explores that violence's modality, intensity, and effectiveness (in *Sürek*: the relation it forms with the violence that exists in the southeastern Turkey, the way it hurts the state's capacity of legitimate violence). Third, the manner it enables the legal and political system to deal with illegitimate violence (in *Sürek*: not giving too much space to the rebels expressing the dismemberment of the Turkish Republic, penalizing expressions that redirect violence onto the representatives of the state). Thus, Article 10's normative structures enables Article 10 guarantor to channelize violence by shielding off those claims to sovereignty from violence that that guarantor upholds, while deflecting violence towards those that that guarantor does not (cf., Asad, 2007, 26). Then, this right reinforces the 'realness' of that political and legal guarantor as a sovereign (cf., Foucault, 2007, 118, 239; Veyne, 1997). Resultantly, this process allow legal systems to refuse to give violence a reality outside law, and arrest it within a legal context (cf., Benjamin, 1996, 239).

Albeit Article 10(2) limitations presuppose a certain constraining power, law does not consider all actors who may perform this task as being legitimate. Think of a colony of militants training rebels in an inaccessible mountain valley and controlling adjoining villages at night. Consequently, only a legitimately established nation-state that guarantees, say, public health, public safety, or impartial justice may limit Article 10(1) rights. One cannot understand the status of Article 10(1) holders beyond both Article 10(2) limitations and Article 10's presupposed context of legitimate violence, because then either freedom becomes ungovernable or government becomes unfree.

§4.4 Concluding remarks

This chapter saw how Article 10 rights work in a certain context. In line with what political and legal theorists tell us, this chapter saw how laws based on Article 10 understand the problem of legal protection of an expression in the light of certain legal methods, institutional constraints, and the provision of collective goods. In line with the contributions of linguistic theory and philosophical hermeneutics, this chapter saw how Article 10's case law understands language uses as a certain kind of social action. Unlike political and legal theorists, this chapter argued that the normative and legal

constraints structure rights-holders' freedoms and rights. Consequently, this chapter argued that legal rules and norms influence rights-holders' conduct, to the extent that rights-holders' expressions become a matter of legal interest. If the question of language is an important one that partakes in the constitution subjects, then this chapter's analysis tells us, by implication, that the legal decision for or against an exercise of Article 10 rights turns onto the question of expressing subjects, and hence to their appropriate management. Unlike influential currents in linguistic theory and philosophical hermeneutics, this chapter argued that not only language and history but also legal rules, regulatory standards, rationalities of government, and certain interpretive schemes shape the meaning and the place law ascribes to social actions.

More, this chapter saw how normative, factual, and legal constraints enable freedom. Thus, albeit it may be an important factor, we cannot understand the question of freedom, and the constitution of free subjects, in simple self-reflexive linguistic terms. Further, the overlap of a democratic society with the guarantee of Article 10(1) rights entails two related points. First, the constraints a democratic society puts in place enable a 'natural' exercise of Article 10 rights and freedoms. Second, Article 10(1) norms determine the 'natural' shape of a 'democratic society' – in the sense that Article 10(1) norms do not work against the tendencies of a democratic society, but that its interventions constitute the basis of a 'democratic society', as the Convention espouses it.

PART II. HUMAN RIGHTS, PROCESSES AND PROCEDURES, AND INSTITUTIONS

A brief remark on Part I's analysis

Part I of our inquiry analyzed selected ECHR Section I articles that protect substantive rights. It argued that those articles place the specific human capacities (e.g., life, private life, belief, and expression) they address as objects of governmental attention. Part I analyzed how Articles 2, 8, 9, and 10 plug the legal being of a rights-holders into certain governmental frames. Thus, it argued that an effective guarantee of these substantive rights depends on the manner a society places corresponding human capacities in their apt social place (Foucault 1978, 144). Then, the legal decision-making requires that law tailor specific practices and institutions in view of these capacities. By virtue of this, rights-holders that ECHR address, and the legal subjects that the legal rules based on ECHR standards manage, fit into a rights friendly society as autonomous humans.

On procedural rights and negative substantive articles

Other ECHR Section I articles address different aspects and serve varied purposes. One can only roughly classify them. Schematically, we can divide the remaining articles into two different sets: procedural and 'negative substantive'.[83] Procedural articles require legal rules to address formal questions, specific institutional structures, and truth obtainment processes in order to fulfill procedural requirements and in order to guarantee substantive rights in a procedurally correct manner. Article 6 on fair trial and Article 7 on no punishment without law are notable. Norms guiding procedural rights are different from the norms guaranteed by substantive rights. Substantive rights like Article 8 or Article 9 protect specific legal or moral norms surrounding agency, expression, intimacy, or personhood. Procedural rights outline formal mechanisms ensuring norms like reliability, truthfulness, consistency, objectivity, reasonableness, decidability, swiftness, or impartiality. Albeit the normative universe of Article 6 on fair trial differs from that of Article 8 on the right to respect for private and family life, they both overlap in a dual sense. It is difficult to see how law can adjudicate, interpret, or enforce Article 8 norms without approaching them through the normative lens of Article 6, or, for that matter, how law can enforce the norms guaranteed by procedure without presuming a specific substance to which those procedural rights refer or specific

[83] This does not reflect the distinction between positive and negative rights. Given the fact that the ECtHR case law interprets articles in a manner that imposes both positive and negative obligation on the public authorities, it is hard to see whether any strict distinction between positive and negative rights presently illuminates ECHR Section I articles at all.

objectives that the norms outlined by procedural rights fulfill.[84] Thus, a procedural right, say, Article 6 possesses a normative understanding and rationale, which elaborates, but not derives from, that of, say, Article 8.

For the want of a better term, I call another set of articles as 'negative substantive'. These articles, though not enshrining any substantive right, complement substantive (and, to an extent, procedural) rights.[85] Despite taking something away from the substantive rights and freedoms, these articles aim at systematizing the substantive norms underlying the Convention. Given the fact that these articles consider the human rights-based *system* as their problematic, or how to make a system out of the different norms protected by the Convention, they contain statements that relate the Convention norms with each other. Thus, among others, these articles do not mention rights of a rights-holder. Rather, they mention certain obligations, duties, and specify discretionary powers. For example, these articles specify how the public authorities may derogate from guarantee of certain human rights (Article 15), what a rights-holder is not free to do with its rights (Article 17), and how a state may not restrict rights for any other purpose than the ones specified by the Convention (Article 17).

On Part II's focus

Legal scholars' interest in procedural rights stems from the role these rights play in allowing judiciary to interpret substantive rights. Legal scholars importantly tell us that the case law of every article involves the question of procedure, in the same way as the question of procedure ultimately turns onto the substantive and normative questions. Given the reason that procedure remains an important component in the case law and in the overall framework of the rule of law, political theorists also talk about the necessary, even if somewhat instrumental, relationship of procedural standards vis-à-vis substantive human rights. Given the fact that lawyers and political theorists have helpfully explored the technical nature of procedural rights, Part II of our inquiry does not focus on the case law of articles enshrining procedural rights and instead focuses on the negative substantive articles that have not fared as well in the

[84] Whereas legal historians of human rights note the way changing ideas of intimacy and personhood influence the case law of the right to respect for private and family life, accounts of the way changing ideas of truthfulness, reliability, impartiality have influenced the case law of the right to respect for private and family life are, surprisingly, not much in circulation.

[85] By negative substantive rights, I do not mean that substantive rights are either positive or negative, but that they belong to the same category, have the same 'nature'. I mean that these articles enshrine, what appears from the perspective of substantive norms, negative statements: statements concerning obligations, derogations from rights, limits to and on rights, rights of a legal guarantor than that of a rights-holder. Despite this, they stand in a complementary relationship with the substantive articles, as articles that concretize a legal system that guarantees substantive rights. Further, in terms of mathematics, we can understand negative substantive articles as reciprocals of substantive rights than their inverse. In mathematics, the reciprocal of x is 1/x or is x^{-1}. Thus, x stands in a complementary, albeit opposite relationship with its reciprocal. By contrast, the inverse of a function f is f^{-1} that simply complements f by being its complete opposite and undoes whatever f does.

existing academic literature. To the extent that our discussion in both Part II and I involves procedural questions, the findings of these parts remains valid in order to appreciate, if only by implication, the role of procedural questions in managing human conduct.

Generally, legal scholars focus on negative substantive articles in terms of political necessity or surrounding circumstances. Largely, they find these articles as having a rather exceptional nature vis-à-vis articles mentioning procedural and substantive rights. For them, one cannot discern a norm underpinning these articles because norms considered in negative terms rather belong to a punitive universe for a lawyerly mind. However, this attitude ignores the important systemic problematic underlying these articles. In fact, it is hard to see how the Convention can otherwise make a system out of different procedural and substantive rights. On the other hand, political theorists consider these articles either as an 'additional' supplement to human rights at best. Or, they consider it as an unavoidable factual matter elevated to the status of Convention articles that remains attached to law and politics at worst. However, they do not consider as something that has to do essentially with human rights norms. Thus, they ignore the questions that these articles seek to address. Alternatively, they believe that those questions remain uninteresting because one cannot answer them in terms of human rights. However, such an attitude ignores the extent to which human rights norms form a part of a legal and political system and the extent to which norms defined in negative terms underlie a system's basis.

Crucially, however, Part II of our inquiry leaves out two articles. First is Article 16 on the political activity of aliens. Albeit important as a distinctive article, this article has much in line with what I later call as 'exception clauses' (see, §6.1). Second is Article 14 on the prohibition of discrimination. Perhaps comparable to Article 18 on limitation on use of restriction on rights, Article 14 mentions how, generally speaking, social institutions may not justifiably deal with rights-holders. However, Article 14 straddles both procedural and substantive aspects. Consequently, ECtHR reads Article 14 in conjunction with other articles. Given that Part I focused on substantive rights, i.e., those rights in conjunction with which the ECtHR generally analyzes Article 14, I ignore this important article on pragmatic grounds.

Chapter 5. Laws, norms, and the context of emergency: A governmental analytic of derogation from rights

> 1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
> 2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.
>
> Article 15 of the Convention: Derogation in time of emergency

Unlike other Convention articles that mention, 'no one shall be treated in a Y manner', or, 'everyone has the right to X', the helping verb in the first clause of Article 15(1) is 'may'. A slight shift away from the typical unequivocal tone of the Convention pinpoints the nature of Article 15's role in a legal system complying with the Convention's standards. First, unlike other Convention articles, Article 15 does not enjoy validity by default; it needs activation. Second, Article 15(1) mentions a purpose. The public authorities may activate Article 15's logos as long as the telos surrounding its use remains active. Thus, Article 15's role remains confined to certain situations. That is, situations that threaten – which Article 15(1) rather metaphorically phrases as – 'the life of the nation'.[86] Third, Article 15(1) signifies open-endedness by outlining limits. Thus, it remains up to the public authorities to determine from which of the derogable

[86] Legal interpretation takes place in the background of shared meanings and social practices. The use of metaphors in legal texts brings this background fact to the light in a two-fold manner. First, a metaphor, like other related signifiers, refers to something that legal interpretation does not take at the face value. The metaphor remains connected to a chain of signification. Law cannot literally protect 'the life of the nation'. The life that Article 15 mentions does not live, age, die, or feel pain. Legal interpretation focuses on the meaning of metaphors as one conceptualizes them in and through discourses, professional pronunciations, expert decisions, and collective actions and social programs. Second, a metaphor covers, unlike other related signifiers, a broader ground. The metaphor 'the life of the nation' potentially signifies collective goods without being reduced to any or (because of the metaphor's elasticity) all of them. For example, Lord Hoffmann remarked in *A and Others v. Secretary of State for the Home Department*: 'The life of the nation is not coterminous with the lives of its people' (para. 90). Thus, when a situation threatens any manifestation of 'the life of the nation', law interprets this metaphor to 'cover up' this situation. Thus, law adjusts norms to surrounding facts in a way that the shared situations hold. For Article 15 purposes, this allows a reevaluation of legal violence for situations that have occurred or are to occur that the existing regime of normal legal violence is not handy enough to address. Albeit academic works on law and language have focused on indeterminacy, professionalism, and conflict resolution while commenting on interpretation, this growing literature curiously downplays the importance of this governmental dynamic.

rights they should derogate in a specific situation. For example, the derogation notice may mention derogation from set 1: right α, or set 2: right ß, or set 3: right α U ß, or set 4: right ß U θ … and so on. Further, as far as the Section 1 of the Convention is concerned, Article 15(3)'s text uniquely refers to the supervisory role of the Secretary General of the Council of Europe. The derogating public authorities must officially inform the Secretary General about the transitions to and away from a derogation regime. Further, they must publicly furnish the reasons concerning Article 15's activation. Thus, Article 15 clarifies – a point later taken up by the Sections 2 and 3 of the Convention – that institutional checks are intrinsic to the factual guarantee of human rights norms.[87] Importantly, as a situational measure, the role of Article 15 in the Convention's framework is crucial. Article 15 views the Convention rights and freedoms from a situational perspective ('take measures derogating from its obligations … strictly required by the exigencies of the situation'). As such, it brings to light the centrality of contextual concerns. That is, Article 15 allows one to view human rights as being more than the cumulative sum of specific individual rights.

Rights' theorists usefully argue that any derogation is in the light of public emergency. Thus, they tell us that derogation itself assumes a steering away from normalcy. This means that one defines derogation with reference to that from which one derogates. This fact posits derogation as being dependent on that from which one derogates. Consequently, derogation is by definition of impermanent and dependent nature. The fact that the public authorities who use Article 15 try to counter a threatening situation entails that the normative endpoint of a derogation regime is the restoration of the derogated Convention rights. Thus, the public authorities do not need to derogate from the notice of their derogation in order to end the derogation regime. Instead, an official withdrawal notice suffices to let us know the return to normalcy – that ipso facto always remained in the background. Normatively, the means does not come become an end in itself. Then, political theorists focus on rights themselves. However, as McCormick notes (1997, 149), theorists of rights seldom give serious thought to the phenomenon of derogation and emergencies.[88] Nevertheless, a strict conceptual separation between derogation from rights and the guarantee of rights ignores the normative basis

[87] Even for theorists working within deliberative models of democracy, an important theoretical problem is to ensure that there is no direct equation between political power and popular will (cf., Habermas 1996, 170). One can trace this problem to Montesquieu for whom a direct democracy and an absolute monarchy suffer from the same flaw: they both lack intermediate bodies that divide and balance political powers (Montesquieu [1748] 1989, 325-336).

[88] E.g., 'The question whether side constraints … may be violated in order to avoid catastrophic moral horror, and … what the resulting structure might look like is one I hope largely to avoid' (Nozick 1974, 34). 'We need an account of 'human rights' with at least enough content to tell us, for any such proposed right, *difficult borderline cases aside*, whether it really is one and to what it is a right' (Griffin 2008, 20; emphasis added). 'Human rights are institutional protections against "standard threats" to urgent interests. A "standard" threat is a threat which is *reasonably predictable* under the social circumstances in which the right *is intended to operate'* (Beitz 2009, 111; emphasis added). 'I do not mean that every kind of activity we call interpretation aims to make the best of what it interprets—a "scientific" interpretation of the Holocaust would not try to show Hitler's motives in the most attractive light, nor would someone trying to show the sexist effects of a comic strip strain to find a nonsexist reading—*but only that this is so in the normal or paradigmatic cases* of creative interpretation' (Dworkin 1986, 421; emphasis added).

of the former.[89] By doing this, such a stance may additionally downplay the importance of the systemic basis of rights. Unlike rights' theorists, legal scholars see how in derogation regimes norms inhabit the situation. The Convention finds derogation regimes neither normless nor detached from a normative stance. Legal scholars see how a derogation regime works by focusing on the role of judiciary and legislature, the place of legal discourse and argumentation, the effectiveness of legal constraints on the executive, and the guarantee of non-derogable rights (Tierney 2005, 670, Dyzenhaus 2006, 2009, 2033, Criddle and Fox-Decent 2012, 81-6, Dyzenhaus 2006a, 4, 11, 15, 58, 139, 147). Nevertheless, legal scholars take the problematic of government of conduct as given. Legal scholarship does not see how social practices articulate derogation regimes and how bracketing of rights influences those social practices. However, as we shall see in §5.1, it is precisely a specific conduct that derogation regime seeks to address, and regulate, in the first place. The question of conduct or subjectivity appears outside the legal scholarship's scope, because lawyers consider legal regime as complete and closed, whose rules apply to all. Thus, from a legal scholarship viewpoint, the general assumption is that if derogation is in place, everyone lives in a derogation regime. Even if legal scholarship grants 'duality' of legal regimes (Ferejohn und Pasquino 2004, 239, Fraenkel 2010), it remains far from obvious in which sense a specific legal regime applies to specific subjects, when one uses a legal lens alone. Importantly, if we do not focus on the practices governing conduct, and the place of legal rules in such practices, we cannot conceptualize the background that enables legal systems to undergo transitions to and from derogation regimes.

In this chapter, I argue that derogation is inseparable from the set of practices by which derogation regime governs behavior. The reason that derogation remains connected to the problematic of government of conduct allows it not to apply derogation standards to every x (x being any capacity that derogable rights protect) when laws derogate from protecting x in the light of x's specific manifestation (say, x_0). Thus, the question of managing x_0 relies on the set of practices that identify, rationalize, and discriminate x_0.

[89] E.g., '[The] preservation of the state from evil is an absolute duty, while the preservation of the individual is merely a relative duty' (Kant 1991, 81). 'There are times of tumult or invasion when for the sake of legality itself the rules of law must be broken. The course which the government must then take is clear. The Ministry must break the law and trust for protection to an Act of Indemnity' (Dicey [1885] 2013, 183). 'There is little danger of [the laws of servility] being actually put in force … except during some temporary panic, when fear of insurrection drives ministers and judges from their propriety' (Mill [1859] 1992, 19). 'The norms of the conduct of war set up certain lines we must not cross, so that war plans and strategies and the conduct of the battles must lie within the limits they specify. The only exception is in situations of extreme emergency' (Rawls 2001a, 97-98). 'The Government may override rights when necessary … to prevent a catastrophe … or to obtain a clear and major public benefit (though if [one acknowledges] this last [point] as a possible justification [one would treat] the right in question as not among the most important or fundamental)' (Dworkin 1978, 191; c.f., 96). 'In situations of emergency, which are not too uncommon, a few or even many may rightly be deprived of much in order that those who can defend the whole community against its dangers may be enabled and encouraged to do so' (Finnis 1980, 174). '[States can] replace commitment with coercion … in times of national emergency, when everyone is bound to work for the survival of the community' (Walzer 1984, 39). '[Rights] represent very strong barriers to certain sorts of intrusive or injurious treatment, but these are never absolute barriers. We break through them when we must, in time of crisis or great danger, when we think we have no alternative' (Walzer, *ibid*, 153).

Consequently, the public officials involved in managing x_0 remain subjected to the procedural protocols of the corresponding social practices and to the professional codes of their institutions. This remains so even when derogation regimes relatively reduce the legal protections of rights-holders with claims to right to x, i.e., by bracketing the way rights-holders contest official exercises of power. In order to argue these points, I focus on Article 15's case law.[90]

I begin by analyzing two sets of Article 15 case law. Both these cases deal with the UK's derogation from the Convention. I see how the guarantee of rights in a normal regime limits rights. Consequently, the derogation regime that allows a derogation from the guarantee of some rights in order to provide collective goods exists on a similar systemic wavelength with the normal regime (§5.1). Then, I see how norms functions in a derogation regime. I focus on the case law dealing with Turkey's 1990 derogation in the light of terrorism in Southeastern Anatolia. I see how by considering the procedural questions in a substantive manner, Article 15's case law addresses normative concerns (§5.2). Later, I focus on *The Greek Case*. I argue that by extending the normative scope of rights in the light of systemic concerns beyond the given normative concerns of each right, Article 15 brings into the fold of law what scholars and practitioners may otherwise leave as 'political' (§5.3). The chapter ends with concluding remarks (§5.4).

An influential account in the literature on the theoretical status of derogations considers derogations as being (conceptually and legally) 'exceptional' (Schmitt 2005, Agamben 2005). Surprisingly, this 'state of exception' literature, while commenting on the status of emergencies, lacks a proper case law focus. With its focus on Article 15's case law, this chapter's discussion develops a different account. Instead of thinking that the unpalatable political pedigree of 'the state of exception' narrative suffices to disproof its observations, this chapter shows how the theoretical scheme underlying this literature lacks analytical, and conceptual, rigor.

§5.1 An analysis of derogation as a set of practices

Whereas other substantive articles in the Convention protect individuals' capacities (e.g., Article 2 on the right to life that protects life), Article 15 constitutes a capacity. The legal capacity that Article 15(1) mentions has no extra-legal existence. Thus, the legal capacity delimits what the public authorities can do (i.e., Article 15(1)'s first

[90] To date, nine Convention signatories have invoked Article 15: Albania, Armenia, France, Georgia, Greece, Ireland, Turkey, Ukraine, and the United Kingdom. The existing case law deals with the derogations of Greece, Ireland, the United Kingdom, and Turkey. The ECtHR's offered its judgments in *Lawless v. Ireland (No. 3)*, *Ireland v. the UK*, *Brogan and Others v. the UK*, *Brannigan and McBride v. the UK*, *Aksoy v. Turkey*, *Sakık and Others v. Turkey*, *Demir and Others v. Turkey*, *Nuray Şen v. Turkey*, *Elçi and Others v. Turkey*, *Sadak v. Turkey*, *Yurttas v. Turkey*, *Abdülsamet Yaman v. Turkey*, *Bilen v. Turkey*, *A and Others v. the UK*, and *Hassan v. the UK*. The former Commission's case law includes *Greece v. the UK* (friendly settlement), *Cyprus v. Turkey*, and *The Greek Case*.

clause) and cannot do (i.e., Article 15(1)'s second clause, Article 15(2), and Article 15(3)). The first set mentions legality of the capacity; the second set mentions the legitimacy of its exercise. Further, the constitution of a capacity through law also imposes constraints based on the legal form on such a capacity. Consequently, law remains active, when the public authorities use the discretionary powers that Article 15(1) mentions. Constituting a legal capacity, which is discretionary in nature, the Convention extends its normative reach beyond specific rights-based norms. That is, Article 15 considers the Convention from a situational perspective and allows a legal system that guarantees human rights to derogate from some of the Convention rights in time of a public emergency. Obviously, a legal system that did not guarantee the Convention rights before cannot derogate from their guarantee later by using Article 15.

This section argues three points. 1) The derogation regime alters the management of x to an extent that the normal context that protects x in the light of the right to x changes. Legal justifiability of a derogation regime varies with the extent to which the set of practices carefully discriminate the threatening manifestations of x. 2). Given their orientation to the context, emergency laws that articulate derogation regime remain relatively volatile. However, by removing certain rights-based constraints, a derogation regime limits the possibilities through which individuals subjected to emergency laws contest the practices that regulate their behavior. Both points 1 and 2 however presume the third point. 3) The background social practices structure normal and derogation regimes. Thus, these practices constitute a continuum. This continuum allows transitions from one regime to another, and back.

In order to establish these points, I focus on two sets of case law. Both these sets deal with two different emergency settings. The first set focuses on the UK's derogation in the light of Northern Ireland conflict. I read two ECtHR case laws that interpreted the situation in the light of this emergency: *Ireland v. the UK*, and *Brannigan and Mcbride v. the UK.* The second set focuses on the UK's derogation regime in the light of 'War on Terror'. The ECtHR dealt with this derogation regime in *A and Others v. the UK*. This derogation regime addressed a threat the public authorities considered 'imminent'. Thus, it attempted to preempt the situation. Consequently, it did not exist as a reaction to one.

§5.1a Northern Ireland conflict, derogation, and emergency

In the Convention's history, the Northern Ireland conflict remains one of the longest conflicts within Europe[91] where the public authorities made extensive use of

[91] The somewhat forgotten history of the Convention's Article 15 includes the UK's derogation notices with respect to its former colonies, including, among others, Malaya, Singapore, Kenya, Uganda, Cyprus, Rhodesia, Aden, Zanzibar, and Mauritius. Simpson's magisterial *Human Rights and the End of Empire* is the glaring exception that proves the rule (see, pp. 874-1053). With respect to colonies, Simpson (p. 875) finds not only Article 15, but the entire Convention framework somewhat anomalous:

emergency legislation.[92] Given the length of emergency measures and a frequent renewal of derogation notices by the British government, a focus on the Northern Ireland conflict allows us to explore how Article 15 addresses the interrelation of law and violence in time of a public emergency.

a. *Ireland v. the UK*

I begin by examining *Ireland v. the UK*. In it, the Irish government complained that the nature and use of the emergency laws in Northern Ireland, UK during the early 1970s amounted to a violation of a number of Convention articles. I first focus on rights and then on the regulation of conduct in the light of derogation.

Article 5 gives rights-holders a right to liberty and security (say, right to x). Article 5 specifies circumstances and procedures when legal norms permit deprivation of one's liberty (say, x). One's right to x varies with the meaning of x, i.e., the understanding of my liberty depending on my conduct and the surrounding circumstances. Thus, law can deprive me of my Article 5 rights in pursuance of social objectives like ensuring compliance with legal obligations (Article 5(1b)), preventing offences (Article 5(1c)), providing educational supervision (Article 5(1d)), maintaining public order (Article 5(1e)), for example. Reductively speaking, Article 5 imposes positive and negative obligations on the public authorities by drawing on practices and expertise of institutions like prison, police, judiciary, or rehabilitation centers. The protection of right to x presumes an overall legal context that manages x in the light of x's meaning.

Albeit Article 5(1) speaks of deprivation of liberty (and not, on surface, of protection), the exceptions mentioned in Article 5(1b) to Article 5(1e) do not understand either the right or the liberty it protects in 'natural' terms. Thus, the protection of Article 5 rights presumes the context of law and order. In *Ireland v. the UK*, the British government pinpointed this context, when it argued that the collapse of 'peace and order' necessitated both the use of Article 15 and the derogation from Article 5(1-4) (para. 36).[93] Given this contextual background, the 'normal procedures of investigation and

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> The references to the needs of 'democratic societies' was, for example, oddly out of place in the case of colonies, which had no democratic institutions at all, and in many where democratic institutions were imperfectly established. But nobody had raised this point. The convention included, in Article 63(3) … a provision, originally proposed by Belgium, where the convention, if extended to the colonies, was to be:
> applied in such circumstances with due regard, however, to local requirements.
> It was open question whether this could be relied on in colonial emergencies or not; what it meant was obscure. The interpretation of the provision was never considered in negotiations, and the British Colonial Office at the time had been opposed to it anyway.

[92] Over a period of three decades, for example, the British government introduced the following acts: The Northern Ireland (Emergency Provisions) Acts of 1973, 1978, 1987 1996, and 1998, the Prevention of Terrorism (Temporary Provisions) Acts of 1974, 1976, 1984, 1989, and 1996, and the Prevention of Terrorism (Supplemental Temporary Provisions) Orders of 1974, 1976, and 1984.

[93] The debate relating to the drafting of Article 48 of the Weimar Constitution, an article that worked as a successor to Article 68 of the Imperial Constitution, evoked strong responses in the Bundestag. The conservative German politician von Delbrück noted: 'Peace and order can be maintained only if the legitimate government has the right to repress violent disturbances of the peace by measures of equally drastic violence' (von Delbrück 1919, 1335). Greer notes: 'The Convention cannot legitimately be

prosecution' (para. 36) presupposing the context of law and order lose some of their effectiveness. Thus, witnesses do not willingly come forward because of fear of intimidation and reprisals, terrorists hide behind the elusive organizational structures, and no-go areas spring up in cities making it difficult for the police to identify individuals leading terrorist operations (paras. 56-8). To ensure compliance with law and establish culpability, the emergency measures: a) created special detention centers; b) gave extrajudicial and discretionary powers to the police and army to arrest, detain, or intern suspects; c) lowered the threshold of judicial oversight; d) and, created changes in the rules of evidence. Thus, emergency measures created a parallel detention setup, motivated witnesses to come forward, and allowed internment of individuals against whom police lacked evidence considered sufficient in normal times. Simply put, a derogation regime alters the normal management of x to an extent, and legally ensures that that change does not strictly come under the purview of the right to x.

Normal: management of x ($x_1 + x_2 + x_3 \ldots$) ↔ (contextual background) ↔ right to x

↓

Derogation: Δ in management of x (x_0 as focus) ↔ (Δ context: ΔC) → [right to x]

Further, in *Ireland v. the UK*, the specific ends that the derogation regime pursues overlap with that of the normal regime, i.e., preventing, preempting, and punishing 'terrorism-related' offences, and maintenance of public order. Consequently, the authorities used data and statistics to measure the number of casualties and incidents, indictments and internments, or opening up of no-go areas. This allowed them to determine both the extent to which derogation laws corresponded with the specific ends in question and the manner through which the modifications in laws fulfilled the contextual objectives (paras. 78, 229). Further, albeit the courts occasionally intervened to uphold the principles of common law, the emergency measures created a separate system of reviews (different composition, procedural standards) that varied with the threat that an individual supposedly posed.

Importantly, the change in the context (ΔC) determines the specific manifestation of x (x_0) that becomes the concern of emergency laws. For example, the right to liberty normally manages liberty in order to prevent crime (1b), ensure compliance with law (1c), maintain order (1c), provide educational supervision (1d), guarantee health and safety (1e), and guard borders (1f). When the public authorities derogate from the guarantee of Article 5, it does not entail that ordinary criminals, minors detained for educational supervision, illegal entrants held near the borders face a situation where derogation renders inactive the institutions guaranteeing their Article 5 rights. Not every aspect of management of x comes under emergency laws. Thus, emergency laws rely on ideas, codes, and rationalities that distinguish x_0 from x_1, x_2, or x_3. As such, emergency laws in Northern Ireland specifically handled organized terrorism. For educational supervision, ordinary crimes, and illegal border crossing, the existing legal

interpreted to mean that the rights it enshrines should be upheld even if this risks the disintegration of any given national democracy as a result of restricting its capacity to tackle civil disorder' (Greer 2000, 24).

setups, institutions, and governmental practices sufficed. Interestingly, given its sensitivity to the contextual questions, a derogation regime may remain more tolerant of certain illegalities. Particularly, this remains valid when ensuring compliance with certain legal measures serves neither ΔC nor management of x_0. For example, in *Ireland v. the UK*, the public authorities in Northern Ireland did not enforce laws that banned street demonstrations and marches with explicitly sectarian overtones, because of a fear that this strict official stance would render the situation worse by fanning riots (para. 51).

Given the context, those manifestations of x that do not strictly work as x_0 (terrorist violence but not organized, organized violence but pursuing sectarian ends) exist at the intersection of normal and emergency regimes. The public authorities use emergency laws to the extent that it is not possible to combat such borderline activities (i.e., Loyalist terrorism of the Protestant community in *Ireland v. the UK*) through ordinary criminal processes (paras. 227, 229). Consequently, in *Ireland v. the UK*, the ECtHR closely considered the applicant government's complaint that the emergency measures discriminated Catholic community and overlooked Protestant terrorism. In its defense, the British government pinpointed the difference between the two forms of terrorism, the questions of conduct (not persons) that emergency measures addressed, and the importance of contextual questions in the application of specific laws (paras. 225-231). Thus, both legal justifiability and the effectiveness of a derogation regime crucially hinge on the way the set of practices in a derogation regime distinguish, and discriminate, x_0 from x_1, x_2, or x_3.

b. *Brannigan and Mcbride v. the UK*

In *Brannigan*, the applicants complained that their arrest and detention pursuant to the Prevention of Terrorism (Temporary Provisions) Act 1984 violated their Article 5 rights. I analyze *Brannigan* in order to see how derogation regime manages a specific conduct (x_0), how this focus remains oriented to the changes in the context (ΔC), and how managing x_0 relates to one's bracketed right to x.

First: x_0 as focus. In *Brannigan*, the deprivation of liberty without following a procedural with judicial character performed four tasks. First, it prevented the detainees from knowing the sources of information (para. 30). Second, it protected highly sensitive information (para. 15). Third, it allowed detective and forensic work to take place. This gave the public authorities sufficient room to do crucial spadework in gathering information (para. 15). Fourth, it allowed the authorities to cross check detainee's replies against the intelligence gathered (para. 15). The sensitive nature of available evidence, the lack of well-established evidence beforehand, and the gathering of evidence during detention justified derogation from Article 5 rights (paras. 22-3). Thus, emergency laws focus on terrorism and allow detention of suspects. True, emergency laws are generally of nature that limit bodily actions of the suspects and impose discipline on them. However, the practices relating to obtaining, gathering, and verifying information during detention work as background norms that justify imposing

discipline on the suspected terrorists in terms of pursuing ends like truth and verifiability, effectiveness and counter-terrorism, and culpability and justice. Thus, 'discipline' does not work as an independent signifier.

Second: emergency laws and the changes in the context (ΔC). The emergency laws in Northern Ireland were subjected to parliamentary renewal and regular expert review (paras. 15, 65). The evaluation of emergency laws depended, for example, on the evaluation of the situation (para. 54), the effectiveness of laws in achieving objectives (para. 15), the emergence of newer problems such as training of terrorists in remaining silent while being interrogated (para. 56). Thus, the withdrawal of derogation notice in 1984 and its renewal in 1989 signaled shifts in the attitude of the public authorities as to combating terrorism effectively in the light of a volatile situation. In fact, the ECtHR noted in *Brannigan* that Article 15(3) required such a process of 'continued reflection' (para. 54). Importantly, the emergency regime is oriented to a context. Given contextual shifts and the understanding that considers subjects' freedom a problem than a resource, a characteristic art of 'derogation' government does not exist.

Third: the derogated right to x as a bracketed right. The emergency laws as per 1984 Act allowed four measures. First, they allowed arresting suspects without warrants on suspicion (para. 16). Second, they delayed access to solicitor for forty-eight hours after the arrest (paras. 24, 64). Third, they delayed informing friends and relatives about detainee's whereabouts (para. 24). Fourth, they involved senior police officers and the Secretary of the State for extending detention beyond the initial forty-eight hour period (paras. 16, 23, 30). However, as far as the normative structure of managing x is concerned, the focus on x_0 does not create a separate normative world. The change in management remains oriented to norms because of facts. Consequently, in *Brannigan*, the public authorities had to fulfill their positive obligations. These included, for example, prevention of abuse of power, inspection of detainees' medical condition regularly, and prevention of false imprisonment and wrongful detentions (paras. 26-29, 61-65). Similarly, negative obligations included an effort on behalf of the public authorities to distinguish x_0 from x_1, x_2, or x_3 in order to legally deal with x_0 in a justifiable and non-arbitrary way (paras. 27-29). However, one cannot speak of detainee's right to liberty here. In fact, what one discerns here is not a procedure with judicial character but an 'administrative measure' with judicial oversight – measure that remains of a variable nature. Likewise, the detainees had access to remedies; they could not however put forward rights claims based on the normal function of Article 5. Thus, in *Brannigan*, the detention orders were never effectively challenged (para. 61). Obviously, one cannot contest much, when one contests reasonability of a 'suspicion' (paras. 28-29).

By considering a derogated right to x as bracketed, I pinpoint, in a legal sense, the one-dimensionality of a derogated right's normative power in a derogation regime. Thus, the management of liberty remains sensitive to the norms surrounding the derogated right to liberty in the light of a change in the context (ΔC). However, given derogation, Article 5 rights-holders lack normative resources with which to legally contest the specific ways through which emergency laws institute changes to the management of their liberty, as laws focuses on x_0 (c.f., *Brogan and Others v. the UK*).

§5.1b From normalcy to derogation … and back: Reading *A and Others v. the UK*

In the context of the 'War on Terror', the UK remains the only Convention signatory to use Article 15. Given its derogation notice in 2001 and the withdrawal of it in 2005, a focus on *A and Others* allows us to see: a) how derogation regime changes the normal management of x; b) how rights-based norms critically evaluate and normalize the changes; c) and, how the withdrawal of derogation influences practices and institutions tailored for an emergency.

In *A and Others*, the applicants complained that their detention under the Anti-terrorism, Crime and Security Act 2001 violated their Convention rights. Among others, the 2001 Act gave an extended power to detain and arrest a foreign national who the public authorities could neither deport nor let loose (para. 11). All applicants in *A and Others* were foreign nationals. While analyzing *A and Others*, I selectively focus on complaints related to Article 5.

First: the change in the management of x. The powers to detain someone under 2001 Act depended on the risk that an individual posed (para. 18). Instead of the normal criminal court, a special appellate court, the Special Immigration Appeals Commission (SIAC), handled appeals of those detained under emergency laws. Before SIAC, the detainees did not have access to 'closed' (i.e., classified) material that formed the backbone of the case against them (paras. 29-69). Similarly, the SIAC judgment was both open and closed. Only a security-cleared 'Special Advocate' (who was not the detainee's lawyer but represented their interests) designated by SIAC had access to the closed material. Further, SIAC accepted evidence that normal courts considered unreliable, such as hearsay statements from an unidentified informant (para. 26).

Yet, a certain continuum exists. Largely using seven methods the evidence against the detainees was gathered: intelligence accounts (paras. 36, 48, 63), financial records (paras. 31, 36, 48, 63), witness' statements (paras. 36, 58, 68), travel histories (paras. 31, 57, 61, 63, 67), surveillance reports (paras. 42, 44, 49), psychological propensities (paras. 44, 56), and their social circle (paras. 36, 38, 42, 48, 59). Thus, the methods to obtain and rationalize data because of which the public authorities declared emergency overlap with those through which the public authorities make a case against the detainees within an emergency. Thus, the practices rationalizing, for example, 'necessity', 'order', 'threat', 'fairness', and 'humaneness' are far from, so to say, 'exceptional'. Further, the proceedings of the trial, the argumentative models, and the role-based structure of the trial process (paras. 26-29) lead one to discern a trial, even if one may question the trial's fairness.

Second: the withdrawal of emergency and the critical evaluation of the changes by rights-based norms. The withdrawal of derogation notice in 2005 led the right to x to evaluate the changes that emergency laws instituted. The public authorities replaced the legal basis of the applicants' detention. Thus, after the government repealed the 2001 Act, the public authorities detained the applicants under the 'control orders' of the

Prevention of Terrorism Act 2005. The restoration of the Article 5 rights entailed that procedure with judicial character determined the appeals of the applicants in the light of exceptions mentioned in the Article 5, such as maintenance of public order, prevention of criminal offences, or deportation. Then, the 2005 Act required a High Court judge to preside over control orders' hearings. Further, the 2005 Act gave the relevant judicial authority powers to determine whether disclosure of information in each case served the public interest (§11.2) – a power that the SIAC system lacked. In other words, the withdrawal of the derogation presumes that ordinary law is empowered to handle the situation. Thus, the right to x stands in an inverse relationship with the changes in the context, i.e., the restoration of the right presupposes either the fulfillment of objectives or, minimally, as a step that will not impede the process of fulfilling the objectives.[94]

End of derogation: $\Delta x \leftarrow$ right to x $1/\Delta C \leftarrow$ right to x

Consequently, the restoration of the normal contextual background with the end of a derogation regime generally presupposes that emergency laws have domesticated the threat posed by the previous contextual change. Further, managing that conduct becomes a function of the normal legal regime. However, the threatening conduct remains a crucial point of attention (marked in curly brackets in the illustration below). This entails that when the normal management of it becomes insufficient or when the threat posed by it radically changes, the derogation regime increasingly appears as the relevant legal answer with which to deal with the problem.

Derogation: Δ in management of x (x_0 as focus) $\leftrightarrow$ (Δ context: ΔC) $\rightarrow$ [right to x]

$\downarrow$

Normal: management of x (x1 + x2 + x3 … + {x_0}) $\leftrightarrow$ (contextual background $\cup$ $1/\Delta C$) $\leftrightarrow$ right to x

Third: the normalization of the changes. To the extent that one cannot critically evaluate certain emergency related practices through rights-based norms, those changes remain unaltered. As such, they are generally included into the normal management of the things in the short term. For example, look at SIAC. SIAC was concerned with immigration issues. It abrogated ordinary immigration rules on national security grounds before the UK's derogation. Later, the 2001 Act extended SIAC's powers and scope. After 2005, the SIAC kept on functioning as a tribunal handling immigration and denationalization cases in a 'special' manner. This pinpoints certain institutional permanence. More, the 2005 Act extended the use of 'Special Advocates'

[94] Elster notes:

> 'When Valéry Giscard d'Estaing was elected president of France, he was asked (in an interview with *Le Monde*) whether he was going to use his powers to restore the situation of the country to what it was before the quasi-revolutionary events of 1968. He answered, reasonably enough, that since to re-create the pre-1968 situation would be to re-create the conditions that had caused 1968, more radical measures were needed. More generally, if the events calling for a state of emergency have structural rather than conjunctural roots, the exercise of emergency powers should aim, among other things, to prevent similar events from occurring in the future' (Elster 2004, 242).

into the ordinary 'operation of the High Court', when the courts dealt with the suspected terrorists (CCA 2005, 6). Likewise, the permanence of this governmental context allowed laws to detain the eleventh applicant in *A and Others* under normal laws and then under emergency laws. Similarly, the public authorities detained all of the applicants in *A and Others* under normal laws, as derogation regime ended. The legal shift concerning the regimes under which the authorities detained applicants did not concomitantly entail a marked change either in the substance or in the conditions of their detention. In sum, albeit derogations may not alter the rights' scheme, they – as a sum of practices – may influence the way a society interprets rights.

Given this background, laws shift from normal to that of emergency without creating governmental hiatuses. Thus, for a majority living in the UK, the emergency laws in the light of 'War on Terror' remained somewhat distant from their day-to-day dealing and affairs, and where, through their personal experiences, they could not appreciate the changes in laws from normal to emergency and then back. In sum, one can roughly understand the transitions from a normal regime to derogation regime, and back to the normal one, as:

Normal 1: management of x ($x_1 + x_2 + x_3 \ldots$) ↔ (contextual background) ↔ right to x

↓

Derogation: **Δ** in management of x (**x_0 as focus**) ↔ (Δ context: **ΔC**) → **[**right to x**]**

↓

Normal 2: management of x (x1 + x2 + x3 … + **{x_0}**) ↔ (contextual background ∪ **1/ΔC**) ↔ right to x

(Note: changes that a regime institutes are marked in bold)

§5.1c Derogation, collective goods, and additional measures

We have seen how the background social practices managing a legal capacity structure both the normal and derogation regimes. Consequently, these regimes are not specific legal 'states'. That is, they do not have their own norms, regulatory principles, and effects. If one considers these regimes as legal states in the aforementioned terms, one can neither conceptualize the specific overlaps between the two regimes nor the possibility of legal transitions from one regime to another.[95]

[95] The fact of invoking derogation does not tell us much. In order to analyze it, we need to focus on three things. First, the way it influences lives. Second, the manner certain rationalities articulate derogation measures. Third, the way a derogation regime alters the legitimate sphere of action of the public authorities. Thus, the fact that during the World War II, both Axis and Allied powers had extraordinary laws (i.e., emergency, state of siege, or martial law) does not say anything substantive about the dynamics of coercion and legitimate violence working in each (c.f., Agamben, 2005, 11-22). Surface legal similarity does not entail necessarily governmental similarity or moral equivalency. Even if exception became the rule (Benajmin 2003, 392, Agamben 2005, 9,14, 22, 58, 68-9, Marcuse 1969, 110), the rule itself does not tell much about the exception per se.

On the other hand, certain scholarly works bemoan the fact that the Normal 2 may become the 'new normal' (Fuller 1964, 78, Ferejohn und Pasquino 2004, 219, Nanopoulos 2015, 913, 921, 931-3, Ackerman 2004, 1047-8, Cole 2002, 959). However, such accounts ignore: a) the extent to which the initial normal (i.e., Normal 1) overlaps with a derogation regime and, b) the way rights-based norms critically evaluate practices after derogation ends. Similarly, such accounts do not give sufficient importance to the role of rights-based norms in shaping a subject's conduct, i.e., the manner through which the guarantee of the right to x relies on the management of x. If rights possess such a managerial dimension, then what we are to understand as the 'normal' role of rights is 'prone to change' (Poole 2009, 270) – and, in any case, does not function as a self-referential, given signifier.

Overall, two points are important. First: the provision of collective goods in a derogation regime. Normally, the rights that the Convention mentions already include limitations (e.g., Articles 8 to 11) and exceptions (Articles 2, 4-6, 11) (see, Tables 6.1 and 6.2). These clauses set the rights in their wider social, economic, and political context (e.g., economic well-being, territorial integrity, health and safety, law and order, national security). Thus, they refer to the certain practices that shape the conduct of the legal subjects. Given this reason, for example, the UK and Turkey have found the exceptions stated in Article 2 on the right to life sufficient in order to combat terrorism, without needing to refer to 'lawful acts of war' as specified by Article 15(3). Though the derogation regime presumes the 'inadequacy' of normal limitations and exceptions 'relating to health, public safety, and order' (*Denmark, Norway, Sweden, Netherlands v. Greece*, para. 153), it does not consider the derogation from rights as a measure invalidating those objectives. In other words, the understanding of 'the life of the nation' mentioned in Article 15(1) coincides with the goods and objectives mentioned in the limitation and exception clauses. Then, any instance wherein such an equivalence remains absent is by default suspect, e.g., derogating from rights in order to protect 'the honor of the people'. In other words, albeit the act of derogation from certain rights renders the questions of limitation of those rights meaningless because there is nothing to limit in the first place, it does not entail that the collective goods and contextual objectives mentioned in the limitation and exception clauses lose their force. A state that derogates from certain human rights in emergency needs to provide, within the Convention framework, access to water, medical facilities, transport infrastructure, education, working prisons, safety of property, clean drinking water, or running gutters. The public authorities cannot justify the non-provision of these goods based on derogation because they derogated from the guarantee of fundamental rights, not basic goods.

To the extent that a state justifies its failure to provide these goods not in terms of inability but in the name of derogation, or as something that puts 'pressure' on a specific populace, its act of derogation refers to something more or something else than what the Convention presupposes. For example, a state's armed forces cannot to lay siege to a city in order to 'pressurize' city inhabitants to ostracize hiding rebels, and then justify this policy of forced hunger by pointing out its derogation notice. The derogation regime does not establish a vengeful, retributive model of justice. Legally

speaking, it operates through the binary of derogation and normalcy, where the former works as a point of last instance when the normal management of a threatening conduct (x_0) becomes ineffective. A derogation regime suspends rights in order to include the subjects within the system, not to exclude them. Emergency laws that permanently exclude a segment of population from a rights-based system contradict Article 15. They do so because they problematize not an aspect that rights protect or a specific conduct (x_0) but the status of the persons whom they exclude (*A and Others*, paras. 15, 20, 21, 190). As such, they lack any intention to subject that segment of population to an art of government based on rights-based norms.

Second: the question of additional measures serving the context. When the Convention puts rights in their wider context, it assumes a relevant systemic setting. For example, it assumes that a substantial majority of individuals considers legitimacy appeal of the state as valid, judges interpret the law reasonably, the police do not abuse power, politicians act in good faith, people are in general educated, the state is secure and strong, contravening legal injunctions is not a social norm, and neighboring states are not belligerent. When the derogation regime considers normal measures relating to the collective goods inadequate, and attempts to manage the situation through emergency laws by bracketing rights, the importance of developing additional measures addressing the relevant systemic setting comes to the fore. Thus, for example, in *Ireland v. the United Kingdom*, as the British public authorities were tailoring emergency laws to the Northern Irish situation, they also focused on relevant systemic questions. This focus included an equitable redrawing of electorates, introduction of proportional representation, involvement of members of the Catholic community in councils and tribunals in order to ease the pressure built up by terrorism predominantly coming from the Catholic community (paras. 50, 60, 77, 229). The worse a situation gets, the more the public authorities require additional measures that address such concerns, e.g., proper education of subjects, just distribution of wealth and benefits, access to basic facilities, cross-cultural exchanges and interaction. Crucially, these measures address the materiality of the situation. The better the relevant systemic setting remains, the lesser the public authorities feel the need to derogate from the guarantee of rights in the first place.[96] In sum, the derogation regime that allows derogation from the guarantee of some rights in order to provide collective goods exists on a similar systemic wavelength as the normal regime that limits rights.[97]

[96] Within the European context, the infrequent use of Article 15 hinges on a number of crucial factors. Think of the EU as a project, relative economic prosperity, movement of goods and people, ingrained political status of established nation-states, relative decline in long-standing territorial disputes in Europe, intra-European policing and security, the soft power of Europeanization projects, the relative technological advantage of European states vis-à-vis militant groups, and the relative political power of Europe vis-à-vis the non-European world.

[97] The bifurcation between the state of exception and the state of normalcy produces further unbridgeable binaries in Agamben's *State of Exception*: law and fact (p. 1, 26), law and life (p. 1, 86), inside and outside of the juridical order (p. 23, 35), and anomie and nomos (p. 86). (See further, 'The law applies itself to chaos and to life only on the condition of making itself, in the state of exception, life and living chaos', p. 73. 'When the state of exception, in which *potestas* and *auctoritas* are bound and blurred together, becomes the rule, then the juridico-political system transforms itself into a killing machine', p. 86. 'What opens a passage toward justice is not the erasure of law, buts its deactivation

We saw how a derogation regime functions. Our focus was on the managerial, contextual, and rights-based variables. The next two sections see how norms function in a derogation regime, even when bracketing rights deprives the rights-holders of crucial normative resources with which they contest exercises of official power. I analyze this point by looking at the interrelationship of the managerial, contextual, and rights-based variables.

§5.2 Derogation and the substantial questions surrounding the procedure

In this section, I argue two points. 1) The practices through which one obtains data, rationalizes it, and narrates it rely on certain norms forming a part of the corresponding skill set. These norms shape what the public authorities are to make of the context and shape the way changes in the management of conduct work. Given this dynamic, Article 15 subjects rights-holders to a legal regime where their management remains 'rational'. Hence, in a derogation regime, it is important to see in what manner one 'decides'.[98] 2) Public authorities, institutions, and officials that enjoy discretionary powers under emergency laws find themselves within discursive constraints of their institutional setups. Thus, laws look at both the institutional and role-based dimensions of the agents involved in dealing with the individuals subjected to emergency laws in order to determine the compliance of the public authorities with the rights-based norms. Hence, in a derogation regime, it is important to see where and how one decides.

In order to establish these points, I focus on the cases dealing with Turkey's 1990 derogation in the light of terrorism in Southeastern Anatolia. Given the length and intensity of the conflict, a focus on this situation allows us to discern the relevance of norms in monitoring extended derogations.

§5.2a Between ΔC and Δx

I first focus on the change in the context. Then, I analyze the way this change reaches out to the changes in the management of x.

First: ΔC. The idea that certain circumstances threaten 'the life of the nation' presumes socially shared practices and forms of understanding that rationalize those threats.

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and inactivity – that is, another use of the law,' p. 64. 'One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for good', p. 64.)

[98] Decision (*Entscheidung*) is a technical term present both in Schmitt (notably in his *Political Theology*) and in Benjamin (notably in his 'A Critique of Violence' and *Ursprung des deutschen Trauerspiels*). Among others, the way they understand exception depends on the way they conceptualize decision-making power. For Schmitt, a decision is decisive and 'revelatory' (Schmitt 2005, 6-7, 12, 13, 26, 35, 49). Benjamin finds decision elusive (Benjamin [1928] 2003, 70-71).

Then, in order to conceptualize a threat, agents (e.g., the public authorities) rely on these practices and understandings.

Although it forms only the tip of an iceberg, let us look at Turkey's 1990 derogation notice in order to explore this point. The notice mentions the number of civilians and military personnel killed in 1990. It then mentions a relative increase in the intensity of casualties over the years (1990 notice, para. 1). The rationalization of data allows one to make projections. These projections influence both legal and managerial dimensions. Similarly, pinning the areas where casualties occurred and determining their geographical layout allowed the public authorities to discern trends and demarcate areas most prone to terrorist actions (1990 notice, para. 2). The derogation regime was accordingly limited to 'Southeastern Anatolia and adjacent provinces' (1990 notice, para. 2). Later, the authorities lifted emergency laws from certain provinces and implemented them on the others, as the geographical concentration of casualties and terrorism-related incidences changed (see, 6 April 1993 notice; *Sakık and Others*, para. 28). Further, when the derogation notice talks about the nature of terrorism and its foreign presence, it draws on the investigative and truth-establishment practices that reveal both the causal factors underlying terrorism and the resources utilized by terrorists.

Reductively speaking, one can separate two kinds of norms informing these practices. First, the 'internal' norms.[99] They form the skill-set corresponding to certain social practices, e.g., consistency, verifiability, objectivity. These norms determine the rational appeal of derogation-related (i.e., leading to and ending derogation) and

[99] Fuller (1964) famously talks of 'inner morality' (at 42) or 'internal morality' (at 44) of law. However, his eight principles (i.e., generality, publicity, rules shaping future actions, intelligibility, consistency, practicability, relative stability, and congruence) admit of variations and exceptions (at 33-94). Thus, a martial law that functions within the sphere of exception of inner morality of law may minimally conform to such a morality. In fact, if law making fails to subscribe to the core of these principles, we would have not bad law but less law even in a normal situation that limits and exempts the application of these principles. In such an instance, the idea of 'inner morality' rather functions as a double-edged sword that injures the hand that wields it. We can read three related factors into this formulation in order to make it useful to analyze derogations. First: knowledge. When general laws respect liberty of sane adult individuals, they rely on knowledge that classifies individuals as insane. To the extent that the exception itself remains rational, the way legal system formulates general laws remains justifiable. Second: practices. The knowledge that practitioners use to classify people as insane form a part of skillset that they acquire and learn, and enact and perform. Beyond promulgation and interpretation of apt rules, the task is to habituate practitioners in this context. Third: institutions. The idea that something is practical for law to demand from a sane individual but not for an insane one requires regulation of individuals' conduct by developing apt institutions in the light of such knowledge; the regulation remains general but difference-sensitive. Thus, it is not enough to discern an 'inner morality' of law when a state introduces emergency measures, unless the classification of surrounding circumstances, the reformulation of legal rules, and the change in the regulation of individuals' conduct remain rational. Among others, this causes us to focus on the skillset of the relevant professionals involved in the process of rationalization and in the management of conduct, the incidence of behavioral change vis-à-vis surrounding circumstances, the constraints of particular professional roles, and the question of institutional design and change. However, with such caveats in mind, it becomes hard to see in what sense such a morality (in Fuller's initial sense) is either inner (i.e., concerned rather with the formulation and promulgation of laws as rules), or moral (i.e., not as something that extends to professionals' and officials' comportment (*Verhalten* in Heidegger's sense)), or reducible to law (i.e., remaining indifferent or 'neutral' to non-law that remains conceptually distinct from law).

derogation-based (i.e., operating within derogation) decisions. Second, the 'presumed' norms. They do not exist at the same level as those informing the skills but frame a narrative. This narrative relates social practices with each other. For example, the derogation notice does not speak about the loss of terrorists' lives because it considers mentioning them legally unnecessary. Albeit the case law indeed refers to the way the Turkish authorities treated suspected PKK terrorists, the killing of a high number of proven terrorists in combat does not activate proportionality analysis. Thus, the case law focuses on terrorism as a problem that law should address, not as a phenomenon whose nuances law ought to evaluate. Similarly, the overall narrative within which one puts the derogation notice has strong presumptions. The notice presumes a state that guarantees law and order within its jurisdiction (1990 notice, paras. 1-2), counters propaganda affecting both its territorial integrity and its populace's law-abidingness (1990 notice, para. 3), maintains its existence by having trustworthy public officials (para. 4), and problematizes the actions of its inhabitants (e.g., labor and work regulations, residential schemes) (1990 notice, para. 4). Consequently, these presumed norms frame the justifiability of legitimate violence. As such, Article 15 operates from a specific field of justifiable violence; it does probe into the history of that violence, or analyze the legitimacy of justifiable violence *ad infinitum*. Ideal justice or abstract consistency is not the concern of human rights, let alone that of derogation. In sum, the norms forming the basis of the practices and the norms structuring the narrative respectively shape the procedural and narrative dimensions of an emergency regime.

Second: the way the change in the context reaches out to the change in the management of x. The reasons that allow the public authorities to discern changes in the threat allow them to alter the management of subjects' conduct accordingly. For instance, whereas the 1990 derogation notice mentioned derogation from Articles 5, 6, 8, 10, 11, and 13, the May 1992 notice limited it to Article 5 (*Elçi and Others v. Turkey*, para. 589). In fact, it is hard to see how Article 15(3) leads the public authorities to 'continually reflect' (*Brannigan*, para. 54) on emergency without identifying the processes that interrelate the understanding of the threats and the development of apt official responses. Thus, a derogation regime is not static. A simple insistence on sovereignty on the one end of the scale and rights on the other end posits only a zero-sum relationship between the two, because of which it becomes impossible to discern any art of government either working in the derogation regime or continuously altering its broader contours.[100]

[100] Thus, in Europe, governments have generally invoked Article 15, and put emergencies in place, without there being, politically speaking, a dictator, even of a well-intentioned 'republican' sort, leading the way. More, it is because of aforementioned governmental nature of a derogation regime that a dictator who decides everything (both on and within emergency) cannot monopolize decision-making. Thus, in the UK or Turkey, for example, derogation regime remained in place, while cabinets shuffled, political leaders lost offices, and parliaments got re-elected. More, the statute-based emergency laws create 'new powers' (Poole 2009, 254). As such, they know no individuality, either in giving authority or in the application of norms. This means that sovereignty is a legal term that applies to a range of actors with different effects and significations. Thus, the governmental nature of derogation regime makes existing derogation regimes different from the sovereign's executive 'prerogative' as famously expounded by Locke (*Second Treatise*, Ch. XVI, §159).

Further, the derogation relating to Article 5 was in place in Southeastern Anatolia till Turkey revoked its derogation notice in Jan 2001 (*Nuray Şen v. Turkey*, para 16). However, the procedural aspects surrounding detention and internment allowed the ECtHR to answer substantive questions, i.e., 'strictly required by the exigency of the situation' (Article 15(1)) and the guarantee of non-derogable rights (Article 15(2)). For example, in a majority of cases dealing with this situation, the ECtHR found violation of Article 5 because the public authorities detained the applicants incommunicado for more than seven days without activating a procedure of judicial character (*Aksoy v. Turkey*, paras. 65-87; *Demir v. Turkey*, paras. 49-58; *Nuray Şen v. Turkey*, paras. 25-29; *Elçi and Others v. Turkey*, paras. 667-686). More, albeit not prohibiting such a possibility, the ECtHR nevertheless considered that the Turkish government did not adduce any special reason detailing why terrorism in southeastern Anatolia rendered 'judicial intervention' before this seven day period 'impracticable' (*Aksoy*, para. 78). Similarly, the lack of effective remedies and procedural oversight, the absence of effective official investigation, and the lack of access to independent doctors or close friends affected the guarantee of non-derogable rights, esp. Article 3 on prohibition of torture (*Aksoy*, paras. 58-64; *Elçi and Others*, paras. 637-649; *Abdülsamet Yaman v. Turkey*, paras. 50-61).

The fact that the Turkish authorities derogated from a right that is procedural in nature (i.e., Article 5) nevertheless allowed the ECtHR to analyze issues relating to it in order to answer substantive issues, i.e., the guarantee of rights, the management of liberty, and the justifiability of emergency laws. Thus, only if in a weak sense, a derogated right like Article 5 maintains certain validity, even in a derogation regime. It does not become something akin to Dr. Johnson's stone, i.e., rendered meaningless by being simply 'kicked' away. Even for the purposes of a derogation regime, derogation does not mean abrogation.[101] Thus, it is important to see in what manner the public authorities, officials, experts, among others, decide, when a derogation regime is in place. In sum, contra 'the state of exception' theorists (Agamben 2005, 6, 48, 60, 80, Benjamin [1928] 2003, 66, Schmitt 2005, 129), albeit derogation regime differs from normal times, it is neither normless nor ad hoc. To the extent that there is no institutional power nor rational social practices guiding conduct, one can talk neither about a rational power nor about the applicability of Article 15 to a situation. Consequently, terrorists cannot rhetorically justify their violations of human rights as temporary derogations pending fulfillment of their long-term political objectives.

§5.2b On institutional discipline and social roles as normative constraints

I now focus on the managerial aspect alone (Δx). In a normal regime, a right imposes positive and negative obligations on the public authorities by drawing on the

[101] In his *General Theory of Norms*, Kelsen notes: 'The distinction between [*abrogare*] and [*derogare*] goes back to the celebrated passage in Cicero's *Republic*: "It is a sin to try to alter [*obrogare*] this law, nor is it allowable to attempt to repeal [*derogare*] any part of it, and it is impossible to abolish [*abrogare*] it entirely (iii. 22)"' (Kelsen 1991, 114).

rationalities and procedures of institutions that deliver collective goods. A normal regime defines codes (legal/ illegal) through which it does not problematize what it does not prohibit. However, a derogation regime defines codes through which it may problematize what it does not protect. Thus, a normal regime largely defines the space of violence it permits in terms of laws framed in advance. On the other hand, a derogation regime largely defines the space of law in terms of violence it confronts. It orients law's prescriptive power, and its field of violence, to a reality in a complementary manner. As such, as already noted in §5.2a, a derogation regime vis-à-vis a normal regime is more volatile in nature and less foreseeable. Obviously, a derogation regime increases the discretionary power of officials and public authorities. Yet both regimes remain connected to the rule of law because the legal form binds both the public authorities and the rights-holders.[102] Hence, laws draw out broader limits (even when those limits vary) within which both act and behave (Hayek [1944] 2001 , 75-6, Foucault 2008, 169).

Consequently, even when bracketing rights makes it difficult for the persons concerned to contest exercises of official power, the officials are not thereby rendered unconstrained from the institutional disciplines they find themselves situated in and the institutional restraints that define their roles.[103] For example, in *Aksoy v. Turkey*, the ECtHR found violation of Article 3 because the public prosecutor 'should have obtained' – but did not actually obtain – further information about the applicant's state of health, when he met the applicant prior to his release, even when the applicant himself made no complaints to the prosecutor (paras. 50, 56).

More, the institutional framework within which officials operate structures, say, their vocabulary, line of communications, and actions. Given that a derogation regime remains a legal construct, institutional regulations, administrative protocols, and procedural standards define the nature, sources, and functions of discretionary powers. For example, in *Elçi and Others*, the ECtHR noted an absence of a clear picture of the 'the steps taken by the authorities to obtain prior authorization for the detention of the applicants' or to obtain 'proper ratification' later (para. 680). More, in *Elçi and Others* (paras. 680-682), the ECtHR found a violation of Article 5 because of five reasons. First, no official accepted direct responsibility for the decision to detain the applicants. Second, the dynamics surrounding the decision were unclear, i.e., whether it was one decision or more. Third, there was a complete absence of proper documentation relating to detention orders. Fourth, there was a lack of written record

[102] Dyzenhaus correctly notes that the rule by law is not equivalent to the rule of law (Dyzenhaus 2006a, 6-7, 19). However, it is hard to think of the rule of law without any sort of the rule by law. Thus, to the extent that the rule by law does not simply give officials in charge discretionary powers of – to use Dicey's words (Dicey [1885] 2013, 225, 233) – 'wide and arbitrary' nature, the rule by law contains fundamental, if not always in itself sufficient, governmental resources, with which it ensures that the management of life in emergencies does not become ad hoc, irrational, unjustifiable, tyrannical, or normless.

[103] Dworkin (2011) notes that once we note the disagreements among judges surrounding constitutional procedures, it becomes possible to speak of 'the morality of procedure' (413). Thus, Dworkin argues that 'once we … count law [as] a distinct part of political morality, we must treat the special structuring principles that separate law from the rest of political morality as themselves political principles that need a moral reading' (2011, 413).

documenting communication between the detaining officials and prosecutor. Last, the documents remained silent concerning the reasons of the applicants' arrests (paras. 680-682). Thus, one can see that in derogation regimes both the capacity and the locale of decision remain unevenly spread out. Hence, neither are all of the officials given discretion, nor is discretion equally shared, nor does discretion become a non-positional good within institutional setups, nor do all of the officials simply follow the politics of moment by doing whatever they deem fit unconstrained by institutional protocols and codes. Subscribing to this view crucially ignores the normative constraints surrounding institutional setups and roles,[104] let alone the norms structuring the overall context. Resultantly, such a view brings both the public authorities and terrorists to the same level, i.e., as if both operate in a legal and normative black hole, where only a belated reactivation of law would protect interned terrorists and hold law-flouting officials accountable.[105]

[104] From a constructivist perspective, it is correct to say that in European human rights law derogation is what European human rights lawyers (or, experts, professionals, security personnel, public employees, judiciary, the public) make of it. Theorists advocating 'extra-constitutional' view rely on such constructivism, e.g., politicians confront extraordinary circumstances and activate extra-constitutional regimes, judges tolerate extra-constitutionality until it ends, police and army act extra-constitutionally foreseeing an ex post accountability (Gross 2003, 1023, 1097-99, Tushnet 2003, 283, 287). However, the way these theorists theorize constructivism merges into a certain naturalism, i.e., a naturalism ascribed to extra-constitutionality as a constitutive legal state that affects every single dimension. Thus, two different strands inform the extra-constitutional narrative, i.e., the idea that extra-constitutionalism affects everything and everyone, and the idea that extra-constitutionalism is what participants make it to be. Only considering derogation regimes as ad hoc saves the de novo nature of extra-constitutional narrative (Gross 2003, 1097, Tushnet 2003, 306, Tushnet 2005, 50), but at the cost of providing (to use Koskenniemi's terms) either an idealistic utopia or a dogmatic apologia. Similarly, making the two strands consistent downplays the role of government of conduct, subjectivity, and discursive limits. One ignores the common constructivist point that the field of argumentation, institutional discipline, the shared skill sets and parameters concerning the use of legal language both define lawyers as lawyers and constrain their actions within certain discursive limits.

[105] The term extra-legality is unclear. One can mean three things, when one uses the term. 1) Normal laws obligate. By extra-legality, one means that not normal laws but higher principles obligate. One would then need to show both what those higher principles are, and what kind of importance one ought to give to them in specific contexts. This idea however makes too much of a gulf between law and higher law. If normal laws are themselves the elaboration of higher law (e.g., human rights norms), it is not clear in which sense bracketing normal legality allows one to revert to or grasp higher laws. 2) Normal laws obligate. By extra-legality, one means that not normal legal methods but context-specific methods ensure compliance. A decision that an official makes in a specific contextual knows no higher authority, especially if the decision comes from the higher power centers. However, it then remains difficult to see in what manner then normal laws would supposedly bind officials, who themselves determine whether they comply with them. The ideas that laws, or higher laws, obligate ends up being non-sense. More, by ignoring the government of conduct, this account rather leads to the proliferation of, what Butler calls as, 'petty sovereigns' (Butler 2004, 65). 3) Normal laws do not obligate. By extra-legality, one means the suspension normal laws and normal legal constraints. It would then be hard to see whether legal norms can then function at all. The idea that legal norms simply function as calls to the 'conscience' of public officials with 'dirty hands' is disappointing (Walzer, 2004, 34). Thus, such an account equates what the public authorities may possibly do with what the public authorities actually do. However, the fact that something remained necessary does not make it laudable or permissible, no matter how deeply troubled one's conscience later is. Like Locke's 'appeal to heaven' (or Gross' appeal to public, or Tushnet's appeal to a mobilized citizenry), which side one is on then remains the only relevant 'normative' question – and, ipso facto, normatively redundant. Whereas Schmitt's idea of exception seamlessly merges here with his definition of the political as a friend and enemy distinction, the extra-

Further, the fact that the uses of emergency laws are challengeable pinpoints the presence of norms in a non-legal sense. That is, the possibility to evaluate discretionary measures presupposes normative importance of certain social roles and skills. Consequently, emergency measures cannot obstruct the function of those social roles and skills, no matter how unsavory their function or existence remains to the achievement of the contextual objectives. For example, the fact that all the applicants in *Elçi and Others* were practicing Turkish lawyers representing PKK suspects required 'strict scrutiny' of the issue by the ECtHR (para. 669). More, in *Aksoy*, the fact that the applicant did not have access to doctor during the first two weeks of detention, the doctor provided later by the detaining authorities only focused on forensic issues, and that the independent medical evidence corroborated the applicant's narrative allowed the Court to find a violation of Article 3 (paras. 15-16, 19, 23, 58-64; c.f., *Abdülsamet Yaman*, paras. 45-46). Thus, the form of medical expertise, its institutional location, and objectivity both structure the veracity of a doctor's expert findings and constrain the actions of the detaining authorities. Consequently, this allows the Court to determine compliance with the rights-based norms. Similarly, albeit not decisive, the role of fact-finding missions, international material, and independent expert reports in detailing whether the public authorities function within a legitimate margin of discretion remains important in the ECtHR case law (*Aksoy*, paras. 46, 80; *Elçi and Others*, paras. 546-567).

In sum, as per §5.2's discussion, following normative relations (marked in italics) function in a derogation regime:

(Δ context: ΔC)

(*internal norms, presumed norms*)

↓

Elevating procedural questions to a substantive level

↓

Derogation: Δ in management of x (x_0 as focus)

(*Institutional discipline and social roles as normative constraints*)

The next section focuses on the interrelationship between contextual and rights-based variables.

§5.3 The play behind the curtain

legal model addresses one end of Schmitt's paradox Schmitt's paradox (i.e., exception) while getting entangled with another (i.e., friend/ enemy distinction).

Albeit the legal capacity to derogate is discretionary, its activation is neither ad hoc nor automatic. Albeit derogation takes away something from procedural rights and substantive freedoms, its justifiable activation presuppose certain norms. These norms allow the changes in the context to reach out to the legal bracketing of a right. Thus, it is when derogation is in place and the public authorities bracket certain rights that we can additionally discern the importance of rights as a system. In order to explore this point, I now briefly look at *Denmark, Norway, Sweden, and Netherlands v. Greece*, i.e., *The Greek Case*. In it, the applicant governments complained that the 1967 Greek derogation, in the light of the takeover of the Greek state by a colonel junta, was invalid (paras. 40-45). *The Greek Case* is unique because the ECmHR found: a) that the Junta government did not fulfill Article 15's conditions (i.e., Article 15(1)'s exigency and 15(3)'s notification requirements); b) and, that the threat to 'the life of the nation' as per Article 15(1) did not exist.

No structural automaton activates emergency laws in the light of ΔC. Or, as Hart says, 'fact situations do not await us neatly labeled, creased, and folded' (Hart 1958, 607). In other words, the change in the context itself does not speak anything specific or substantive. The process leading to the bracketing of rights generally presumes an already established legal channel through which the public authorities reflect, deliberate on, activate, and implement emergency laws. Thus, the ECtHR case law does not problematize whether, say, cabinets or parliamentary majorities declare emergencies. Article 15(3) only requires that the public authorities issue 'formal and public' (*Cyprus v. Turkey*, p. 17) derogation notices 'without delay' (*Lawless v. Ireland (No. 3)*, para. 47). Thus, the ideas of constitutional change, constitutional amendment, and constitutional suspension all presuppose dynamism, but, in the background of a normative continuation of the constitutional system. This means that derogation is a tool that fills in the temporal gaps of a polity. Thus, an imaginary of continuity is associated with derogation, even when derogation is in itself a figure of alteration.

However, the Greek Junta seized power, imprisoned civilian and military leaders, and annulled the 1952 Greek Constitution. Nevertheless, the Junta government did not justify the new constitution it promulgated as providing a novel normative basis beyond that of the Convention. More, the Junta government in *The Greek Case* did not seek to legitimize its seizure of power in the name of derogation. Instead, it justified its coup d'état as a response to deal with the threat of a Communist takeover and as finally aiming at the restoration of normal legal regime as espoused by the Convention, i.e., one that would guarantee rights in a fuller sense (paras. 63, 71). These two facts pinpoint that the Junta aimed to place its government within the systemic continuity of the Convention norms. Without avail, though. Importantly, in *The Greek Case*, the Junta government derogated from the guarantee of certain rights; it did not derogate from the framework of the Convention itself. Thus, even extraordinary situations creating 'revolutionary' governments require judicial monitoring (*The Greek Case*, para. 60). In other words, extraordinary situations do not create an extralegal world (contra, Agamben 2005, 47).

Concerning the Article 15 related complaints, the Commission considered three points important in *The Greek Case*. First: evidence and reasons. The evidence adduced by

the Junta government did not show how a planned Communist takeover remained either effective or imminent. Additionally, it did not show how such an ensuing disorder might have affected 'the life of the nation' (*The Greek Case*, paras. 154-164). Second: measures and notification. The Junta government did not provide information concerning administrative measures. Further, it notified the Council organs about the reasons of derogation four months after taking the derogating measures (*The Greek Case*, para. 81). Third: actions and aims. The Junta government did not justify the extent to which the objectives aimed at by its derogation regime addressed concerns that a normal legal regime could not handle (*The Greek Case*, para. 207). Thus, the derogation regime fulfilled purposes beyond those specified by Article 15. Consequently, the Junta government's derogation decision – not solely the specific use of Article 15 powers, as in the other cases – did not fulfill Article 15 conditions. Thus, the Junta government violated Article 15. In the remaining Article 15 case laws, however, the Convention organs have to date only found violation of a specific right that they read in conjunction with Article 15.

More, as seen in §5.1 and §5.2, a derogation regime focuses on a specific form of conduct in a certain situation. Then, its force subsides when the situational threat subsides. As such, one works on probabilities (decrease in threat) and possibilities (the potential concerns affecting the life of the nation). Thus, as noted in *The Greek Case*, the 'threat to the life of the nation' should be either 'actual or imminent' (para. 113). Crucially, the objective of the derogation regime is neither the concentration of political power nor its enhancement. Thus, a state under derogation regime remains distinct from despotism (wherein one 'refers any injunction made by the public authorities back to the sovereign's will' (Foucault 2008, 169)) or *Polizeistaat* (wherein the provision of the collective goods always refers to the strength of the state). Rather than primarily aiming at the threat, the derogation regime analyzed by the Commission in *The Greek Case*, i.e., the derogation regime of the Junta government, affected the way a constitutional system remains interwoven with rights-based norms. Thus, the emergency laws did not develop an apt correspondence between the presence of a threat and the development of proper legal responses. For example, in *The Greek Case*, the Commission noted that even if an emergency existed in Greece, the Junta government could not justify its political and legal measures. These included the suspension of the parliament, the absence of general elections, the absence of a Constitutional Court, the lack of an electoral law, and the prohibitions on political parties (*The Greek Case*, paras. 418). As such, the Junta government's actions affected the conditions justifying shifts from a normal regime to a derogation regime (and back).

To an extent, *The Greek Case* allows us to understand the normative dynamics of Article 15 in systemic terms. The decision in *The Greek Case* does not refer circularly either to the state or to its legal system in an abstract manner. The circular argument advanced by the Junta government in *The Greek Case* proceeded as follows: obeying law → provision of collective goods → presence of law → possibility of provision of collective goods. For such a circular account, the Conventions norms lose some of their primacy when confronted with the existential concerns of a state (*The Greek Case*, para. 41). In order to avoid this circularity, the decision in *The Greek Case*

juxtaposes a different narrative. The Commission proceeded in a threefold manner. First, it saw in what manner the public authorities decided on derogation. Second, it analyzed how and where officials decided in a derogation regime. Third, it saw the extent to which derogation-based and derogation-related decisions remained justifiable. By implication, then, the overall framework within which derogation occurs becomes important, i.e. *which* political and legal system decides, or *who* derogates. As such, Article 15 allows us to see the rights within the framework of a democratic constitutional system, even when that system may democratically legislate to reduce legal protections guaranteed by constitutional rights. Thus, threats to collective goods essential to a democracy, or without which rights lose their substance/ meaning, allow a legal system of a democratic constitutional state to derogate from some of its Conventions obligations (*The Greek Case*, paras. 161). For instance, the Commission noted that even if an emergency existed in Greece at the material time, the measures leading to the deprivation of liberty could not be justified based on Article 15 (*The Greek Case*, para. 287).[106] By looking at procedural and normative issues, the Convention organs analyze questions both formalistically and systematically. Rather than saying that a derogation regime ends, transmogrifies, contradicts, or threatens a democracy, Article 15 presumes democracy as its subject, or, at least, as in *The Greek Case*, problematizes efforts to legitimize systemic shifts away from democracy. In other words, by extending the normative scope of rights in the light of systemic concerns beyond the given normative concerns of each isolated right, Article 15 brings into the fold of law what scholars and practitioners may otherwise leave as 'political'.

True, the threat to the life of nation does not necessarily mean a threat to the human rights norms per se because of which alone the public authorities may derogate. However, by making room for the idea of a threat to 'the life of nation', the Convention legally ensures that this idea does not function independently and without any reference to the Convention norms whatsoever. Thus, the fact that a government calls itself 'revolutionary' does not absolve it from its obligations under the Convention (*The Greek Case*, paras. 60). Both the reason and the manner of its derogation remain justiciable. Similarly, those states that either deny rights to a certain part of population before or have no intention to restore their rights after derogation ends behave in a manner incompatible with the Convention standards because either they were not constitutional democracies before or they would be something else than a constitutional democracy when the derogation ends. In fact, as Raz notes, it is a common understanding among liberal theorists that countries with well-entrenched democratic constitutional traditions largely tend to comply with the normative constraints of rights as they derogate from the guarantee of some of those rights (Raz 1986, 156-7).

Similarly, from a systemic perspective, albeit laws bracket rights, one can critically evaluate a derogation regime using normative resources provided by a rights-based

[106] The Commission noted that the Junta government did not justify why normal limitation on rights remained inadequate. Second, it noted that the public authorities released or amnestied more than two-third of persons detained under emergency laws.

understanding.[107] The systemic importance of rights-based norms does not recede with their legal derogation. Not that rights are not disrespected, but that occurrence of such disrespect causes scandals. So do abuses of power. As such, these scandals force the public authorities to offer clarifications. True, the clarifications are frequently insincere. Importantly, even when such abuses may take place with official knowledge, their revelations do not cause the officials to offer justifications. In such instances, violations of rights do not amount to a criticism of rights, and one cannot use those examples to develop a broader critique of rights.

However, it remains theoretically possible that the public authorities who might use derogation as an excuse to justify political changes or who might consider rights-based evaluations as violating their state's urgent interests refuse to acknowledge the oversight of the Convention framework. In fact, this is what happened in the aftermath of *The Greek Case* decision. Barely a month after the Commission's judgment, the Junta government withdrew from the Council of Europe. However, a possibility that a recalcitrant state withdraws from the structure sustaining the Convention is not an Article 15 problem. Instead, it is a possibility that affects the entire Convention – a framework that relies on the consent of its signatory states to guarantee human rights within their jurisdictions.

Be as it may, §5.2 and §5.3 show:

[right to x]

(*providing tools for a critical evaluation despite being bracketed*)

↑

Normative concerns of a systemic nature

↑

(*deliberation, reflection, procedural oversight*)

(Δ context: ΔC)

(*internal norms, presumed norms*)

↓

Elevating procedural questions to a substantive level

[107] In fact, one can only feel the critical bent of the works that largely remain critical of emergencies and derogations by accepting the validity of a normative background. Without this, it is impossible to understand why derogation or emergencies are a bad thing in the first place. Raz, for example, caustically notes:

> 'No doubt human rights rhetoric is rife with hollow hypocrisy; it is infected by self-serving cynicism and by self-deception, but they do not totally negate the value of the growing acceptance of human rights in the conduct of international relations. The hypocrite and the self-deceived themselves pay homage to the standards they distort by acknowledging through their very hypocritical and deceitful invocation that these are the appropriate standards by which to judge their conduct' (Raz 2010a, 321-22; c.f., Hart 1994, 162, 206, Ignatieff 2001, 7, 11, Walzer 1984, 97-98).

↓

Derogation: Δ in management of x (x_0 as focus)

(*Institutional discipline and social roles as normative constraints*)

§5.4 Concluding remarks

This chapter analyzed how derogation regime functions. It looked how, because of specific contextual circumstances, a derogation regime brackets rights. Further, it saw how norms articulate a derogation regime. In contrast to rights' theorists, this chapter argued for understanding rights both contextually and systemically. Normatively speaking, the situational aspect of Article 15 pinpoints that both Article 15's application and the guarantee of the Convention's substantive and procedural rights remain a work of design. Thus, a legal system that guarantees the Convention's substantive provisions does not come into being 'naturally', nor can one naïvely expect such a legal system to withstand, rather 'naturally', threatening situations. Thus, the Convention norms are universal without being 'natural'. In contrast to legal scholars, this chapter argued that derogation is inseparable from a set of practices by which a derogation regime governs behavior. Further, this chapter argued that the prior socially shared background allows laws to shifts from normal to that of emergency without creating governmental gaps. Thus, both the question of conduct and subjectivity remains relevant in analyzing derogations.

Unlike the literature on 'the state of exception', this chapter saw how Article 15 works within a certain continuum. Thus, Article 15's use does not lead to a different state with its distinct contextual, rights-based, and managerial dimensions. Similarly, by looking at the function and interrelation of these three dimensions, this chapter analyzed the place of norms in a derogation regime. Thus, one defines emergency laws as extraordinary with reference to the Convention rights. Similarly, the public authorities do not derogate from the guarantee of all the rights. More, the reason that derogation remains connected to the problematic of government of conduct allows it not to apply derogation standards to every x (x being any capacity that derogable rights protect). The fact that the literature on 'the state of exception' ignores the issue of the government of conduct prevents it from making any nuanced analytical contribution. More, it also provides this literature with a limited conceptual toolbox that paints a partial picture of emergency laws and their dynamics.

Chapter 6. Negative Governmentality through Human Rights: On Limitations Clauses, Exceptions Clauses, and Anti-Abuse Provisions

When the Convention mentions rights, it contextualizes them. For example, when the Convention protects freedom of expression (see, Ch. 4), it also sets limitations to its exercise, e.g., 'in the interests of national security'. Similarly, when the Convention protects the right to life (see, Ch. 1), it also states exceptions that do not contravene this right's guarantee, e.g., 'the use of force which is no more than absolutely necessary'. Resultantly, a contextualized understanding of freedom underlies the Convention rights. Later, Section I of the Convention develops an additional layer of qualification to the enjoyment of rights: the anti-abuse provisions, viz. Articles 17 and 18. Whereas limitations and exceptions contextualize rights, anti-abuse provisions define, for the sake of freedom, what freedom is not. As such, they specify that a formal proclamation, and understanding, of rights is partial,[108] if not 'pernicious'.[109]

Despite the fact that limitation clauses, exception clauses, and anti-abuse provisions exist with reference to rights, their role in contextualizing rights and freedoms remains instrumental in one crucial sense. By specifying what rights may not protect, what rights do not protect, and what rights do not allow, they make a system out of congeries of legal norms. In other words, they reveal rights as a system. Alternatively, by looking only at the first paragraphs of those Convention articles that state rights affirmatively, it is not obvious to what extent one right refers to another or to what extent all the rights logically flow from a certain standpoint or what to extent all the rights interrelate. Thus, by specifying the substance of rights and freedoms, the 'negative' clauses refer norms to a socially shared background and approach norms with such a background in mind.

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[108] One of the key arguments of Jeremy Bentham against the French Declaration of Rights (the 1789 Declaration of the Rights of Man and of the Citizen) concerned the syntax of the document. The reader of the Declaration could easily be deluded into thinking that the rights enshrined in the text were virtually limitless, because the Declaration made no explicit reference to limits, restrictions and exceptions.

> 'Suppose a declaration to this effect: No man's liberty shall be abridged in any point. This, it is evident, would be an useless extravagance, which must be contradicted by every law that came to be made' (Bentham 1843, II: 493a; c.f., Burke 1993, 61).

This is what justified Bentham's characterization of the Declaration as 'nonsense upon stilts':

> 'This, we see, is nothing: It leaves the law just as free and unfettered as it found it' (Bentham 1843, II: 493a).

One need not agree with Bentham's full theory of rights to be of the view that he had a point when he emphasized the importance of limits and restrictions in the full and proper definition of rights. Quoting Bentham again: 'No law can be made that does not take something from liberty; those excepted which take away, in the whole or in part, those laws which take away from liberty' (Bentham 1843, II: 493b). In other words, rights have to be set in their socio-economic and political context.

[109] The stratagems used by Italian Fascists and German Nazis in order to rise to power are illustrative in this regard.

Consequently, a full definition of rights has to include their 'negative' side.[110] In this chapter, I analyze the 'negative' clauses of the Convention.

Albeit rights' theorists identify the importance of the 'negative' side of rights, the 'negative' clauses only play a secondary role in their theorizations of rights. Rights' theorists usefully argue that rights-based ideas inform limits and exception to rights. They tell us that one defines a society as rights' friendly by evaluating the primacy that its legal system accords to rights. True, the Convention does not foresee a society that guarantees collective goods optimally only at the cost of guaranteeing rights. However, with this premise, rights' theorists focus on 'subjective' faculties that important rights protect. Albeit the role of limits, exceptions, and anti-abuse provisions remains pronounced in their analysis, the role of these negative clauses remains extraneous to their conceptualization of rights. Think of contractarian theory of rights. It is hard to opt for such a path without implicitly considering rights 'pre-political'.[111] However, if rights are pre-political, they can critically evaluate political power without bearing any systemic content, because pre-political is pre-systemic. In order to conceptualize normative power of particular rights alone, this stance may remain justifiable. Nevertheless, it disregards the importance of rights as a system. However, the question concerning system and its importance come to the fore, when holders test rights to their limits.

On the other hand, influential legal scholars that give due importance to the 'negative' side of rights consider rights as mere reflexes of 'objective' law. In their narratives, the 'negative' clauses show priority of extra-rights-based norms over rights. Given the fact that 'negative' conditions substantiate rights, they argue that rights have no autonomous substance. Thus, they tell us that when one focuses on the 'negative' side of rights, one sees that declarations of rights are just a reflex of the way one organizes power in a society.[112] Such a conception of rights views rights as a system only by connecting it to a polity.[113] As such, the systemic bond lies neither in rights nor in their negative side, but in an exogenous factor. Indeed, to an extent, we can see that limits and exceptions restrain individual freedom and empower the state. However, even this

[110] Bacon considers such a route as being methodologically decisive. He notes: 'The nature of an use is best discerned by considering first, what it is not; and then what it is: for it is the nature of all human science and knowledge to proceed most safely by negative and exclusion, to what is affirmative and inclusive' (Bacon 1857, VII: 398). Concerning freedom, Kant notes:

> 'The concept of *freedom* is a pure concept of reason. It does not constitute an object of any theoretical knowledge that is possible for us; and it can by no means be valid as a constitutive principle of speculative reason, but can be valid only as a regulative and, indeed, merely negative principle of speculative reason' (Kant [1797] 1999, 14).

[111] One can also discern such a pre-political understanding of rights in the conceptualization of economic freedoms in the case law and the secondary law of the EU.

[112] Few of the major writings of Carl Schmitt, Lorenz von Stein, and Sergio Panunzio reflect this trend.

[113] This conception tends to re-emerge with force when there is a founded or unfounded perception that the circumstances seriously threaten the stability of the polity. The recent series of European crises fit into this pattern. The overlapping of financial, fiscal, economic, and "security" crisis in the EU, and very especially the Eurozone, have paved the way to specific policy proposals and general discourses that 'objectivize' rights.

picture is partial. Limits and exceptions to rights are Janus-faced. Thus, we can respond to these legal scholars by showing that such limits and restrictions render freedom possible and limit the power of public institutions by setting their legitimate scope. In fact, we shall see that the role of anti-abuse provisions is to protect the Convention from interpretations that reduce the Conventions norms either to objective law or to abstract freedom.

In this chapter, I analyze those statements that mention legal norms in negative terms. My focus is twofold. First, I see statements that define a rights-friendly legal system by mentioning how its protection does not work and where its protection ends. Then, I look at statements that identify what rights-holders do not have to with their legally protected free capacities and what the public authorities do not have to do in the name of guaranteeing rights. I develop my argument based on such an analysis. I argue that freedom requires both the positive affirmation of moral agency and the constraining of moral agency. That is, there is no 'raw' or 'pure' understanding of rights or freedom. The 'negative' clauses in the Convention flesh out legal obligations, and operationalize them through governmental practices. This results in subjects being required to perform certain actions and abstaining from others.[114]

I begin by analyzing the way rights constitute freedom by limiting rights or making exceptions to them (§6.1). To do this, I analyze limitation and exception clauses. I argue that limitation and exception clauses qualify and calibrate rights by setting rights in their wider social, economic, and political context. Later, I see how the Convention equips itself with standards with which the Convention organs can directly tackle wrongs of sufficient intensity and systemic nature by looking at both their formal and substantive aspects. I do this by analyzing anti-abuse provisions. I read the case law of Article 17 and Article 18 (§6.2). Finally, I elaborate the concept of 'negative governmentality' based on the foregoing analysis. I argue that the idea of freedom underlying the Convention both positively affirms moral agency and constrains it (§6.3). The discussion ends with brief concluding remarks (§6.4).

§6.1 The shape of freedom: On limitation and 'exception' clauses

This section focuses on certain social constrictions that make freedom possible. I do this by looking at limitation and exception clauses. I argue that limitation and exception clauses place both rights and freedoms in a legal framework. The resulting idea of freedom that the Convention presupposes has a certain shape.

[114] Thus, from a governmental viewpoint, the problem is to shape conduct by both encouraging and disencouraging certain actions.

§6.1a The structure of limitation and exception clauses

Limitation and exception clauses qualify and calibrate ECHR rights by setting them in their wider social, economic and political context. They perform three main functions. 1) These clauses open rights up to the various notions of the collective good. This includes economic well-being, territorial integrity, health and safety, the maintenance of law and order. Consequently, this opening up prevents 'law [from referring] only to law' (Schütz 1995, 120; cited in Agamben, 2005, 26). 2) Limitation and exception clauses relate the guarantee of rights to the specific social practices aiming to shape the conduct of legal subjects. 3) Limitation and exception clauses reconcile social change (leading to different understandings of what the collective good entails) with legal determination. In particular, the interplay between abstract rights and context renders possible a stable and still open to change interpretation of constitutional standards, in this case, the Convention rights.[115]

In this section, I first look at the limitation clauses (§6.1b). Then, I analyze exception clauses (§6.1c). Later, I look at the case law of limitation and exception clauses to make some theoretical points (§6.1d).

§6.1b The shape of freedom as limits to liberty: On limitation clauses

> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.
>
> Article 11(2) of the Convention: Freedom of assembly and association

Limitation clauses are a defining element of the right being limited. This does not entail that they are an 'inherent' part of the right (*Golder v. the UK*, paras 21, 40). Nevertheless, they have a relevance of their own. They identify the protective reach of each right by reference to the values and objectives that underpin it. To put it differently, by setting the rightful scope within which a right can be limited, limitation clauses specify the substantive content and the purpose of the limiting act.[116] Resultantly, the

[115] In *Soering v. the United Kingdom,* the ECtHR noted that 'the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective' (para. 87).

[116] Thus, the test performed by the ECtHR in its case law of discerning whether rights have been interfered with in a proportionate pursuance of 'legitimate aims' is crucial. It in turn makes the interfering

conduct of the addressees of the law is regulated in view of the objectives underpinning the limitation clauses, at the very same time that the limited right is afforded legal protection. Thus, the case law of articles with limitation clauses forces the ECtHR to analyze the justifiability of the specific interferences (see, Ch.1, 2, 3, and 4). For example, when the ECtHR finds that activities that cause noise (within certain limits) are justified, despite limiting the right to respect for private life (including privacy of the home),[117] the Court is affirming that a wide understanding of economic well-being determines (and defines) the concrete rights enjoyed by the plaintiffs.

As such, limitation clauses define what it means to live in a rights compliant society. The limits to liberty define the shape of freedom that the rights-holders enjoy. If we consider the case law of the ECtHR systematically, we will conclude that the Convention defines autonomous life as, for example, the life of individuals who are members of a territorially secure state, in which they enjoy participation in a performing economy with low levels of unemployment, and in which they enjoy access to education and health. Thus, as a rights-holder, I can challenge the concrete interpretation of the rights I enjoy, including the limits to those rights. What I cannot challenge is the existence, rationale and function of limits to rights. In other words, while I can challenge the specific configuration of the limits to rights, I cannot challenge the constitutive role of limitations. In sum, limitation clauses and limiting practices have a constitutive character and effect, which lies at the core of not only individual autonomy but also of an autonomous society.[118]

Further, unlike legal scholars conceptualizing rights as mere reflexes of objective law, we can see that governmental practices that limit rights are themselves determined by the very rights they limit, instead of becoming end in themselves. Think of surveillance. Now, there may well be very good reasons why the right of privacy of a specific person or persons has to be limited and restricted. If there were good grounds to conclude that a certain Mr. X is engaged in a criminal conspiracy to undermine national security, a judge would be justified in ordering the eavesdropping of the communications of Mr. X. Still, the Convention requires to prevent a potential abuse of state power through procedural safeguards, including judicial supervision (see, *Leander,* para. 62; *Huvig and Kruslin,* para. 33*; Malone,* paras 79, 87; *Klass,* paras 39-60).

Table 6.1: Limitation clauses: Articles 8-11

measure legitimate, shifting this concept of judicial interpretation, as an effect, from focusing on ends to the determination of proper means.

[117] See, *Powell and Rayner v. the UK* (paras. 37-45), and *Hatton and Others v. the UK* (paras. 116-130).

[118] 'Constitutional rights can only be limited by or on the basis of norms likewise with constitutional status' (Alexy 2010, 185).

ECHR Articles	Article 8 ECHR. Right to Respect for private and family life	Article 9 ECHR. Freedom of thought, conscience, and religion	Article 10 ECHR. Freedom of expression	Article 11 ECHR. Freedom of assembly and association
paragraphs that mention limitations to the rights that their corresponding article protects	Article 8(2) ECHR. There shall be no interference by a public authority with the exercise of this right except such as is:	Article 9(2) ECHR. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are:	Article 10(2) ECHR. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are:	Article 11(2) ECHR. No restrictions shall be placed on the exercise of these rights other than such as are:
compliance with the law (with respect to both its form and its quality)	in accordance with law	prescribed by law	prescribed by law	prescribed by law
democratic necessity (procedural and substantive)	and is necessary in a democratic society	and are necessary in a democratic society	and are necessary in a democratic society,	and are necessary in a democratic society
political necessities relating to national security	in the interests of national security,		in the interests of national security,	in the interests of national security
political necessities relating to territorial safety			territorial integrity	
social concerns	public safety	in the interests of public safety,	or public safety,	or public safety,
economic necessities	or the economic well-being country,			
maintenance of law and order	for the prevention of disorder or crime,	for the protection of public order,	for the prevention of disorder or crime,	for the prevention of disorder or crime,
public health, general welfare, social policy	for the protection of health or morals,	health or morals,	for the protection of health or morals,	for the protection of health or morals
consideration of rights and freedoms of others	or for the protection of the rights and freedoms of others.	or for the protection of the rights and freedoms of others.	for the protection of the reputation or rights of others,	or for the protection of the rights and freedoms of others.
protecting confidentiality within certain social, economic, and political institutions			for preventing the disclosure of information received in confidence,	
preserving the independence and objectivity of judicial bodies			or for maintaining the authority and impartiality of the judiciary.	

§6.1c When abstract rights meet concrete practices: On exception clauses

The Convention articles also contain certain exceptions. I hereafter refer to them as exception clauses. For example, the guarantee of the right to life finds its exception when 'quelling a riot or insurrection' (see, Ch. 1).

Broadly speaking, exception clauses perform two related functions. First, exception clauses make certain rights claims inapplicable within certain domains. For example, Article 4 prohibits forced labor. However, the companion exception clause makes clear that it is not possible to characterize compulsory military recruitment during wartime as forced labor (Article 4(3b)).

Second, exception clauses make a specific construction of that right (by reference to specific conditions or historical context) part of the normative understanding of the right. For example, Article 5 on the right to liberty and security applies in a different manner to mentally ill or individuals suffering from infectious diseases. Thus, one detains mentally ill, alcoholics, or individuals suffering from infectious diseases not primarily with a view to bringing them 'before the competent legal authorities' – which is crucially mentioned in Articles 5(1a to 1d) and 5(3) ECHR. Albeit it presupposes judicial supervision, relevant authorities can justifiably detain those that Article 5 ECHR mentions in exceptional terms without a prior court order.[119] Similarly, albeit those that are mentioned in exceptional terms remain rights-holders and can make Article 5 claims, the rationalities allowing the law to interpret their rights cause legal rules to see their rights in a contextual, and hence in an exceptional, manner. Simply put, unlike a convicted murderer, the relevant authorities detain me, a mentally unstable individual, not for what I have done but for what I am, and thus they detain me primarily for my own therapy and welfare. Similarly, the fact that Article 3 does not foresee exceptions does not entail that states abolish training of their special operation soldiers because it is inhuman or degrading.[120] In fact, doing so implies constructing the right in a manner blind to the specific historical and protective context in which it makes sense. To put it differently, exception clauses exempt certain institutional setups, practices, and rationalities from the breadth of the rights, in order to make sense of the way a society actualizes those rights.

Consequently, exception clauses calibrate rights because of the specific terms of the relationship between the individual and public authorities. In particular, this remains valid for special and intense relations of subjection, e.g., soldiers, prisoners, vagrants, mentally or physically ill. Notably, these relations unfold within specific institutional structures, e.g., the army, hospitals, asylums, isolation wards, social support institutions. Crucially, these clauses make exception with respect to the forms of knowledge on which these institutions depend, e.g., military sciences, medical expertise, psychiatry and psychology, social policy, and welfare discourse. Precisely which set of rights applies to one's case and what precise interpretation those rights merit depend on the specific terms of such a relationship.[121] Calibration of rights

[119] See, for example, *Winterwerp v. the Netherlands* (para. 38), *Aerts v. Belgium* (para. 46), *Johnson v. the UK* (paras. 61-66), and *Koniarska v. the UK* (The Law).

[120] In her study of the structure of war in the twentieth century, historian Joanna Bourke notes:

> 'In all military training programs, the fundamental process was the same: individuals had to be broken down to be rebuilt into efficient fighting men. The basic tenets included depersonalization, uniforms, lack of privacy, forced social relationships, tight schedules, lack of sleep, disorientation followed by rites of reorganization according to military codes, arbitrary rules, and strict punishment. These methods of brutalization were similar to those carried out in regimes where men were taught to torture prisoners: the difference resided in the degree of violence involved, not its nature' (Bourke 1999, 67).

[121] While dealing with Article 6(1) complaints, the Court has paid attention to 'the special relationship of trust and loyalty' (*Pellegrin v. France*, para. 67) that binds a public employee to the state. This allows the Court to interpret their Article 6(1) rights in a special, i.e., exceptional, manner. Thus, when it comes to civil service employment disputes, especially concerning those public servants that serve in 'the

through exceptions renders clear the limits of rights narratives that reduce rights to mere reflexes of objective law. The position in which each specific person stands in relation to the law cannot be determined in purely formal legal terms, not even by reference to the rights that stem from the specific status that person enjoys. That is why, for example, a state may train its soldiers to kill and require them to expose themselves to mortal dangers. The ECtHR has found that this does not entail either the violation of the right to life of the soldiers or forcing soldiers to violate the right to life of others (see, §1.1). Likewise, in *X v. Germany*, the Court found that actions aiming at preventing prisoners from committing suicide were justified, even if the very same actions would say to result in the violation of the right to liberty of persons not being imprisoned. Human rights standards do not determine, for example, why a state must possess legitimate violence at all or why should imprisonment function as a social practice. However, and that is important to stress, human rights identify the threshold of legitimate violence by the state and the level of suffering that can be imposed through confinement.

Table 6.2: Exception clauses: Articles 2, 4, 5, and (to an extent)[122] 6 and11

ECHR Articles	Article 2 ECHR. Right to life	Article 4 ECHR. Prohibition of slavery and forced labor	Article 5 ECHR. Right to liberty and security	Article 6 ECHR. Right to a fair trial	Article 11 ECHR. Freedom of assembly and association
paragraphs that mention	Article 2(2) ECHR.	Article 4(3) ECHR. For the	Article 5(1) ECHR. Everyone has the	Article 6(1) ECHR.[123] In the	Article 11(2). This article

armed forces and police' (*Pellegrin*, para. 66), the Court considers, with few important conditions, Article 6(1) inapplicable. Consequently, albeit Article 6(1)'s text itself speaks of limiting complaints to civil and criminal cases, the contextual determination of those limits generates consequences whereby those who remain a part of the 'core' civil service (*Pellegrin*, para. 65) cannot rely on Article 6(1) rights in order to challenge, say, the termination of their employment contracts.

[122] Both Articles 6 and 11 simultaneously exhibit the tendencies of appreciating certain exceptions and determining certain limitations. Whereas Article 11(2) mentions 'restrictions', it ends by mentioning an important exception. Similarly, whereas Article 6(1) 'excludes' certain parties from 'all or part of the trial', its opening clause limits complaints to civil and criminal cases (than complaints relating to administrative measures, for example). More, the interpretation of Article 6 by the Convention organs has made room for certain 'limitations by implication' on the rights it protects (*Golder*, para. 38) that, even when not mentioned in the text of the article, are necessary in order to place this article in its proper context (c.f., *Stanev v. Bulgaria* (para. 230)). Thus, the case law of Article 6 talks about equality of arms, proportionality between means employed by the public authorities and the legitimate aims they wanted to achieve, balance between time given to defense and the overall time of the trial, among others. However, to the extent that the text of Article 6 does not mention limitations, and the case law does not analyze the applicability of the right first and then reconstruct proper limitations systematically, it appears conceptually mistaken to list Article 6 with those articles that explicitly contain limitation clauses. Nevertheless, one must pay attention to the overall context in which the Convention organs interpret Article 6 as an important non-derogable right and the way they consider how the imposition of limitations on this right by public authorities remains compatible with guarantee of an effective and fair trial.

[123] Article 6(1) only deals with the aspect of 'publicness' in the context of trial and judgment. This does not function as a limitation clause, despite delimiting the breadth of 'publicness'. Article 6(1) simply 'excludes press and public' in certain situations from 'all or part of the trial'. Article 6(1) does not seek to balance various aspects. In other words, albeit the exceptions relating to publicness mentioned in Article

exceptions to the rights that their corresponding article protects	Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:	purpose of this article the term "forced or compulsory labour" shall not include:	right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:	determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing… judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial:	shall not prevent the imposition of lawful restrictions on the exercise of these rights by members:
pre-empting or countering that violence which is unlawful	(2a) in defence of any person from unlawful violence;				
necessity of lawful detention and legitimacy of prison as an institution	(2b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;	(3a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;	(1a) the lawful detention of a person after conviction by a competent court; (1b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (1c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;		
defence related necessities and the legitimacy of military as an institution		(3b) any service of a military character or, in case of conscientious objectors in			of the armed forces,

6(1) chime with limitations mentioned in Articles 8 to 11 (i.e., public order, national security, in the interests of society or of morals), Article 6(1)'s keyword refers to exclusion (i.e., 'excluded') than 'interferences' (Article 8(2)), 'limitations' (Article 9(2)), or 'restrictions' (Articles 10(2) and 11(2)). More, whereas the case law of Articles 8 to 11 balances limiting measures vis-à-vis specific rights, Article 6(1) looks at the substance of the procedure. These include, for example, an analysis that see whether the authorities tailored the form of procedure with respect to exceptional, important, or relevant reasons. The Court does this without developing any step-by-step interpretive test that ultimately determines the legal interpretation of rights guaranteed by Article 6. Thus, the 'closedness' of the trial in certain cases, with reference to specific conditions, remains part of the normative understanding of Article 6(1) right.

		countries where they are recognised, service exacted instead of compulsory military service;			
countering threats to public order and collective well-being	(2c) in action lawfully taken for the purpose of quelling a riot or insurrection.	(3c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;		in the interest of public order or national security in a democratic society, of morals	
law and order related necessities and the legitimacy of police (and civil services' structures) as an institution					of the police or of the administration of the State.
civic obligations		(3d) any work or service which forms part of normal civic obligations.			
considerations of the welfare of children, and the legitimacy of corresponding institutions (i.e., schools, care institutions, juvenile centres)			(1d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;	where the interests of juveniles … so require	
health related considerations, and the legitimacy of corresponding institutions (i.e., hospitals, asylums, rehabilitation centres, detention wards)			(1e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;		
political necessity relating to state's management of entry into and exit from their territories			(1f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.		
other unforeseen, special circumstances				or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.	

§6.1d The case law of the ECtHR on limitations and exceptions

In its case law, the ECtHR underlines the central role that limitations and exceptions play in the configuration of the Convention rights. This subsection explores four points. 1) Limitations and exceptions set rights in their socio-economic context. As such, the rights they limit or except are not pre-political. 2) Limitations and exceptions both presume and constrain democracy. 3) Limitations and exceptions refer to certain practices. Thus, the rationality they make room for presumes, say, expertise, professionalism, and institutional structures. One cannot reduce that rationality to one power center or source, i.e., legislature or judiciary. 4) Limitations and exceptions refer abstract rights to a context. The interpretation of A's right to x and B's right to x varies with the context in which A or B find themselves in.

1. Limitations and exceptions: Whither natural rights?

When referring to limitations and exceptions, the ECtHR makes a constant reference to collective and individual interests. It is because the legal interpretation deems legal freedom as both a manifestation of interests and as guarding such interests (individual or collective) that 'balances' between rights and goods can be struck without undermining freedom (c.f., Raz 1986, 31, 176, 190-2, Kramer 1998, 7-11).[124] Critics allege that the balancing metaphor and weighing exercises undermine freedom. However, the legal interpretation of rights in the background of limitations and exceptions results in outlining the scope of freedom. One determines the scope of freedom by reference to both the substantive normative content of rights (e.g., liberty, private life, free speech) and the governmental practices that necessarily result from a specific legal-political setup (e.g., confinement, economic progress, territorial integrity). This very act of delimitation of the sphere within which individuals are actually free to act renders possible the emergence of freedom as something else than a mere individual capacity: that is, as an organizing social principle. In other words, it is the guarantee of rights in conjunction with the limitations and exceptions to rights that defines freedom in legal terms. The grounding of human rights in their legal and social context through the limitation and exception clauses entails that the ECHR is based on

[124] As a conceptual tool in politics, the literature assumes interests as calculable (so that it can be approximated and measured), variable (so that it can be taken up, can change over time, and be abandoned) and generalizable (so that different interests can be neutralized and added up). This understanding permeates the rationale of electoral politics (so that different individual votes can be compared, substituted, and statistically analyzed) and the ends that a democratic state proposes to itself (so that it can follow 'collective interests' and prevent 'sectional interests').

the rejection of the pre-political character of rights, and consequently, of natural law theories (Postface, §2).[125]

In other words, we can approach the Convention rights only by reference to a certain and specific praxis. Freedom emerges procedurally and relationally. As such, we cannot identify freedom as a specific 'natural' feature of unencumbered individuals.

2. The strange question of democracy

Among all the limitations mentioned in ECHR, the test performed by the ECtHR to determine whether an interfering measure is 'necessary in democratic society' has proved to be one of the most demanding in its case law. This test has resulted in decisions in favor of the claimants' rights in a significant number of cases.[126]

The preparatory notes and the Convention's preamble attest to the fact that the Convention assumed that political system of all the signatory states was, and would remain, democratic. Indeed, the Convention intertwines democracy and human rights. It characterizes democracy both as the bulwark of rights (and as a political form that protects the interests of rights-holders) and as a normative structure that constrains the exercise of rights (and protects everyone's rights and genuine social and individual interests).[127] On the one hand, the case law assumes that through a democratic law-making process all justifiable limits to rights were established. On the other hand, the interpretation of rights and limitation clauses hinges on the fact that to what extent limits uphold and sustain a democracy, i.e., to the 'being necessary in a democratic society' test.

Two noteworthy socio-political effects of the intertwinement of democracy and rights follow. First, by considering that rights require both democratic authorship and legal determination, the Convention affirms that democratic societies uphold and enforce rights. This is why the Court acknowledges that ECHR states, as 'democratic' polities, possess: (1) a margin of discretion in guaranteeing rights; (2) a margin of error when

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[125] Jellinek notes that 'the legal order adds something to the freedom of action of the individual, which that individual does not by nature have (*der Handlungsfähigkeit des Individuums etwas hinzufügen, was es von Natur aus nicht besitzt*)' (Jellinek [1892] 2011 , 47). As noted in the Introduction to Part I of our inquiry, Article 1 ECHR avoids referring to any idea of the human essence from which all human rights flow, unlike Article 1 of the Universal Declaration of Human Rights (e.g., reason and conscience). ECHR simply mentions human rights; it does not justify them. Further, Convention both relies on consent and on consensus; natural law, however, does not.

[126] Greer notes:

> 'The phrase "necessary in a democratic society" is arguably one of the most important clauses in the entire Convention since, in principle, it gives the Strasbourg organs the widest possible discretion in condoning or condemning interferences with rights which states seek to justify by reference to one or more of the legitimate purposes in the second paragraphs of Articles 8 to 11' (Greer 1997, 14).

[127] Ibidem.

failing to protect rights; (3) the possibility of recalibrating the protection of certain rights (within bounds and limits) in emergencies. To an extent that states lapse in their democratic character, the Convention organs remain unwilling to develop a lax interpretation of such margins (see, §5.3).[128]

Second, by construing rights as principles that underpin the functioning of democracy, the ECHR constrains democracy through the very standards that make up and define democracy. The tension between rights and democracy is inherent and internal to democracy itself, and accounts for the fact that the substantive content of rights does not depend, as the content of ordinary law may depend, on the change of the ruling majority. The general assumption is that the procedural structure of the ordinary law making generates legitimate norms. However, by itself, this does not guarantee compliance with constitutional standards. In a narrow sense, democracy refers to a specific procedure of law and decision-making, i.e., parliamentary democracy. In a wider sense, democracy refers to a wider social setup. Thus, the Convention embeds democratic legitimacy in its own normative standards, i.e., the Convention norms. As constitutional principles, the Convention norms have a legitimacy and stability that is higher to those of democratic proceduralism in a narrow sense. Therefore, even when democracy as a political procedures falters (so that rights-holders have to be protected from threatening majorities) (e.g., *Refah*, paras. 89, 95, 99, 102-3) or recedes (so that the courts bypass the democratic competence of the legislature) (e.g., *Dudgeon*, para. 61), the constitutional structure contains resources to uphold democracy in a wider sense.[129] In other words, the Convention does not ground the rule of law on reflexive democratic law making only, but in the normative commitment of the legal system to the democratic constitutional structure. Thus, from the Convention viewpoint, it might become necessary to rule against procedurally enacted positive laws (as we will see in §6.2, in relation to Articles 17 and 18).

In sum, democratic constitutional system connects freedom with constitutional rights and democratic procedures on one hand, and with specific collective objectives and governmental practices on the other. Autonomous moral agency becomes possible in such a 'framework of constraints', as Raz phrases it.[130]

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[128] In this sense, Article 15 ECHR presumes democracy both as a process (so that it is legitimate to invoke it when democratization is being strengthened) and as a peculiar legal subject (so that the use of Article 15 is permitted only when the invoking state is a democratic state). In one sense, democracy is achieved by asserting itself. In another sense, democracy is saved by preventing its violent overthrow. Therefore, Judge MacDonald succinctly notes: 'A state of emergency declared not to further democracy, but to destroy or repress it, would be invalid under Article 15' (MacDonald 1998, 226).

[129] C.f., Austin: 'The *important* difference is the difference of *modes*, and not the difference of *sources*. Provided it be made in the *direct* or the *legislative* manner, law, established immediately by subject judges, is just as good as law emanating immediately from the sovereign. Judges legislating avowedly in the manner of Roman Prætors, might do the business *better* than any of the sovereign Legislatures that have yet existed in the world' (J. Austin 1885, 533).

[130] Raz: 'Autonomy is only possible in a framework of constraints' (Raz 1986, 155). Luhmann: 'Freedom itself emerges as a result of its restrictions' (Luhmann 2014, 288). C.f., Mill:

3. Reason, rationality, and rights

It is important to notice that a number of the notions that are key in the drafting of limitation and exception clauses, such as 'interests of public safety' or 'protection of health', refer to established standards of scientific expertise and discourses, regulatory practices, and professional protocols. This means that it would be too simplifying to affirm that the limits to rights are set by legislative prerogative, or, even for that matter, judicial prerogative or interpretation.[131] One cannot reduce the context presupposed by limitations and exceptions to a limited power center or limit it within a defined meta-legitimacy discourse. Thus, even legislative and judicial interventions draw on prevailing social standards regarding what constitutes relevant knowledge and expertise. Take the idea of 'margin of appreciation' as an example. Importantly, this idea is central in the balancing of rights and collective interests. Without taking into account the wider socio-economic parameters crucial in balancing act, one cannot provide an analysis of this doctrine. Thus, it would be reductive to define this doctrine simply as an exercise of power by the national government.

4. The interpretation of rights and the presumption of a context

Importantly, if practices making human rights intelligible are diverse and dissimilar, it means that the idea of autonomy is likewise heterogeneous. For example, what kind of treatment befits an autonomous life is different in the case of, say, a mentally unstable person, a terminally ill patient, an imprisoned convict or a serving soldier. Autonomy cannot be defined obliterating such differences or, for that matter, downplaying the rationalities that define autonomy in specific contexts. Divorcing the definition of social and political freedoms from the context in which they operate fails to take into account that freedom becomes meaningful only against a background of actual practices. For example, a child in a rights friendly society is autonomous to the extent that education disciplines him, and his parents are not free to deny him education at all. Similarly, identifying discursive inputs from rights-holders as the source of freedom does not capture the way regulation of subjects takes place without or against their consent, let alone their inputs. For example, in the care proceedings

> 'The principle of freedom cannot require that he should be free not be free. It is not freedom, to be allowed to alienate his freedom. These reasons, the force of which is conspicuous in this peculiar case, are evidently of far wider application; yet a limit is everywhere set to them by the necessities of life, which continually require, not indeed that we should resign our freedom, but that we should consent to his and other limitation of it' (Mill [1859] 1992, 103).

[131] This is apart from the fact that the legislature can only address issues in their generality, which for their concrete determination fall on the judiciary. This fact makes the judicial practice of 'balancing' not only unavoidable but also expedient. It is expedient in the sense that there is no general rule of concrete limitation that in effect reduces a legal right to a nominal status.

relating to Article 8 on the right to respect for private and family life, professional voices from particular vantage points (e.g., national social workers, expert psychologists, teachers, and welfare authorities) contribute to shape the normative notions associated with autonomy (see, §2.3b).

Similarly, one cannot capture a managerial control over lives in discourse-based terms alone. For example, even if we understand punishment in terms of a communication theory (Bennett 2008, Markel 2012, Tasioulas 2006), we cannot account for the rationalization and function of, for example, supervisory observation, spatial distribution, or daily routine patterning of prisoners in a prison setup. Likewise, we cannot rely on rights to influence and eventually limit or constrain the profiling of convicts based on their crime and danger in a prison setup. Nevertheless, we can use rights to determine whether an act of profiling in a prison setup is racially discriminatory. Crucially, the burden of proof lies on us to analyze the practice of rights, not on the practice of rights to conform to our theoretical models of rights.

§6.2 Between the form and the substance of freedom: On anti-abuse provisions

Limitation and exception clauses do not exhaust the complete definition of rights as a system. When deciding on from Articles 2 to 16 of the Convention, the case law assumes that the legal system of a signatory state, which it addresses, is functional and compliant. With this background of structural legality, only specific instances appear a problem question, i.e., the manner in which a legal system guarantees rights, the extent to which procedural forms protect rights, the way a legitimate political system can derogate from the guarantee of certain rights during emergencies. To the extent that they do, systemic questions may come to the fore based on these articles when a legal system is unable to guarantee rights at a large-scale and over an extended period, that is, only by implication. However, even then the guiding assumption largely remains unchanged: formal restructuration presupposes substantive commitment with rights-based norms. Consequently, in the final two articles, i.e., Articles 17 and 18, the Section I of the Convention takes a further step. It concretizes the understanding that remains implicit in other articles (i.e., consequently, the ECtHR always reads Articles 17 and 18 in conjunction with the other Convention articles), and pays attention to the eventuality that rights, or at least its vocabulary thereof, might be used to put in jeopardy the stability of a rights-based legal system. Thus, with Articles 17 and 18, the Convention equips itself with standards with which the Convention organs can directly tackle wrongs of sufficient intensity and systemic nature by looking at both their formal and substantive aspects. By the help of these articles, the Convention develops standards that tell what a rights-based legal system is not, in order to protect it. Consequently, the Convention acknowledges the need for legal regulation of possible

systemic threats to a rights-based system. This section analyzes Article 17 (§6.2a) and Article 18 (§6.2b).

§6.2a Abuse of rights: Liberty versus rights?

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.
>
> Article 17 of the Convention: Prohibition of abuse of rights

Article 17 excludes the abuse of rights from the legal scope and remit of rights. Article 17 mentions 'State, group or person'. As such, it addresses everyone involved in realizing the Convention project. This broad referral acknowledges the diffused nature of the issue Article 17 mentions. In collective terms, Article 17 ECHR provides tools to save democracy. Without such a standard, participants may engage in democratic process to turn democracy (as the Convention envisions it) into a hollow shell. Showing abuse of rights as anti-juridical act plays a role in preventing anti-constitutional majorities from realizing their aim of dismantling constitutional democracy from within.[132] In individual terms, Article 17 prevents a legal subject qua moral agent from abusing its freedom and agency. Article 17 withdraws (even if only temporarily, as long as that is required to defend constitutional democracy) the enjoyment of the rights a rights-holder abuses (to the extent that it abuses them). Crucially, Article 17 talks about the Convention rights and freedoms themselves as vulnerable to actions that threaten the Convention. Thus, the threat it (en)counters does not come from an extrinsic source.

Preventing the strategic abuse of rights requires empowering public institutions to render them capable of tackling such wrong use of rights, while ensuring that they wield public power in accordance with legal norms and procedures. By mentioning 'State' or 'group', Article 17 ensures that the abuse of rights by rights-holders does not provide the authorities with an excuse for a flight from law (*Glimerveen and Haagenback v. the Netherlands*, p. 187). Structurally, Article 17 ensures that rights-holders exercise rights within the legal context of a democratic constitutional system. Thus, the case law handles Article 17 complaints in those cases where groups or individuals become liberticidal, and make use of the Convention rights as tools with which to erode the rule of law. Of course, challenges to a legal system can exist in other forms. Think of armed rebellion or terrorism. However, challenges that do not make use of rights, but of other

[132] In *Vogt v. Germany*, the ECtHR, acknowledged the legitimacy of the concept of a 'democracy capable of defending itself' (para. 51, 59). In *Ždanoka v. Latvia*, the ECtHR interpreted Article 17 in this light (para. 98-101).

means (including, quite obviously, physical force) do not come within the remit of Article 17. The legal framework within which the state then has to react is a different one, akin to classical standards. For example, in those cases, the public authorities can apply either Article 2(2) (concerning lawful deprivation of their lives) or Article 15 (concerning an extended period of their detention without trial when authorities apprehend suspects).

1. Article 17's syntax

Contrary to most other articles in the Convention, no right is enshrined in Article 17. Instead, it affirms a key 'duty'. This duty is both legal (do not abuse the rights protected by this Convention) and hermeneutical (do not misinterpret rights; do not include in the breadth and scope of the rights actions that are formally within its protective range, but substantially result in the undermining of rights). Thus, Article 17 ECHR neither protects a specific capacity of rights-holders (i.e., expression, liberty) nor requires procedural standards in view of those (i.e., fair trial, no punishment without law). As a result, one of the fundamental pillars of the architecture of European human rights law is not a right, but a 'duty'.[133]

2. Invoked by

Unsurprisingly, the public authorities invoke Article 17 against litigants that are formally rights-holders. The prohibition of the abuse of rights reverses the standard normative relation governed by the Convention. Article 17 protects the legal system of human rights as a whole as well as specific Convention rights from rights-holders with a view to safeguard the democratic constitutional system. For example, in *United Communist Party of Turkey v. Turkey*, the ECtHR identified five broad criteria when a group may

[133] For Kelsen, 'the right in the specific sense of the word is the legal power to enforce an existing duty' (1991, 324). This definition of right assumes an already existing normative justification to protect an action or an object, and a legal power that enforces those standards aptly. Therefore, rights have a relational character. Consequently, there already exists a possibility of governability of relations construed in legal terms. However, one's status as a subject of rights, within the legal system, is itself premised on a basic duty. This duty imposes an obligation as enshrined in, for example, Article 17. See, Kant, for example, who at one point in *The Metaphysics of Morals* notes:

> 'If a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering* of a *hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it' (Kant 1991a, 25).

Therefore, as a condition of possibility, human rights are premised on a duty that a subject of right owes both to oneself as a holder of rights and to the legal system. To the extent that human rights system remains premised on such a duty, and to the extent that Article 17 mentions it, this moral duty understood in legal terms remains *conceptually nested* with the idea of rights as entitlements, i.e., which set of rights I am entitled to depends on my conduct vis-à-vis the aforementioned duty.

abuse the right to association through the creation and maintenance of a political party. (1) The party is not a democratic party 'proper' because 2) the party resorts to illegal or undemocratic methods, 3) encourages the use of violence, 4) aims at undermining the democratic and pluralistic political system, 5) and, pursues objectives that are racist or likely to destroy the rights and freedoms of others (para. 23; cf., *German Communist Party*, at 4).

3. Drawing the line between misuse and abuse of rights

The tension between the affirmation of autonomy and the curbing of autonomy to safeguard it calls for a delicate balancing act. Thus, Article 17 aims to prevent the 'complete' subversion of human rights.[134] Other actions that do not affect the wholeness of rights are seldom a point of interest for Article 17. The ECtHR deals with those actions by looking at limitation clauses. Thus, in *Paksas v. Lithuania*, the ECtHR noted that Article 17 activates only 'on exceptional basis and in extreme cases' (para. 87).

4. Article 17's construction

Given the possibility of abuse, an anti-abuse provision refers to the abuse in generic terms. Its concrete determination and application is a matter of interpretation. Article 17's text is likewise open-ended. This allow for an expansive interpretation. Thus, Article 17 serves as a complement to the meaning of all other substantive articles of the Convention. Article 17 is in itself a 'negativity' to be read in conjunction with each of the other substantive Convention articles. The purpose of Article 17 is to complement the full legal meaning of all other articles. This is the case, for example, when the limitations of an article with which Article 17 is read in conjunction with are considered to be limiting, and there is nevertheless an acknowledgment that that right is being utilized for ends 'contrary to the text and spirit of the Convention' (*Marais v. France*, p. 190).

In such a way, Article 17 operates as a fundamental check over the use of various fundamental rights. In particular, it prevents individuals and groups with liberticidal aim 'from exploiting in their own interests the principles enunciated in the Convention' (*Paksas v. Lithuania*, para. 87). Wherein such an aim does not exist, the ECtHR does not apply Article 17. In order to illustrate this point, let us look at *Paksas v. Lithuania*. It dealt with a complaint from a former Lithuanian President. The national authorities impeached him and disqualified him to hold elected office for life, after being

[134] Since Article 17 is to be used in order to prevent a subversive use of the Convention rights, the public authorities cannot use Article 17 for those reasons that the Convention does not explicitly refer to, see *United Communist Party v. Turkey* (para. 60).

condemning him on several accounts for cronyism. The ECtHR stated that Article 17 could not be invoked by the (new) Lithuanian authorities, because the underlying conduct (of the former President), even if reproachable, did not aim at subverting the system of rights (para. 89).

There is no balancing in the case law on Article 17. Its 'negative' character entails that there are no limitations or exceptions. It takes two not only to tango, but also to balance. One employs Article 17 not to determine in what manner the legal interference of rights is to take place, but rather to determine that with which one interferes (Keane 2007, 643, 656). Thus, in those cases where Article 17 is applied, the legal decision is, comparatively speaking, not detailed.[135] As such, the logics of freedom reach their conceptual and articulatory limits, when they confront the essence of unfreedom.[136]

5. From formal validity to substantive validity

Article 17 ensures that the exercise of each right is not simply legally but also normatively valid. This connects each article of the Convention enshrining a fundamental right with the normative order of a rights friendly society. Therefore, the scope of difference that each fundamental right promotes and guarantees stays within a 'uniform' framework of plurality – akin in effect, but not in rationale, to Rawls's idea of 'reasonable pluralism'.

Further, those individuals and groups that combat a legal system by abusing their rights find their enjoyable set of legally guaranteed rights reduced in view of their moral 'rightness'. Importantly, however, it means that the activation of Article 17 does not throw one against whom the public authorities invoke this article out of the legal context. That is in the sense that all of its legal protections are withdrawn (*Glimmerveen,* para. 195). In *W. P. and Others v. Poland*, for example, the ECtHR dealt with a complaint against Polish government for banning a racist and anti-Semitic association entitled 'National and Patriotic Association of Polish Victims of Bolshevism and Zionism'. In it, the ECtHR noted that to achieve Article 17's purpose, it was not 'necessary to take away every one of the rights and freedoms guaranteed from persons found to be engaged in activities aimed at the destruction of any of those rights and freedoms' (*W. P. and Others*, The Law). Thus, Article 17 only causes that subject (party, individual, group) to lose those rights that protect its specific capacity, such as association, thought, or expression. Only those capacities that abuse rights are, so to

[135] Whereas the case law of Articles 8 to 11 relies on the notions of balancing and discretion, when ECHR reads these articles in conjunction with Article 17, the exercises relating to balancing and discretion reach their judicial limit.

[136] Therefore, for Cannie and Voorhoof, Article 17 generates 'guillotine effect' (Cannie und Voorhoof 2011, 58).

speak, 'neutralized' (*Lawless v. Ireland*, 1, 13, 15).[137] Additionally, it entails that a holder of rights does not lose non-derogable rights.

Importantly, Article 17 ensures that when a rights-holder abuses its rights by interpreting them unreasonably, it is human rights itself which requires circumscribing its capacity to act. This entails that the abuser remains through and thoroughly a rights-holder. Article 17 identifies the set of rights that one is entitled to depending on one's conduct, without conditioning the very status as rights-holder. Legal interpretation undertakes the calibration of the scope of action by reference to statements, actions and manifestations, and participation in organized social activities (*Kühnen*, The Facts; *Schimanek,* The Facts).[138] For example, in the *German Communist Party* case, the former Commission noted that the party itself spoke of 'the dictatorship of the proletariat' (p. 3). Therefore, its establishment and organization constituted an activity within the meaning of Article 17 (p. 4). This fact in itself made invocation of Articles 9, 10, and 11 redundant. Resultantly, Article 17 ensures that rights-holders exercise their rights in a manner that the exercise of rights remains generalizable within the context of human rights. Thus, Article 17 is important in the framework of ECHR because it ensures the continuity of a legal system the Convention establishes in the face of contingency and behavioral unpredictability.

6. Article 17's preemptive character

Further, unlike other articles, Article 17 does not wait for an act to take place. Article 17 is pre-emptive (*Glimerveen*, p. 196). Law can use Article 17 to withdraw the protective capacity of specific rights. This occurs at a time when the content of an act is troublesome, albeit the subject is within an ostensible legal threshold (*Glimerveen*, p. 190; *German Communist Party*, p. 4). In *German Communist Party*, for example, the party had not established 'the dictatorship of proletariat' to which it aspired. As such, Article 17 is theoretically central in another sense. It explicitly gives the positive legal system a strong normative basis. Thus, an application of Article 17 goes beyond any abstraction that positive law does from the kind of motivation in order to gauge

[137] As far as jurisprudence of Article 17 is concerned, the Court has applied it to those cases from rights 'have been deflected from their real purpose' (*Paksas*, para. 88). These are: the right to freedom of thought and opinion (*Kühnen*), expression (*Glimmerveen*, *B.H., M.W., H.P. and G.K. v. Austria, Schimanek v. Austria*, *Ivanov v. Russia*, *Norwood v. the UK*, *Garaudy v. France, Lehideux and Isorni v. France*, *Remer v. Germany)* or association (*Refah*, *Communist Party*, *Hizb-ut Tahrir v. Germany*, *W. P. and Others v. Poland*). The fact that the Court has read Article 17 with these rights is unsurprising, once one notes that these rights protect those capacities that try to bring social change. Thus, in his *Legality and Legitimacy*, Schmitt says that such rights (to expression, association, opinion) are, in view of the capacities they protect, 'social catalysts'.

[138] One can discern the first signs of such liberticidal aims at the level of expression. Thus, in a large number of cases, the ECtHR read Article 17 in conjunction with Article 10 on the right to freedom of expression. This is especially so when a remark is explicitly 'directed against the Convention's underlying values' (*Paksas*, para. 88).

legal conformity. As such, the case law of Article 17 is not simply limited to being contented with protecting a law-abiding behavior. Consequently, law may rely on Article 17 to tackle a conduct before a liberticidal individual or group increases its socio-political influence enormously. In fact, one of the crucial tasks that the drafters of the Convention faced, and consequently the aim that Article 17 importantly tries to realize, was to block the resurgence of liberticidal leaders and groups.[139] In other words, a political consciousness of temporality guides Article 17. If the threat however becomes alarming, a democratic constitutional state can make use of Article 15 (see, Ch. 5).

7. Distinction between abuse and misuse of rights

The ECtHR seldom finds Article 17 applicable after a threat has subsided or has been overcome (*De Becker*, pp. 137-8). Very telling in that regard is *Lehideux and Isorni v. France*. In that case, the ECtHR rejected constructing the limits of freedom of the press through the perspective of Article 17, contrary to what the French authorities had done when the leading French daily *Le Monde* had published an article defending a rather revisionist account of Pétain's role in the Vichy regime. Characterizing the publication as an abuse of rights failed to consider the fundamental role of time and timing in the application of Article 17. The Court noted that 'the lapse of time makes it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years previously' (§ 55).

8. Completing the circle

Article 17 encourages groups or individuals to modify their liberticidal behavior. We can understand the ruling in *Kühnen*, for example, as providing an invitation to the rights-holders to drop references to a revolutionary overthrow of State and to the establishment of a dictatorship of proletariat from the political agenda of their political

[139] The preparatory notes of Article 17 ECHR clearly pinpoint the aim of its drafters: developing standards that would legally regulate abuses of rights and freedoms *before it is too late*. As a drafter of Article 17, Maxwell-Fyfe remarked: 'We do not desire by sentimentality in drafting to give evilly disposed persons the opportunity to create a totalitarian government which will destroy Human Right altogether' (Fyfe 1957, 3). In his concurring opinion in *Lehideux*, Judge Jambrek influentially noted: 'The European Convention was drafted as a response to the experience of world-wide, and especially European, totalitarian regimes prior to and during the Second World War. One of its tasks was, according to Rolv Ryssdal, to "sound the alarm at their resurgence"' (para. 3). Despite the validity of this observation, the source cited (1991) does not contain any such quote from Ryssdal. Be as it may, in *Refah Partisi v. Turkey*, the ECtHR noted: 'A State cannot be required to wait until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent' (para. 102).

party.[140] This reconciles the prohibition of the abuse of rights to undermine the Convention with the tolerance of arguments regarding the desirability of the very content of the Convention. It is because of this tricky balancing act that Article 17 stands in an inverse relation with the social effectiveness of human rights norms: the lesser the number of cases in which states 'win' on the basis of Article 17, the more socially effective human rights norms are likely to be in the guidance of conduct in a society.

§6.2b Human rights and state power: A primordial if agonistic relationship

> The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.
>
> Article 18 of the Convention: Limitation on use of restrictions on rights

We have seen how Article 17 signals to rights-holders what they cannot do based on rights that constitute their agency in legal terms. The regulation of freedom necessarily includes the prohibition of certain courses of 'free' action based on a proper consideration of the full context of such actions. Whereas limitations and exceptions to rights define the shape of freedom, Article 17 defines the essence of (un)freedom. Now, I consider the other 'dark' side of rights, the 'statal' equivalent of abuse of rights.

National authorities may make use of rights and rights discourses in ways that render the legal and political system (increasingly) antithetical to the effective enjoyment of rights. If, in abstract terms, the Convention calls on the state power to guarantee rights, the force and power of the state may result in the undermining of rights.[141] This calls for law closing the full definition of rights by means of limiting the very limiting and

[140] In certain cases, this may cause anti-constitutional elements to be duplicitous and ambiguous. What is academically required at such moments is to analyze the manner through which their apparently legal conduct is conceptualized. For a relevant case study, one can look at the political repercussion of Jörg Haider's far-right Austrian Freedom Party (*Freiheitliche Partei Österreichs*) which was included in the Austrian cabinet when it gained 26.9% votes in the general elections of 1999. Subsequently, there was an instalment of diplomatic sanctions against Austria by the EU. However, the report of the panel appointed by the ECtHR monitoring Vienna's human rights record was decisive in ending the sanctions. Similarly, a recent judgment by the German Constitutional Court that blocked the ban on extreme right wing National Democratic Party (*Nationaldemokratische Partei Deutschlands*) is interesting because of its focus on the issue of public opinion and general influence. The Court believed that on the both these counts, NPD did not stand any chance to succeed. Things would have been otherwise, had NPD been influential. In other words, it also means that when human rights meet a political limit, it becomes less of righteous government of men and more of government of righteous men.

[141] Arendt, for one, famously observed in her *The Origins of Totalitarianism* that state power is both the effective guarantor of rights and its principal violator (pp. 267-304).

excepting actions of the state. This is the structural role played by one of the fundamental provisions of the Convention, Article 18.[142]

Article 18 limits the discretion of public authorities, when restricting the scope of Convention rights.[143] As is also the case with Article 15 (empowering public authorities to calibrate the remit of rights during emergencies; see, Ch. 5), Article 18 ECHR stands out because it explicitly addresses not rights-holders but the public authorities. On what concerns the latter, the result is the limitation of the restricting powers of the public authorities. While the argumentative burden rests with the eventual individual plaintiff, Article 18 renders clear that the setting of limits and exceptions to rights in the Convention does not imply extending a blank check to the Convention states. Freedom can and must be restricted in order to ensure the wholeness of the system of rights. The limitations and exceptions foreseen in the Convention constitute the clear set of rationales for that purpose. Limitations and exceptions actually undertaken for other reasons constitute actual breaches of Convention rights (*Khodorkovskiy v. Russia*, para. 260; *Gusinskiy v. Russia*, para. 77). In plain English, there may well be instances in which the ECtHR regards actions that public authorities claimed constituted legitimate limitations to rights not as limitations as such, but as violations of rights (*Gusinskiy v. Russia*, paras. 73, 75).

1. The text in its context

Article 18 results from the tension between the general and abstract characterization of public authorities as the guarantor of Convention rights and the concrete and, so to say, contextual possibility that specific public authorities may either breach Convention rights or, hopefully only exceptionally, may be willing to become their nemesis. It is indeed the concrete and historical 'state' that is occasionally condemned based on Article 18. Thus, the ECtHR, even if declaring the responsibility of the state, focuses on the specific actors within the machinery of the state responsible for the breaches.[144]

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[142] A widely read textbook, for example, wonders:

> 'It is not clear why Article 18 was included in the Convention. There is no equivalent provision in the Universal Declaration of Human Rights … There is not much guidance in the preparatory work. Article 18 may seem to add little to the Convention except to make explicit what is either implicit in other provisions or may be thought to be well established under the general principles recognized by international law' (Rainey, Wicks und Ovey 2014, 124).

[143] In *The Greek case*, Article 17 was invoked by the applicant states against the use of Article 15 by the Greek colonel junta. However, the ECmHR decided against the derogation, and did not consider Article 17 as being useful to analyze the case. Albeit in this case the Commission did not read Article 15 in conjunction with Article 17, it did not rule out a possibility for such an analysis.

[144] While mentioning in *Gusinskiy*, the role of prison authorities, Acting Minister for Press and Mass Communications, and a State investigating officer in intimidating the applicant (para. 76), ECtHR decisions involving Article 18 do not find the state per se to be in wrong. It only identifies specific individuals working in the state machinery – not the general signifier of the State – as a causal factor, even when this may resultantly give the state, from a legal perspective, a 'transcendent' status.

This gap requires keeping under constant scrutiny the substance and quality of state action. Review of state action demands going beyond the procedural forms and the arguments that may be invoked by the state, or what is the same, consider the substantive implications of the actual actions of the state, so to say, underneath the legal form in which they are clothed. Article 18 sets the framework under which it is possible to check whether governmental practices serve their declared purpose and unfold according to proper procedures. In *Gusinskiy v. Russia*, for example, the ECtHR found a violation of Article 18. In *Gusinskiy*, a Russian media tycoon who owned a private media company, i.e., Media Most, was arrested and detained on the charges of fraud. The detaining authorities released the applicant based on 'agreement': that they would drop charges against the applicant and release him, if he sold Media Most to Gazprom, a giant conglomerate controlled by the Russian state, at a price determined by Gazprom. The ECtHR noted that 'it was not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies' (para. 76). To put it differently, the explicit enshrinement of Article 18 aims to reduce the chances that one does not use the legal apparatus as a tool to breach Convention rights (c.f., *Ilgar Mammadov v. Azerbaijan*, para. 137; *Sisojeva v. Latvia*, para. 129).

Thus, it is based on an absence of following established practices (such as, investigation methods, detention procedures, use of the concept of 'reasonable suspicion', legal safeguards) through which the interferences with rights are permitted under the Convention that Article 18 is activated (*Cebotari v. Moldova*, para. 48). Then, it depends on manner that a State modifies those measures that it may legally limit rights under law and accrue legitimacy onto itself in the process. By looking at those practices, Article 18 ensures that the political relationship that human rights require between its own normative standards and a concrete legal-political guarantor is aptly maintained. The aptness that Article 18 maintains stands in between the exception and the limitation clauses (the legal room the Convention provides to a State by acknowledging necessities relating to its monopoly of legitimate violence) and the right to derogation (the legal room the Convention provides to a state by acknowledging necessities relating to an emergency).

As much as is the case with Article 17, Article 18 does not have a substance of its own. Thus, the ECtHR applies and implements Article 18 jointly with other Convention articles.[145] In particular, Article 18 review brings into play the unwritten 'spirit of the Convention' (*Lutsenko v. Ukraine*, para. 108). One cannot articulate such an unwritten spirit in an exhaustive manner. However, this idea as a metaphor remains a

[145] Thus, in certain cases, the public authorities can violate Article 18, even when the article in conjunction with which ECtHR reads Article 18 is not violated (c.f., *Gusinskiy,* para. 73; *Cebotari v. Moldova* (para. 49).

fundamental resource by reference to which ECtHR characterizes state actions and decisions as incompatible with the Convention.

2. Referring facts back to norms

The structural effect of Article 18 is that of completing the set of legal resources that the ECtHR can mobilize when confronted with state breaches of rights justified in the name of upholding the very same rights. While quite obviously there is a political dimension to such a state of affairs, Article 18 ECHR allows the issue to remain a 'legal' one. In other words, Article 18 provides an explicit basis on which one can tackle such infringements within strictly legal discourse. To put it differently, Article 18 draws a legal, and not merely political or moral line, between compliance with rights and manipulation of rights with a view to infringe them (*Lutsenko*, paras. 104-110; *Tymoshenko v. Ukraine,* para. 299).

It is important to add that while Article 18 adds a fundamental layer of protection against the subversion of rights 'from within', that is, protects rights from public authorities breaching them under the false cover of protecting them, the Convention system of rights cannot but assume that in most cases public authorities are a champion, not the nemesis, of rights. In other words, Article 18 cannot be an effective means of creating or recreating a constitutional culture of rights protection. If Article 18 protects such a culture, it only does to an extent that it presupposes its importance and prevents actions that would rather end it.

3. Distortion in the name of protection

Article 18 ensures that the legal apparatus on whose effectiveness and 'good faith' the Convention depends on (*Khodorkovskiy v. Russia*, para. 255; *Tymoshenko v. Ukraine*, para. 294) does not justify the distortion of rights in the name of their protection (*Gusinskiy v. Russia*, para. 76). The obligation Article 18 imposes is that a legal guarantor of rights should respect the authoritative room that human rights norms give it. Therefore, when the ECtHR noted in *Gusinskiy* (para. 73-6) that the applicant's liberty was restricted for a purpose other than that provided for in Article 5(1c), the ECtHR delimits the margin of discretion accorded to authorities. This means that limitation and exception clauses not only address rights-holders, but also a state. By doing so, Article 18 constrains, within the limitability of the aforementioned clauses, the legal systems on which human rights depend. In other words, Article 18 points to an important fact: if there are modalities of power (e.g., political, legal, administrative) that one utilizes in order to establish a rights friendly social system (i.e., democratic constitutional system), then that system has to remain cognizant of the workings of power on which it relies. This is because the later are never risk free (Foucault 2000,

372; c.f., §1.3a). The negative conditions that define such system, which emerge from within it, and the way one deals with them, constitute the 'negative governmentality' of human rights. It is to the elaboration of this concept that the next section turns.

§6.3 The constitution of freedom: On negative governmentality

This chapter has analyzed how freedoms and rights presuppose a context. I argued that practices of autonomy already presuppose limitations and exceptions to rights (§6.1). Thus, both affirmative statements on rights and limitations and exceptions to rights define rights. Then, I analyzed why and in which sense an autonomous moral agent is not free to do away with freedom (§6.2a). Rights provide their holders with the resources to contest legal and political decisions. However, one cannot construct rights as enabling rights-holders the possibility to contest the very existence of the rights on which they stand. Then, I considered the extent to which rights empower the public authorities by identifying what the state cannot do by reference to the principles underpinning rights (§6.2b).

In this section, I argue two main points. 1) All these dynamics (limitations, exceptions, and anti-abuse provisions) are theoretically interconnected. To the extent that what is of essence is what one cannot do through freedom, the crossroads where all of them meet is the idea of 'negative governmentality'. 2) The negative side of rights makes a system out of the congeries of legal norms. As such, it defines law, and rights, as a guide of conduct.

As noted, freedom requires both the *positive* affirmation of moral agency *and* the constraining of moral agency. When one looks at limitation clauses, exception clauses, and anti-abuse provisions, it becomes obvious that there is no 'raw' or 'pure' understanding of rights. Limitation and exception clauses interweave rights with collective goods, institutional structures, rationalities of government, and with law as a means of social integration. The anti-abuse provisions foresee a scenario where rights-holders or the public authorities use rights with a view to undermining the foundations of the rights-based legal system and precipitate its demise.[146] Thus, the Convention does not conceive the relationship between rights and moral agency in value-neutral terms, at least not when it comes to the underlying principle of freedom.[147] By

[146] Such a claim does not belittle at all the massive risk posed by actual public authorities breaching rights. The last century and the few years that have lapsed of the present one have been witness to massive rights violations by state actors, not infrequently justified in the name of various crises and emergencies.

[147] Schmitt notes in *Legality and Legitimacy*: 'There is no middle road between the principled value neutrality of the functionalist system of legality and the principled value emphasis of the substantive constitutional guarantees … Compared to a seriously intended value assertion and affirmation, conscientious value neutrality means a denial of values' (47; c.f., 25). C.f., Dworkin: '[One should not confuse the liberal] neutrality of government towards the conception of the good with an alleged

specifying what rights are not, what they do not protect, and what they do not allow, the Convention specifies the shape of freedom it presumes and protects. As such, these negative clauses flesh out legal obligations and operationalize them through governmental practices. In the background of such a systemic understanding, the Convention guarantees rights-holders their freedoms. Thus, it ensures that rights-holders do not make of use of their freedom in ways that undermine freedom systematically.

This negative side is not extraneous to rights. It is this fact that makes a system out of congeries of rights. Thus, it plays a major role in shaping of the actual autonomous moral agents, and in defining how they see the real and the legal worlds through both the rights and the limits to the rights that are said to prevail. Not only what can be done with and through rights, but also what cannot be done with and through rights. This entails that a formal proclamation of rights is not enough. The 'morality of freedom', to use a Razian phrase, has to be fleshed out. Substantive and concrete choices are required when coming to terms with the limits and exceptions to rights. Consequently, there is no 'raw' or 'pure' understanding of freedom.

Once we observe that the definition of rights has to comprise their 'negative side, we are bound to observe that rights do not determine standards of conduct (by means of producing normative knowledge) but they also play a major role in shaping and molding the conduct of rights-holders, very especially on what concerns the 'negative' side of rights. Thus, limitation and exception clauses are part of negative governmentality, which, among others, crucially cultivates a specific governmental rationality that guarantees that rights-holders exercise liberty in ways that ensure the stability of the democratic constitutional system. Of course, it is banal to say that legal systems expect that addresses of that legal system will comply with the legal norms. However, law cannot produce by itself addressees that regard the legal system as legitimate (in fact, to an extent, law cannot produce by itself the very reasons that ground its legitimacy) (Habermas 1996, 358-9).[148] As a result, there is no guarantee that the legal constitution of freedom would result in compliance with the law on the side of those to whom law is addressed.

Democratic constitutional theory suggests that individuals should be both authors of (active agents) and subject to (targets and objects) of the law (Habermas 1996, 113-123). One couples autonomy and consent not through law itself, but through participatory and civic structures, which foster living conditions in which individuals are safe, schooled and healthy, integrated into economic structures based on reciprocity,

neutrality about the principles of justice. [The later idea is something that] liberalism, because it is a theory of justice, must reject' (Dworkin 1986, 441).

[148] Post (1995) calls this the 'paradox of public discourse', that the law may not be used to enforce the civility rules that make rational deliberation possible (146-7).

and so on and so forth.[149] One ties general reasonability to universal acceptability.[150] The law cannot establish the very conditions of its own legitimacy. Similarly, subjects to the law may undermine the stability of the law by means of a strategic abuse of their rights. It would then be mistaken to reconstruct expressions of choice and opinion, coming hand in hand with the subversion of law through law, as exercises of self-legislation, popular sovereignty, and consent and its legitimacy.[151] Limitations and restrictions undermining the abuse of agency are required. In such circumstances, actions and governmental practices are required to uphold the rights-based legal system.[152] Consequently, those societies that constitutionalize human rights but lack practices addressing conduct that human rights structurally presuppose (e.g., political transparency, independence of judiciary, professional civil service, strong economy), i.e., practices that rationalize what autonomous life is and what not, remain unable to

[149] Habermas notes: 'The process of internalization that secures a motivational foundation for actors' value orientations is usually not repression-free; but it does *result* in an authority of conscience that goes hand in hand with a consciousness of autonomy' (Habermas 1996, 67). In order to supplement legal rules with an apt political character of a society, Kelsen notes that 'in practice, civic education is one of the principle demands' of the democratic constitutional order'. He further notes: 'All education, it is true, is based on the relationship between teacher and student – an intellectual form of the leader-follower relation – and therefore (in a good sense) essentially authoritarian in character. Nevertheless, the problem of democracy presents itself in social practice as an educational problem on the grandest scale' (Kelsen [1929] 2013, 95). Likewise, Rorty notes: 'Producing generations of nice, tolerant, well-off, secure, other-respecting students in all parts of the world is just what is needed—indeed, *all* that is needed—to achieve an Enlightenment utopia. The more youngsters like this we can raise, the stronger and more global our human rights culture will become' (Rorty 2010, 361). Griffin: 'Rights will be largely ineffectual unless someone declares and publicizes them, and educates people in them, and gives them weight in society' (Griffin 2008, 104).

[150] Reasonability requires that the rational conditions that establish a free order allow deliberation and choice to an extent that those conditions are not effectively jeopardized. Normatively, deliberation occurs within such an order, not about ending it. If this gap between reasonability and rationality is not bridged, one faces a paradox. A famous remark in this regard is Rousseau's:

> 'In order for a nascent people to appreciate sound political maxims and follow the fundamental rules of statecraft, the effect would have to become the cause; the social spirit, which should be the product of the way in which the country was founded would have to preside over the founding itself; and, before the creation of the laws, men would have to be what they should become by means of those same laws' (*The Social Contract* at II: Chap. 7).

[151] E.g., Dyzenhaus: 'To say that public opinion is the ultimate basis of the rule of law does not make its principles contingent on what the public thinks' (Dyzenhaus 2006a, 64). Habermas: 'The development of a constitutional state can be understood as an open sequence of experience-guided precautionary measures against the overpowering of the legal system by illegitimate power relations that contradict its normative self-understanding' (Habermas 1996, 39).

[152] Raz notes:

> 'Since individuals are guaranteed adequate rights of political participation in the liberal state and since such a state is guided by a public morality expressing concern for individual autonomy, its coercive measures do not express an insult to the autonomy of individuals. It is common knowledge that they are motivated not by lack of respect for individual autonomy but by concern for it. After all, coercion can be genuinely for the good of the coerced and can even be sought by them' (Raz 1986, 156-7).

either guarantee human rights effectively or to shield rights-based norms from the possibility of systemic threats.[153]

Negative governmentality builds a bridge between the form of the legal system and the substantive content of the norms that are part of it. A purely formal understanding, for example, of procedural standards ignores the extent to which procedures remain substantively nested with constitutional principles. Thus, constitutional principles define procedural standards in contextual (e.g., forms of behavior that procedure considers relevant), normative (e.g., presupposition of rational will-formation), and systemic (e.g., the role and scope of procedural standards in certain key political institutions) terms. In other words, the formal aspect of democratic procedures interrelates with the legal rules that determine the shape of the legal system, i.e., democratic constitutional system. In the same vein, formal, procedural analysis of law is always insufficient, because it does not take into account the fundamental importance of the tension between form and substance, or what is the same, the eventuality that formal compliance may result in substantive infringement. In law making, law adjudication, and implementation, the Convention interconnects means and ends. Thus, the Convention considers the substantive outcome of a procedure legitimate, if the outcome is in line with the normative conditions that render the procedure legitimate. Consequently, groups or political parties cannot legitimize their anti-constitutional activities either by participating in the procedure or by complying with procedural standards only in a formal sense. To the extent that the democratic procedures themselves do not affirm something concrete and remain rather formal, legal rules underlie their formal basis. That is, they delimit the acceptable forms of discursive contributions and restrict certain unreasonable inputs and outputs, i.e., by specifying what these procedures are not, what kind of behavior remains unacceptable, and what kind of uses participants cannot put them to.[154]

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[153] The question *how* a rights-based legal system is to be established cannot be answered exhaustively by referring reflexively to human rights law. The rationale of negative governmentality closes the legal gap between norms and their implementation. In fact, the effectiveness of human rights depends to the extent that a society interrelates human rights norms with practices prioritizing certain conduct, and disencouraging certain others. Consequently, at moments when rights-based legal system is being established, standards like Article 15, for example, could be retroactively used to justify such legal and political transitions. Once installed, however, such a legal system can then be used ex post facto to deal with the violations of specific human rights during and prior to such transitions.

[154] With an awareness that certain 'unreasonable' doctrines may find it impossible 'to abide by constitutional regime except as a *modus vivendi*' (Rawls 2005, 489), Rawls believes that it is important that a rights friendly society develop legal standards that do not consider inputs from these doctrines as equally legitimate in the overall legitimation pool. He notes:

> '[The] existence [of unreasonable doctrines] sets a limit to the aim of fully realizing a reasonable democratic society with its ideal of public reason and the idea of legitimate law. This fact is not a defect or failure of the idea of public reason, but rather it indicates that there are limits to what public reason can accomplish' (ibid).

Further: 'That there are [unreasonable] doctrines that reject one or more democratic freedom is itself a permanent fact of life, or seems so. This gives us the practical task of containing them – like war and disease – so that they do not overturn political justice' (Rawls 2005, 64). C.f., Ackerman: 'The only reason for restricting immigration is to protect the ongoing process of liberal conversation itself'

In sum, under the heading of 'negatively governmentality', one can primarily analyze three related things, within a legal system. First, it is shaping freedom. This extends to identifying what one cannot do through freedom. Such constriction helps shape autonomy and its agents. Second, it is analyzing abuse of freedom. This requires focusing on the essence of (un)freedom. It entails studying the function of those rationalities that identify subversive conduct, practices that manage it, standards that elaborate the befitting way to deal with them, and strategies that bring an abusive subject back within the legal context. Third, it is legally regulating abuse. This relates the problem of preserving a legal system back to the legal rules. Thus, negative governmentality extends to the question of developing practices of government whose task is to ensure that free subjects do not govern themselves in an abusive manner. It is the social task of those legal structures that seek to uphold a culture of autonomy to determine in what manner can freedoms be, in Alexy's words, '*correctly* distributed' for subjects spread over a range of socio-political formations.[155]

§6.4 Concluding remarks

This chapter emphasized the importance of limits and restrictions in the full and proper definition of rights. It argued that rights play a fundamental role in the governing of European societies. They do this by not only affirming certain normative standards (and in the process producing normative knowledge) but also by deeply shaping the way in which the addressees of the law regard themselves and their environment. The negative side of the rights provides an understanding of the *systemic* relationship between the different Convention rights.[156]

Like legal scholars that find rights as mere reflexes of objective law, this chapter argued that limitations and restrictions are not extraneous to rights. Unlike their findings, it argued that limitations and restrictions do not simply refer to either public power or to a polity in a reductive sense. Further, it argued that both limits to rights and anti-abuse provisions limit the power of public institutions. Thus, like rights' scholars, this chapter argued that rights give their holders important resources with which they counter public power. Unlike rights' theorists pinpointing the pre-political nature of rights, this chapter argued that rights require institutional discipline and support. One cannot say that a

(Ackerman 1980, 95). Thus, although future generations, from a legal perspective, do not hold any right because they are inexistent and consequently cannot have their legal rights violated in a court of law, the legal standards shaping, restricting, and conditioning the freedoms of existing rights-holders (i.e., negative governmentality) ensure that future generations inherit a legal system that would treat them as rights-holders (Rawls 2001, 159).

[155] 'The law actively creates liberties, so it always causes – directly or indirectly – losses of liberty … This raises the question of the *correct* distribution of liberties' (Alexy 2010, 158).

[156] Given the nebulous surrounding the role of negative governmentality in international human rights law, it remains difficult to speak of international human rights law *as a system*, even when one grants the effectiveness of international human rights law as a discourse.

legal system guarantees the right to an 'autonomous' life, if people are placed at a major risk of living short and unhealthy lives, prison system is in ruins, the economy fails, neighboring states are belligerent, and children are not sent to schools by their parents. The idea of an autonomous life becomes meaningless without governmental discipline. The latter is a necessary condition for freedom to be both socially established and individually exercised in a satisfactory manner. Thus, what emerges is the very principle of the rule of law, to the extent that the latter wards off not only arbitrary exercises of legal and political power, but also reproachable patterns of action and conduct from legal subjects.[157] The first mechanism ensures the protection of freedom; the second ensures the regulation of subjects through freedom.[158] Both go hand in hand.

At the same time, this chapter intervened into the existing debates on governmentality. It showed that the idea of shaping conduct remains connected to the idea of restricting, limiting, and preventing certain courses of action. By focusing on the Convention, this chapter showed how a governmental order closes itself to certain practices in order to reproduce itself.

In sum, based on a detailed analysis of the 'negative' clauses of the Convention, I showed that these often-neglected norms turn the ECHR into a genuine legal system. The sections here studied not only form an integral part of the Convention, but more importantly, function as certain limit-concepts that play a decisive role in determining the actual substantive content of rights in critical situations, in the very cases in which the role of rights is tested to its limits. It is at these critical junctures that the fate of the human rights system that the Convention establishes is ultimately determined.

[157] Rule of law, Hayek notes, means 'that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how authority will use its coercive power in given circumstances, and to plan one's individual affairs on the basis of this knowledge' (Hayek [1944] 2001 , 75-76; c.f., Raz, 1977, 195-211, Fuller 1964, 39-40, 44). In *Sunday Times v. the United Kingdom,* the ECtHR noted: 'A norm cannot be regarded as a **"**law**"** unless it is formulated with sufficient precision to enable the citizen to regulate his conduct' (para. 49).

[158] Laws that are not human rights friendly or legal systems that do not seek to uphold human rights either govern subjects with respect to certain moral ideas (e.g., national consciousness, collective reawakening, class struggle, virtue, serving God) or consider it sufficient to leave the subjects free in a non-governmental sense. The idea that freedom can be regulated, that regulation can produce freedom-friendly contexts, that if there is no regulatory power in place one cannot enjoy freedom, and that regulation can take freedom as its aim and axis remains central to human rights. It is this idea that differentiates human rights from the aforementioned moralized legal understandings. More, it is this idea that brings human rights closer – in the sense of having a certain foundational affinity with – to those rationalities of government that likewise interrelate freedom and government: a free market economy and the broader 'liberal' family of rights.

A Postface to Human Rights

Part I of our inquiry read selected substantive rights, i.e., right to life (Ch. 1), right to respect for private and family life (Ch. 2), right to freedom of religion (Ch. 3), and right to freedom of expression (Ch. 5). Part I argued that an effective guarantee of human rights place the corresponding capacities in their apt social place. It saw how judiciary interprets legal codes (permissible/ impermissible, legal/ illegal, valid/ void) in the light of certain practices and rationalities. Part II of our inquiry read those 'negative' articles that complement substantive rights, i.e., derogation in time of emergency (Ch. 5), and limitation clauses, exception clauses, and anti-abuse provisions (Ch. 6). Part II argued that 'negative' articles, despite taking something away from substantive rights, allow a systemic reconstruction of the content of the Convention. It saw how human rights remain interwoven with collective goods, institutional structures, and law as a means of social integration.

This chapter concludes our inquiry. It recapitulates our main findings in a summary form. I begin by focusing on the structure of a human rights claim. I see how the government of conduct functions as a rights' problematic. More, I focus on the interpretive structure of the government through human rights (§1). Then, I see how viewing human rights as governmentality intervenes into the debates in legal theory. In addition, I briefly see how our perspective differs from natural law and positivist models of viewing human rights (§2). Later, I see how viewing human rights as governmentality contributes to the debates in political theory. Then, I briefly see how, and to what extent, viewing human rights as governmentality differs from influential models that attempt to capture the practice based on human rights norms. Lastly, I end by offering brief remarks concerning the universalization of human rights (§3). Predictably, the picture that I sketch of legal (§2) and political (§3) theory remains caricatured.

§1. On human rights as governmentality

The broader setting and the limits of a human rights claim

The ECHR gives rights-holders normative resources with which they can put forward human rights claims. From a rights' advocacy perspective, a legal system that simply guarantees human rights when rights-holders make claims fails to guarantee human rights effectively. Unlike the general tenor of criminal law, clear infringements alone do not activate human rights law. Instead, human rights law orders things. For example, let us begin by cursorily focusing on a human rights claim. Making a regressive analysis of a right to life claim, we can see that right to life assumes police, courts, prisons, and

the necessity of violence (see, §1.1). When dealing with X's claim that its interned brother Y lost his life in violation of Y's right to life, the Convention organs assume that the police and prisons respect human rights, national court interpret human rights reasonably, and that rights' compliant structures can justifiably be violent. Seeing Y's right to life by looking at its progressive effects, we can see that a judgment in the favor of X's claim involves something more than X's personal compensation. Ideally speaking, it forms part of a process that allows the national authorities to train, say, prison wardens in line with the rights of the imprisoned (c.f., Hart 1994, 40; see, §1.1c). However, as rights' experts who train professionals know, not all human rights-based constraints on social structures and processes require explicit human rights claims or function in an ex post manner. For instance, a legal system that effectively secures rights and freedoms preempts violations of rights by treating rights-holders in line with their human rights. Albeit crucial, guiding social structures and processes through rights-based norms is irreducible to explicit human rights claims. Neither the social background itself nor all its constraints are the cumulative sum of particular human rights claims (see, §4.2).[159] This cryptic point requires some elaboration. For this purpose, let us expand the scope of our analysis by focusing on the context of rights.

On the structure of a human rights claim

Before focusing on the context of rights, I briefly analyze the structure of a human rights claim. Consider a rights-holder L making a human rights claim concerning the protection of its x. Here, x is any capacity that a specific human right protects. Take the right to association (association being x) as example:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.
>
> Article 11 of the Convention: Freedom of assembly and association

Suppose L serves in the military as a private. In the military, L aims to create an employees' union composed of non-commissioned officers. The union would lobby for

[159] 'While some enforcement measures are at the discretion of, or affected by decisions and preferences of, the right-holders, others are not. They are a matter of public concern, and public officials are in charge' (Raz 2010b, 38; c.f., Donnelly 2013, 9).

higher pays, law working hours, better working conditions for the non-commissioned officers, and more effective combat presence of high-ranking officers. Upon seeking recognition of the union, authorities tell L to call off the project. Given L's incompliance with the directive, the authorities dismiss L from service. L alleges that its dismissal from military violates its right to freedom association.

L's rights claim operates from a specific subject position, i.e., a (former) private in the military. Likewise, L's claim operates with respect to its subject position, i.e. L's dismissal from the military violated L's rights and that L's lobbying activities in the military were justified. When the judicial bodies analyze L's rights claim, they analyze the case on hand with an eye to both the broader institutional setup of the military and L's specific circumstances. Logically, analyzing L's rights claim in a military setup necessarily acknowledges the broader collective good that military delivers, e.g., national security. This point is obvious when we look at the text of Article 11. When Article 11(2) mentions restrictions on freedom of association, it presumes that laws guarantee rights to x in a society that regulates x in view of, say, national security. Formally speaking, we can use the following illustration to understand the rights claim:

management of x ↔ L's rights claim ↔ L's subject position

↓ ↓ ↓

social objectives ↔ right to x ↔ institutional setups and specific circumstances

Let us look at the structure of the protectable as per L's rights claim. When L claims violation of its right to x in a military setup, law analyzes the complaint by seeing whether the military authorities followed proper procedures that respected, say, L's interests. However, law places L's interests in the light of rationalities guiding the military setup, e.g., discipline, hierarchy, efficiency. True, rights claims by rights-holders constrain the rules by which military treats them. For example, military cannot prohibit me, a sergeant, from associating with my extended relatives, only because my relatives happen to share an ethnic identity with the rebel group that the military fights against then. Despite L's status as a rights-holder, which limits what the military authorities do with L, the rationalities that elaborate interests do not flow from L's status as a rights-holder. In other words, how military disciplines its members to create an efficient fighting force or how military hierarchy achieves 'oneness' is (to an extent) susceptible to rights claim; however, it cannot be deduced from it. Similarly, when Article 11(2) mentions members of the armed forces in exceptional terms, the right Article 11(1) protects applies to military personnel in an exceptional manner (§6.1c). Yet, the right alone cannot tell us all that is to the rationale of such an exception. We can illustrate the position of a specific rights claim using the following formula:

rationalities that govern x ↔ L's rights claim ↔ institutions, laws, procedures

Let us take another example. Suppose M is an organization that arranges a procession on an annual basis. Given disturbances last year, the city authorities this year assign M a procession route outside the main city area. M considers this trivialization of its procession's objectives, one of which is to highlight M's cause. Even if M's procession is religiously motivated, consider that the objective of publicity forms a part of its religious ritual. Thus, M believes that the new route is as useless as carrying water to the sea. M alleges that this relocation violates its right to assembly.

In this instance, the legal determination of M's right to x claim involves specific rationalities that manage x. For example, M's right to x claim revolves around the risks of violence and disorder, and around the questions concerning (say) traffic management or city development or city's economy. To the extent that the city's regulations properly enforce standards of public safety and order, and to the extent that the city's regulations respect rights-based norms, the city's restriction of M's rights remains more easily justifiable. When we look at the broader picture, we can see that M's rights claim functions in a setting, where city authorities have already certain rules regulating assemblies and processions in place. The legal interpretation of M's right to x claim focuses on both the nature and scope of those rules. To the extent that M's rights claim identifies gaps, inconsistencies, or flaws in the existing regulatory framework and its enforcement, M's rights claim influences how the city authorities redraw those rules. However, to the extent that such rules remain rights compliant and the city authorities properly enforce them, M cannot abstractly use its rights to do otherwise.

legal framework regulating x ↔ M's rights claim → M's justifiable treatment

\ ↓

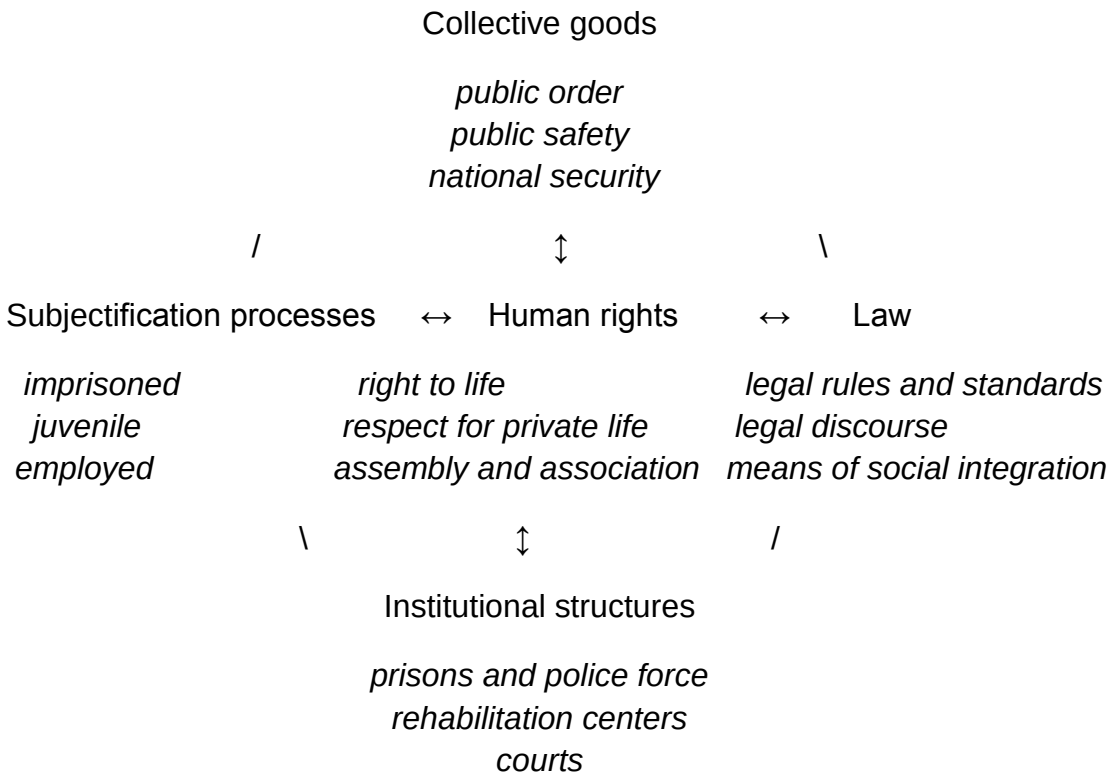
management of M's x in line with its right to x

On the context of human rights

Two points are worth noting. 1) Human rights claims contest social facts using rights-based norms. However, how a society understands those facts is not deducible from rights-based norms. 2) Human rights claims articulate rights-based norms in an applied manner. Among others, the particular legal interpretation of those norms remains sensitive to the institutional setups, specific circumstances of the case, and legal procedures.

In order to look at the broader context structuring human rights claims, let us look again at the ECHR in generic terms. When the Convention talks about securing rights and freedoms to everyone, it mentions signatories' jurisdiction. The Convention assumes legal and political institutions that have both the capacity and the will to enforce human

rights. Although both Noah and natural law may withstand a deluge of biblical proportions, it is difficult to see whether and if one can secure the Convention rights without any kind of legal and political structure whatsoever. When the Convention talks about procedural rights, it mentions, say, judicial procedures, penitentiary schemes, impartiality of trial. It uses rights to specify how institutional structures in a broader social sense should treat rights-holders. As such, institutional structures in a broader sense govern the conduct of rights-holders because they have human rights. When the Convention understands certain rights-holders in an exceptional manner (e.g., specifying that additional restrictions on the members of armed forces do not violate their freedom of assembly and association), it mainly understands rights with respect to their subject position. When the Conventions limits rights (e.g., limiting freedom of expression for the sake of territorial integrity), it presumes the social provision of collective goods. This provision forms the social backdrop to a specific human rights claim. When the Convention talks about anti-abuse provisions, it systemizes particular rights. Thus, anti-abuse provisions look at the effects and meaning of a rights use. Hence, anti-abuse provisions refer rights-based norms to their legal, institutional, and social setting, in order to see whether one abuses rights in the name of rights. When the Convention talks about securing rights, remedying violations, or judicially supervising the implementation of ECHR standards, it presumes both the legal interpretation of rights-based norms and the legal regulation of the broader setting in line with such an interpretation.



I now comment on how human rights address, and regulate, conduct of rights-holders. I do this by focusing on the interaction of these variables.[160] Before doing this, I briefly mention how such a focus captures the way rights function.

On the government of conduct as a human rights' problematic

A human rights claim functions within a given social background. Albeit political theorists rightly argue that descriptive and normative views regarding personhood and autonomy underpin human rights, one cannot understand the interaction of those views with the context in terms of those descriptive and normative views alone. Take care proceedings. With political theorists, we can indeed argue that laws ought to respect autonomy of children as per their right to respect for private and family life. However, care orders involve analyzing societal variables. These include, for example, the level of hygiene in the family, the psychological stability of both the parents, or the child's educational performance and its interaction with peers and teachers at school. True, it may be helpful to understand the problem from the perspective of autonomy. However, one can only understand what autonomy entails from the perspective of the problem on hand (see, §2.2). Alternatively, legal theorists rightly pinpoint that the contextual interpretation and enforcement of rights claims presume social institutions and law as a means of social integration. However, even when law, for example, regulates noise pollution at night as per holders' right (i.e., respecting the right to private life of those living near airports), law itself does not determine the substance of the economic wellbeing of the country (see, §6.1b and §6.1d). In other words, even if legal standards determine, say, the skeletal structure of prisons, certain social understandings, ideas concerning collective goods, and rationalities concerning the government of human behavior put the necessary flesh on the bones. One overcomes the obstacles faced by political and legal theory, when one considers understanding

[160] One can object: 'Where is the idea of democracy here? Should not it function as one of the variables in the interpretive structure sketched above? Does not this mean that the aforementioned variables are rather ad hoc?' The European Convention on Human Rights does not mention democracy, to be precise. However, it speaks of something being 'necessary in a democratic society'. Both necessity and society are important here. By viewing democracy as a democratic society, the Convention considers democracy broadly. Thus, the ECtHR can decide against democratically valid decisions of a legislature, such as a ban on homosexual acts or removal of liberticidal democratic parties duly elected by a majority, in favor of upholding the idea of democratic society. By adding the idea of necessity, the Convention includes knowledge-based and good-based considerations into the formulation of 'necessary in a democratic society'. Therefore, the idea of something being 'necessary in a democratic society' remains explainable with reference to the aforementioned variables: institutional structures including legislature and judiciary, the understanding of democracy as a certain collective good, the collective goods presupposed by democracy, and the normative constraints imposed on procedural democracy by rights.

and managing conduct as an issue that influences the way we interpret and socially position human rights.[161]

On the government of conduct through rights

Three related points are notable, especially when we analyze how human rights interact with the surrounding social variables. I refer to such an interaction as government through rights.

1) Government as a condition enabling protection of human rights

Take a social movement protesting ethnic discrimination. Using human rights, this movement speaks to institutions and laws. It argues that laws should guarantee anti-discrimination rights and that institutions should prevent discrimination. In pragmatic terms, its success depends on the extent to which anti-discrimination rights regulate laws and institutions. The transition from initial rights advocacy to legal complaints relating to the violation of rights relies on the institutional and legal background that structurally incorporates anti-discrimination rights and treats rights-holders accordingly. Rights protect their holders when they perform such regulation, and, when rights, by default, manage the behavior of individuals that those laws and institutions deal with. Then, anti-discrimination rights shape institutional structures and require such structures to develop practices and projects in a normatively compliant way. If a legal system fails to steer institutional structures to govern the conduct in accordance with human rights, it fails to secure human rights effectively.

2) Government as a social effect of human rights

Suppose the said social movement achieves its aim of outlawing ethnically selective military recruitment. The laws would now require right to x to function as normative instrument with which an institution reorients itself, i.e., develops normatively compliant standards and practices. Think of statute now assigning a quota to the said minority to serve in the national military. Then, the military streamlines its employment regulations in line with the anti-discrimination statute. This includes changing hiring procedures, creating complaints' monitoring bodies, prohibiting racial offenses. Now, when I, a

[161] Hart (1994) notices that the regulation of conduct in any 'large group' through 'general standards, rules, and principles' is 'the main instrument of social control' (124). He builds on this point to cover law in general: 'If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist' (ibid). C.f., Fuller: '[Law is] the enterprise of subjecting human conduct to the governance of rules' (1964, 74).

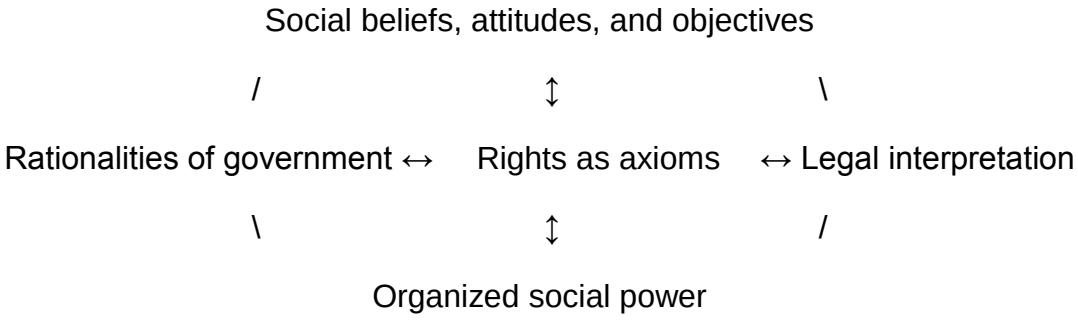
member of disadvantaged ethnic minority, join the military, the institutional structure protects my rights by ensuring that the way it treats me and the way others treat me remains normatively justifiable. Resultantly, the way that institution now governs conduct (including that of mine) by altering or introducing measures is because of holders' rights.

3) Government as a contextual project

The social effect of rights leads rights to regulate. As rights regulate, they both influence and draw on the broader context. Suppose an elite university admits me, a young student from a discriminated and historically disadvantaged minority, based on affirmative action admissions' policy. The regulation of institutional standards through rights in this case largely presumes: a) the necessity of education (i.e., a collective good); b) the forms and methods of nurturing young minds (i.e., subject positions); c) and, the existence of university structures (i.e., institutions). By looking at the anti-discrimination rights in the light of the aforementioned contextual presumptions, law engages the obligation of the public authorities to do, prevent, punish, or enable something. Given the connection of human rights with the context, a human rights claim ties rights-holders more bindingly with the normatively constrained being of the surrounding variables.

On the interpretive structure of the government through rights

I now see how government of conduct through rights interacts with those rationalities that produce subjectification processes, guide legal interpretation, ensure the provision of collective goods, and sustain institutional structures. I do this by looking at the broader interpretive framework guiding rights claims. Based on the structure of the context of rights, we can generically illustrate this interpretive framework as:



1) Government through rights as constrained by the prior regulatory understandings

Take Article 14 ECHR on prohibition of discrimination. It prohibits discrimination on grounds such as sex, race, and religion, among others. However, using anti-discrimination rights as an axiom, rights-holders cannot demand law to, say, prohibit discrimination of ugly faces in beauty contests or in commercial advertisements. Likewise, rights-holders cannot use Article 14 ECHR to argue that law should penalize piano clubs for discriminating individuals with broken fingers. Coming back to our previous example. Suppose using anti-discrimination laws military now assigns people belonging to an ethnic identity X or a religious group Y a quota to serve in the military. When people from X or Y join military using their anti-discrimination rights, they cannot use either the specific right in question or their rights in general to demand that the military fight only against those groups that are a threat to X or Y. More, doing this ignores how rights claims address an organized social power and how rights claims articulate themselves in terms of specific rationalities of government. Thus, the fact that one applies human rights norms to 'relevant' facts depends on the prior regulatory structure. In other words, the prior regulatory understandings structure the rational scope of one's human rights claims.

Alternatively, this constraint enables human rights claims. Consider a change in a variable. Suppose that advances in genetic engineering make it possible for everyone to have on a voluntary basis a beautiful face at minimal costs. Suppose the generalization of this enhancement practice alters social attitudes. Society now finds it troublesome that no one with an ugly face enters legislature. Roughly speaking, the surrounding conditions would then allow the legal interpretation to see people having ugly faces as a group, whose members can make valid anti-discrimination claims. Thus, when we discern an evolving interpretation of human rights, we pinpoint that there is no fixed content to the interpretation of human rights. That is, the interpretation both transforms surrounding variables and varies with their transformation. This fact of evolving interpretation enables critics to argue that certain past interpretations of human rights were in fact violation of human rights, even though the participants then engaged in those human rights practices considered those interpretations both binding and valid.[162] Evolutive interpretation allows a critic to distance itself from the

[162] Just think of the unease European human rights lawyers have when they find Article 56(3) of the Convention as mentioning, because of the colonial holdings of the drafting states then, that the 'provisions of this Convention shall be applied in [such overseas territories for which signatory states are responsible] with due regard to local circumstances'. This comes after Article 56(1) that, for such overseas territories, equates jurisdiction with discretion: states with overseas holdings decide whether to extend the Convention 'to all or any of the territories for whose international relations [those states are] responsible'. However, states cannot interpret Article 56(3) now as an article that allows them to limit their jurisdiction as understood in Article 1 (*Al-Skeini v. the UK*, *Al-Jedda v. the UK*). Alternatively, the change in social attitudes and political circumstances have influenced the legal interpretation. Thus, even though major former empires such as France, England or Netherlands continue to possess significant overseas territories, it is hard to see if and whether they can now justify (either legally or politically) their disregard of human rights in territories covered by Article 56(1) as legitimized by reference to Article 56(3) (*Piermont v. France*; para. 59; *Tyrer v. the UK*, para. 13). Take another example. Think of Article 12 of the Convention. Its text explicitly mentions right to marry as involving 'men and women of marriageable age'. The plaintiffs arguing for legalizing homosexual marriages now

troublesome things done in the name of human rights in the past, while also allowing it to subscribe to the continued validity of human rights – the latter being the normative instrument that allows the critic to criticize those past practices in the first place.

2) Government through rights as dependent on the prior regulatory understandings

Take Article 2 ECHR on the right to life. The legal interpretation of an Article 2 rights claim depends on the way a society understands and manages life. When rights-holders make a claim that the public authorities bear positive obligations to regulate the dangers posed to their lives in the cases of toxic emissions or because of bad urban planning (*Öneryıldız v. Turkey*, para. 90), their claim functions in the framework of biopolitics that considers optimizing life conditions as a crucial social objective (see, §1.2). Take Article 8 ECHR on the right to respect for private life. When the public authorities intervene into family lives in order to secure the interests of the children, their actions function in the framework of oikopolitics that considers health, hygiene, and proper upbringing as crucial social objectives structuring family lives (see, §2.3). Even when public authorities derogate from the guarantee of the right to respect for private life in time of emergency, it does not entail that they can derogate from the broader social understanding guiding the application of Article 8 ECHR in normal times. To put in a hackneyed fashion, derogation does not entail that the public authorities shut down rehabilitation and care centers or dismiss care professionals and experts because the public authorities have derogated from the rights guiding those practices (see, §5.1c). Thus, the interpretation of a specific human rights claim is a function of the surrounding rationalities of government.

3) Government through rights as an intergovernmental exercise

Take Article 5 ECHR on the right to liberty. This right mentions convicts, suspects, criminals, minors, diseased, lunatics, vagrants, drug addicts, alcoholics, and illegal entrants in exceptional terms. The interpretation of this right consequently focuses on the rights of these subjects with respect to the specific practices and rationalities that understand and manage them. Similarly, when Article 5 later talks about reasonability, promptness, and lawfulness it draws on norms like consistency, truth, or verifiability that both provide general standards with which to justify specific forms of procedural oversight and particular tools whose interpretation varies with the case at hand.

Take another example: Article 10 ECHR on freedom of expression. This right mentions formalities, restrictions, conditions, or penalties surrounding its exercise (see, §4.2). The interpretative context of rights determines the limits of and protects the expression

increasingly draw on the Court's elaboration of the right to respect for private and family life in order to challenge the heterosexual ideals mentioned by Article 12.

by looking at, say, specific institutional sites, e.g., news outlets, political parties, universities. I can use my rights to lobby for a foreign war; I cannot use my rights to advocate bombing my country's parliament. I can use my rights to compare humans and primates using scientific language and tools; I cannot my use rights to contrast some humans with some primates in a political campaign. When rights as axioms draw on the rationalities of government and organized social power, their interpretation determines the extent to which law protects my expression in specific circumstances. In other words, the interpretative structure identifies the extent to which a rights-holder is governable (see, §2).

4) The distinctive structure of government through rights

Both at specific and systemic level, rights manage rights-holders affirmatively and negatively. Given these dynamics, the ECHR protects freedom contextually without fixing the content of freedom through an antecedent naturalist rule.

Consider a specific case. Take Article 9 ECHR on the freedom of religion. Suppose I send my child to a school that ranks and classifies pupils in terms of the moral worth of their beliefs. Using Article 9, I can critically evaluate practices that condemn 'false' moral views. Thus, in this case, legal interpretation based on Article 9 as an axiom requires that organized social structures do not subscribe to those practices that understand subjects moralistically. In other words, the right abstains from developing an evaluative account of what it protects. In an affirmative sense, the right to freedom of religion enables legal interpretation to abstain from necessarily basing protection or regulation of religion in line with the self-interpretation of religious subjects.[163]

Consider it generally. In a negative sense, human rights allow rights-holders to contest certain practices. In such instances, human rights function as a critical tool. Further, the norms based on human rights also constrain the surrounding variables. Think of the role of human rights as constitutional standards. As constitutional standards, human rights outline freedom. Rights-holders do not have freedom outside such constrictions because there is no freedom to protect outside such constrictions. Consequently, human rights structure societal deliberation, political power, democratic politics, and law-making process (see, §6.3). The case law on anti-abuse provisions is illustrative (see, §6.2a). In an affirmative sense, human rights protect life, private life, or religion by setting up axioms surrounding their protection and requiring social practices to develop accordingly. Thus, human rights allow legal interpretation to

[163] C.f., Dworkin (2011): 'No divine authority can provide a ground for basic human rights. On the contrary, the logic of argument runs the other way: we must assume the independent and logically prior existence of human rights in order to accept the idea of divine moral authority' (340).

influence both organized social power and the rationalities of government in a way that the rights-holders enjoy their rights and freedoms aptly.

5) Government through rights and the rationalities of government: A reciprocity

Within the framework of rights, effective protection entails a reciprocal relation between specific rationalities of government and the government through rights. For example, the concern of the public health both restricts the right to respect for private life and allows holders to argue that the public authorities enforce proper health standards in their neighborhood in order to guarantee their right to respect for private life. If one thinks that rights and social goods always clash with each other, one ignores the fact that rights-holders now make rights claim in order to secure a certain social good. If one thinks that rights and social goods always overlap with each other, one ignores the fact that rights-holders can use rights to challenge a specific program delivering those goods, even when critically assessing the very basis of those goods using rights is what they cannot do.[164] Given this reciprocity, adequate laws, background practices and rationalities, and stable institutions enable the Convention signatories to secure human rights. Likewise, a proper entrenchment of human rights in their constitutional structures enables the Convention signatories to bring their laws and institutions in line with each other's.

Recapitulation 2.0: A brief and distorted summary

Let me again recapitulate the discussion. This time at the pain of distortion because the discussion is highly crammed. Consider roughly three stages dealing with the legal interpretation of a human rights claim. First deals with the context from which a claim emerges (call this 'the claim-structuring field'). Second is the claim itself and its legal interpretation. Third deals with the way the claim influences the context (call this 'the post-claim field').

First: the claim-structuring field. When a rights-holder makes a claim, it is with respect to a certain social problem, e.g., work, university, home. As such, one articulates one's claim from a specific social position, e.g., employed/ employer, student/ teacher, private subject/ home occupant. Both the formulation of the claim and the consequent legal interpretation of a human rights claim depends on this context. Take a fair trial case for example. Among others, the fairness of a trial depends on ideas like

[164] 'The right to concern and respect is fundamental among rights … because it shows [that] the idea of a collective goal may itself be derived from that fundamental right. If so, then concern and respect is a right so fundamental that is not captured by the general characterization of rights as trumps over collective goals, expect as a limiting case, because it is the source both of the general authority of collective goals and of the special limitations on their authority that justify more particular rights' (Dworkin, 1978, xv; c.f., Finnis, 1980, 218).

consistency, objectivity, impartiality. Certain practices concretize these ideas. Alternatively, these ideas are not dissociable from certain practices. Similarly, the legal interpretation of a rights claim depends on the context. Think of the way the fairness of trial contextually varies, as courts deal with juveniles, military deserters, spies, or lunatics. The claim-structuring field is a complex of knowledge and practices already guiding conduct.

Second: the human rights claim and its legal interpretation. We can cursorily see two central aspects, when we look at the legal interpretation of human rights claims. 1) Structural. What accounts for an effective and valid interpretation? 2) Substantive. What human rights achieve? Structurally speaking, a human rights claim presupposes trained judiciary and lawyers, legal institutions, a strong and compliant executive, proper and accessible complaint making opportunities, the soundness and generality of legal standards, the absence of challenges to law as a means of social integration, and the like. Substantively speaking, human rights affirm, negate, and order. The idea that the interpretation of human rights depends on surrounding rationalities of governing conduct, i.e., they are governmentality because of surrounding regulatory context (what we called as 'the claim-structuring field'), is half-truth. The other half is that human rights are a complex but distinctive art of government. Negatively speaking, human rights allow rights holders to contest aspects of social practices. Affirmatively speaking, human rights focus on specific human capacities like expression, thought, privacy, religion, or life to put them in their apt social place. The way human rights order social practices corresponds with this affirmative and negative function of theirs. Thus, human rights govern conduct of their holders in virtue of their rights. Consequently, human rights are not a license.

Third: the post-claim field. The post-claim stage then structures the field of actions within which rights-holders operate. Altering police practices, changing regulations and institutional standards, banning certain forms of treatment, imposing on the public authorities certain positive and negative obligations, and the like. Thus, the effect of legal interpretation merges with the claim-structuring field. Ideally speaking, this then influences further human rights claims. The circle closes. In this sense again, human rights standards develop a certain life of their own, as officials in charge, professionals, and experts strive to develop human rights compliant contexts without necessarily requiring an explicit human rights claim to do so. Human rights based claims remain effective within the context of such a human rights practice. More, this practice remains aware of but precedes empirically understood consent.

claim-structuring field → human rights claims → post-claim field

knowledge and practices guiding conduct *substantive and structural aspects* *ordering the context*

↓

claim-structuring field …

A side note: On the human in human rights

As we analyze the reciprocal relationship between rights and rationalities of government, one point becomes obvious. That is, when it comes to legal determination through human rights, one never confronts axiomatic human beings pure and simple, but situated beings (c.f., Hart 1994, 159). As such, it is impossible to write a history of the concept of the human in human rights without referring one's narratives concerning the human to those practices that rationalize the human.

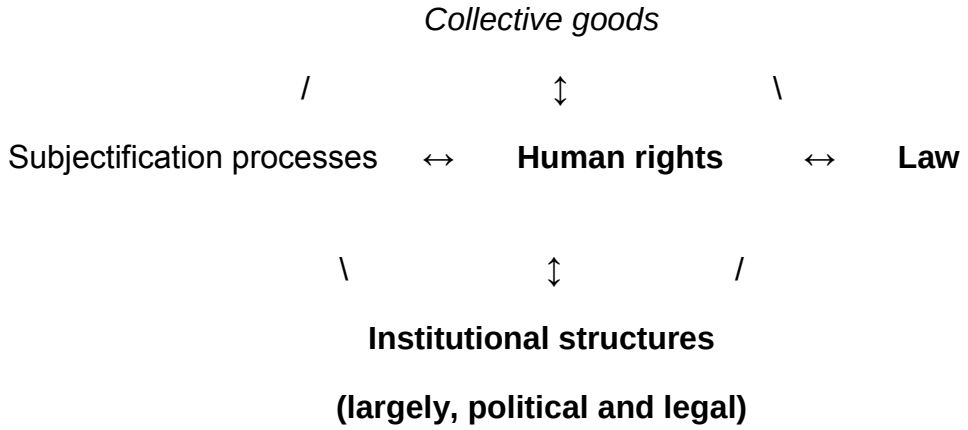
The fact that there is almost no theory of *the human* in human rights in the existing academic literature (a fact that does not bother its practice after all!), but that there is an abundant theory of rights in human rights, already pinpoints the fact that the practices that rationalize human rights, and, by implication, the human, are dissimilar. Even those who think of human rights as natural rights are not very enthusiastic about philosophizing the nature of the human in an equally detailed way. The problem runs deeper: If a theory understands specific ideas of human as underlying specific human rights, how those specific ideas add up to give a unified picture of human rights requires having in mind a unified figure of both humans and human rights beforehand. Alternatively, if a theory understands the human in general terms, it is not clear how that idea would engage all the specific human rights and their evolving interpretation in convincing terms, because different practices underlying different human rights rationalize and manage human capacities differently.

§2. Human rights as governmentality: A dialogue with legal theory

I first see how our perspective contributes to legal theory. Then, I briefly see how, and to what extent, viewing human rights as governmentality differs from influential models (i.e., natural law and positivist) of viewing human rights.

Government through rights and legal theory

In general, legal theory analyzes human rights largely in terms of their relation to law and legal and political institutions. Thus, legal discourse, legal professionals, legislature, executive, courts, and the constitutional status of human rights figure prominently in their works. When legal theorists view human rights as normative resources that allow rights-holders to put forward certain claims before the public authorities, they see how legal interpretation works, how it constrains state institutions or, resultantly, how it limits the operation of collective goods. Generically, we can illustrate the focus of legal theory as follows:



(Note: In bold, points of central focus
In italics, point of secondary focus)

A formal legal analysis of rights largely sees human rights in terms of permission and prohibition or that of protection and violation. Thus, one misses how human rights manage or how human rights involve rights-holders' self-limitation. To the extent that legal scholars focus on the management of conduct through human rights, they only see it as a generalized effect of protection of human rights. Then, one misses how institutions use human rights as instruments in order to develop practices in compliance with human rights norms, i.e., expanding the interpretive idea of protection to preempt violation of rights. Alternatively, if a legal system simply interprets human rights without that interpretation guiding the social system, one would only see human rights norms instrumentally, i.e., being one among other legal tools that serve rights-holders' momentary interests.

Importantly, viewing a human rights claim in its contextual setting allows us to see how and to what extent things are revealed as a legal question. For example, I can make a human rights claim that laws should not discriminate either my coreligionist or me in the provision of medical facilities. However, I cannot make a human rights claim that my religious comportment ought to dictate medical science. Likewise, I cannot claim that the state should institutionalize what my religion considers healable in order to provide basic healthcare. Here, we ought to make a distinction. Generally, legal scholars focus on the appropriate consideration to relevant facts. By focusing on judicial interpretation, legal hermeneutics see the way judiciary considers relevant facts aptly. Thus, one treats consideration and relevance simultaneously. However, they differ. Consideration focuses on selected material; relevance dictates how we make selection. In other words, law applies legal norms to those issues that legal interpretation finds legally relevant. However, what counts as legally relevant is not the function of law. When we talk about appropriate consideration, we assume that a legal

system can train lawyers, judges, prosecutors, or juries to handle human rights claims rightly, and we criticize them or their methods when they do not do so. When we talk about legal relevance, we anchor our analysis of law into social dynamics. Given the expansive basis of the idea of relevance, relevance is less a matter of training than a matter of having the right frame of mind and perspective. Then, the demarcation is not between rightness and wrongfulness (as in the idea of consideration); it is between presence and absence, i.e., something is either legally relevant or irrelevant. More, the idea of relevance may be somewhat intuitive. However, one cannot take legally relevant facts intuitively. Facts take certain shapes because of social rationalities. The idea that a dying person lives a life not worth living or that its life is unbearable presumes established standards that at least allow all parties adjudicating its claim to agree that the claimant is distressed, in pain, or unhealable. Both these points require us to analyze legal interpretation of human rights in the light of social attitudes and rationalities, among others.

On the other hand, when legal theorists ignore the broader social rationalities guiding conduct, they see rationality in a limited manner, i.e., as it works in the structure of law or of politics. The obvious fact that the contributions of experts, officials, and professionals allow the ECtHR to determine the circumstances of the case in its case law remains of secondary theoretical importance to them (e.g., Dworkin 1986, 3, 15, 46). By ignoring one central variable involved in the interpretive structure of rights, legal scholars then give either the judiciary or the legislature (or both) more or less an overblown rational power.[165] This leads to a category mistake. As an example, consider a society that understands diseases as a divine test. When a rational legislature legislates in such a society to guarantee basic healthcare in the light of holders' right to life, it would logically rationalize healthcare laws in line with the nature of divine acts. It is difficult to see how the legislator's rationality can then guarantee on its own such a central right without – from a rights-based perspective – massively intruding into rights-holders' moral lives. In fact, the said intervention would be because of the legislator's rationality. A rational legislator cannot guarantee human rights, or, at least, cannot 'validly' guarantee human rights, when surrounding variables on which it draws are either invalid or dysfunctional. Procedural and institutional rationalities are a part of social rationality; they are not all that is to rationality.

Governmentality: Beyond natural law and positivist models

[165] 'Legislative decision-making cannot be treated as the explanatory origin of the validity of the constituted meaning of the norms. Seen from a causal angle, there are further origins and origins preceding them which are often more important than decision-making … The function of legislation does not lie in the creation or production of law, but in the selection from and in giving dignity to norms as binding law … law is not created from nothing … In other words, we have to distinguish between attribution and causality' (Luhmann 2014, 159-160).

By viewing human rights as governmentality, we saw how human rights remain interwoven with collective goods, institutional structures, rationalities of government, and with law as a means of social integration. I now see how, and to what extent, our perspective differs from natural law and positivist models to view human rights.

Human rights, natural rights, and natural law

If one ignores the role of rationalities of government in the interpretation of human rights, it becomes hard to see how one can avoid giving a naturalist interpretation of human rights, especially human rights law. One would then see law as securing the interests of rights-holders that pre-exist the form and the nature of rights-holders' specific interactions. Crucially, however, we cannot determine what rights-holders' interests are without seeing how a society rationalizes those interests. The underlying motivations of rights-holders to perform specific acts using their rights remains irreducible to the social understanding that protects their interests. In fact, the social practices contributing their interpretive share to human rights law understand interests neither detachedly nor fixedly nor self-evidently. We can take the principle of evolutive interpretation as an example. It is hard to see then how can one argue that the evolving substance that law ascribes to justice articulated in terms of applied human rights standards do not affect the content of justice articulated in terms of abstract human rights norms. One can counter-argue: 'The evolving interpretation of human rights law does not put gaps between different understandings of natural law or natural justice. That is, evolving interpretation does not show different paradigms of natural law that positive human rights reflect. In fact, it progressively ties human rights law closely with justice articulated in terms of a natural law'. However, even this counter-argument introduces a certain historicism into any doctrine of natural law. Then, such a stance becomes more vulnerable to the criticisms that the changing interpretations of human rights rather entail that we cannot discern any concrete shape at any given time that we can ascribe to natural justice. As such, it remains impossible for us to speak of any actual realization of complete natural justice. More, whereas the principle of evolutive interpretation understands human rights law with reference to consent, consensus, acceptability, and social dynamics, it is difficult to understand natural law with reference to either.

On the other hand, when one ignores subjectification processes, one simply narrates human rights in a way that the background social picture appears somewhat static. Medieval societies had 'natural' law, or later rights derived from a natural understanding of law, because things were ideally supposed to be in or to be moving

towards their 'natural' place (Hart 1994, 189).[166] They did not have human rights,[167] not because they were necessarily unable to come up with universal human rights because of their 'parochial' worldviews. Instead, they lacked a regulative social framework. In other words, they lacked the idea that rights and freedoms could function as regulative social principles.[168]

Further, it is difficult to subscribe to the idea of human rights as natural rights, especially when we look at the text of the Convention and the interpretation of its standards. First, text. The Convention mentions human rights. It does not find a need to elucidate those human rights with reference to ultimate values or teleology. Further, it does not seek to explore in what sense the different rights hang together. More, if one defines natural rights as those rights that sovereigns 'may not transgress under any circumstances' (Foucault, 2008, 8), it is easy to see that almost all of the rights that the Convention mentions do not have such a status. The Convention itself mentions limitations, exceptions, and derogation from the guarantee of rights. These facts have prescriptive effects. Rather than saying that one deduces 'ought' from 'is', the 'is' itself influences 'ought' by circumscribing its status and its function. Consider further the anti-abuse provisions that perform a special role in the architecture of European human rights law. For example, the threats that anti-abuse provisions address are ones that come from those rights-holders who use their rights in order to end a rights-based system, i.e., a liberticidal political party close to winning elections. Anti-abuse provisions acknowledge

[166] 'The term 'natural right' (*ius naturale*), in its modern sense of an entitlement that a person has, first appeared in the late Middle Ages. God was thought to have placed in us natural dispositions towards the good, dispositions giving rise to action-guiding precepts' (Griffin 2008, 1; c.f., 9, 11-12, 18-19). 'Natural law was something objective, which individuals must obey because God made them part of the natural order he ordained: illegitimate practices were deemed *contra naturam* or "against nature"' (Moyn 2010, 21). 'For the middle ages mechanisms were efficient causes in a world to be comprehended ultimately in terms of final causes. Every species has a natural end, and to explain the movements of and changes in an individual is to explain how that individual moves toward the end appropriate to members of that particular species' (Macinytre 2007, 81-2).

[167] Strauss notes: 'The premodern natural law doctrines taught the duties of man; if they paid any attention at all to his rights, they conceived of them as essentially derivative from his duties. As has frequently been observed, in the course of the seventeenth and eighteenth centuries a much greater emphasis was put on rights than ever had been done before … quantitative changes of this character become intelligible only when they are seen against the background of a qualitative and fundamental change' (Strauss 1953, 182). Commenting on Roman legal texts, Finnis notes: 'Modern emphasis on the powers of the right-holder, and the consequent systematic bifurcation between 'right' (including 'liberty') and 'duty', is something that sophisticated lawyers were able to do without for the whole classical Roman law' (Finnis, 1980, 209).

[168] C.f., Finnis (1980): 'In Suarez (e.g., *De Legibus*, I, c. 17; III, c. 33, para. 1; V, cc. 19-34) or Hale (e.g., *On Hobbes' Dialogue of the Common Law* [c. 1670], in Holdsworth, *History of English Law*, vol. V, 507-8) there is certainly a recognition that the law 'does' more than merely command, forbid, permit, and punish (as the Roman lawyers (see *Digest* I, 3, 7 (Papinian)) and Aquinas (*S.T.* I-II q. 92 a. 2) supposed); but, the further 'effect' or 'force' of law is not 'power conferring' but rather 'laying down a definite form for contracts and similar acts-in-the-law, so that an act performed in other form may be treated as not valid (*De Legibus* III, 33, 1). In this perspective, one can marry, buy, sell, promise, lend, etc., etc., without having any power to do so conferred on one by law, but the law may, for good reasons, *nullify* one's acts (*lex irritans*). [In] this perspective … the law … [had a] *subsidiary* function' (292). See also, for example, (Luhmann 2014, 9, 70-1, 143, 150-1, 163, 166, 171).

that the (ab)use of human rights may at times violate the justice based on human rights, even when the rights-holder is explicitly within the sphere of action protected by its rights. Contrastively, theoretically speaking, the use of natural rights never obstructs the course of natural justice because one cannot use one's natural rights to turn those rights into something unnatural. However, a social system that secures human rights to everyone through its legal arm cannot stick to such a naturalist naïveté, if it is not to expose itself to systemic threats.

Second, interpretation. Consider an influential argument often posed by critics against natural law tradition, i.e., even if one considers human rights as natural rights, it remains difficult to infer precise standards guiding conduct in an equally valid manner.[169] To illustrate, if natural rights lead a thirsty mare to a wine cellar, they cannot

[169] Values as bodily health and life that a natural law narrative (e.g., Finnis) considers objective do not mean that the way those values present themselves to us proceed naturally. What contemporary medicine secures as being healthy and what contemporary social attitudes consider as livable does not rest on naturally given, or at least, naturally fixed, structures. Just think of the shock a contemporary reader encounters, when confronted with the report with which Foucault (1963) begins his *The Birth of the Clinic*:

> Towards the middle of the eighteenth century, Pomme treated and cured a hysteric by making her take 'baths, ten or twelve hours a day, for ten whole months'. At the end of this treatment for the desiccation of the nervous system and the heat that sustained it, Pomme saw 'membranous tissues like pieces of damp parchment ... peel away with some slight discomfort, and these were passed daily with the urine; the right ureter also peeled away and came out whole in the same way'. The same thing occurred with the intestines, which at another stage, 'peeled off their internal tunics, which we saw emerge from the rectum. The oesophagus, the arterial trachea, and the tongue also peeled in due course; and the patient had rejected different pieces either by vomiting or by expectoration' (ix).

Of course, it would be far-fetched to say that this understanding based on 'old myths of nervous pathology' (x) is without its systematic structure. In order to address this point concerning knowledge and societal regulation, two obvious routes remain available to natural lawyers. For a natural law perspective, however, each route has hurdles of its own.

1) Natural lawyers can rationalize our immediate intuitive (e.g., shock, disgust) reactions. They can rely on the professional self-description of contemporary medicine to pinpoint that others in the past without access to the discourse of scientific medicine remained misguided (c.f., Finnis 1980, 24). However, this has two problems. First, this creates disconnect between commitments and objectives. When we say that muddle-headed simpletons in the eighteenth century, even when they pursued natural goods and valued natural virtues, remained unable to guarantee natural law at all, we do not but picture natural law in relative, contingent, and structurally constrained terms. Second, this answer relies on a view of historical progress, at least in terms of attainment, or clarification, of truths. Without this view, it remains impossible to view contemporary scientific discourse and rights-based understanding in non-skeptical terms. However, the idea that there is more to history than a simple empirical succession of events, and that history is something whose progress determines the standards through which we understand universal natural goods, is not the one that natural law tradition upholds.

2) Natural lawyers can tone down our immediate intuitive reactions by showing that the specific models of natural law in certain societies varied, while nevertheless subscribing to the universal good of those values. In fact, natural law narratives know that errors and falsities may exist synchronically (Finnis in his 2011 Postscript to *Natural law and natural rights* criticizes 'false universal religions' (458) on this point, for example). After all, natural law theorists heavily rely on Aristotle's political and ethical explorations, while largely ignoring his unscientific statements on physics. Thus, they can tell us that though pre-eighteenth century medicine (or alchemy) grotesquely erred, it nevertheless sought health (or knowledge) not disease (or falsehood). Different 'paradigms' (in Kuhn's sense) of understanding in different times produce different natural law models. However, with this answer, one unwittingly ends up subscribing to a thesis that to the extent that social forces shape our knowledge of human nature,

specify it for her whether to consume from the fountain containing rosé, or white wine, or wet clay. In terms of using human rights as a practical code of conduct, this issue requires bringing into view additional interpretive factors that influence both the understanding and the social position of human rights norms. Of course, one can bring into one's natural law narrative a figure of authority that authoritatively provides guidelines. However, it remains unclear to what extent the interpretation of rights by such an authority flows 'naturally'. In other words, it remains unclear to what extent the authority of the authoritative body itself remains natural (say, if it is to be non-arbitrary), or derived from natural rights (say, if it is to be originally just), or even reducible to those rights (say, if its existence imposes extra-rights-based duties on holders). Unsurprisingly, the ECtHR utilizes constructivist tools like margin of appreciation, balancing, proportionality, margin of error to interpret human rights in particular situations.

On legal positivism and the question of rationalities: A governmental intervention

Positivist theorists presume the importance of human rights. Given the training of lawyers and the professional setup within which lawyers handle cases that touch human rights, a positivist stance on human rights is understandable. Positivist analysis of human rights proceeds within those legal societies that constitutionalize human rights. Constitutionalizing human rights provide positive laws with a normative basis. This allows a legal practitioner to focus on social facts and a positivist theorist to focus on rules guiding human rights practice without bothering about, or exploring, the 'merits' of law (Buchanan 2013, 11, Macklem 2015, 18, 22).[170] However, it is hard to see how one can advocate human rights based on positivist premises, especially when rights' advocates use human rights to evaluate both legal institutions and social practices. Of course, positivist theorists can, and do, criticize existing positive laws. However, they cannot do that on positivist premises or principles alone (Hart 1994, 240). For example, there is no independent normative justification that positivists can

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the givenness of human nature is not immune to historical dialectic. Consequently, this answer rather removes the ground on which the meaning and the appeal of contemporary medicine stands from its feet (c.f., Mill [1859] 1992, 21-22). First, this answer does this without itself being able to provide a cross-paradigmatic parameter that evaluates each paradigmatic understanding, because each such parameter would in itself be paradigmatic of and for a particularity. Second, the paradigm shifts (A → B) would again pose problems for a natural law perspective, because such an explanation rather requires a supra-paradigmatic view, which would in any case fail to illuminate either point A (the initial paradigm) or point B (the new paradigm).

[170] In his *The Province of Jurisprudence Determined*, Austin famously states that the 'existence of law is one thing; its merit or demerit is another' (J. Austin 1995, 157). In *The Concept of Law*, Hart states: 'Legal Positivism [means] the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so' (1994, 185-6; c.f., 110). In his *Essays on Bentham*, Hart states: 'When judges or others make committed statements of legal obligation it is not the case that they must necessarily believe or pretend to believe that they are referring to a species of moral obligation' (Hart 1982, 127).

offer for the place of anti-abuse provisions, except with a circular reference to the preservation of a human rights-based legal system.

When positivist theorists focus on providing a descriptive view of rights, they analyze rights with reference to legal and political institutions. Positivists bracket subjectification processes. More, their interest in collective goods lies in the extent to which the provision of these goods touches legal and political institutions. Bringing both subjectification processes and collective goods into purview of a positivist theory of rights would collapse a positivist project because one would then give as much importance to non-law as to law.[171] Similarly, when positivists bracket the question of subject positions, it becomes impossible to study how legal standards apply to individuals, which differentiate them based on the meaning that legal interpretation assigns to them in their capacity as certain subjects.

Moreover, when positivists structurally presume ideas relating to individuals and groups, their narratives rely on certain ontological foundations, e.g., individual rationality, collective survival, and flourishing and compromise (c.f., Hart 1994, 91-95). For example, when positivism talks about individuals' desires and choices, it is hard not to discern in it a structural presumption whereby individuals share an identical 'form' that accommodates varying contents, without that accommodation in turn altering the said form. In this sense, a positivist theory of rights remains vulnerable to the same set of objections as the ones posed against a deontological version of justice (Sandel 1983, 25, 129-131). That is, if all individuals are to an extent a replica of each other in such formal terms, it becomes hard to see the extent to which such a bundle of identical rational contractors creates a distinct social group in the first place. Thus, foundational problems haunt a positivist narrative, i.e., whether to define rules in terms of groups that adhere to them or groups in terms of rules they follow, whether rules confer power or power flows from rules, whether practices follow from a singular rule or whether shared practices create rules that one cannot reduce simply to series of rules.

Further, it is hard to see how a descriptive theory of rights can provide a functional analysis of rights. Talking about the effects of rights on rights-holders' actions, behavior, or expectations is of non-legal interest, to the extent that these variables are not a point of legal determination. Thus, positivism talks about sanctions, commands, obedience, but not about management. Positivism can explain the trickledown effect

[171] Positivism feeds on a social history that allows laws to work in a differentiated manner. In a society where justice remains rather personalized not institutionalized or where justice depends on king's wisdom, positivist analysis cannot provide a descriptive view of the laws of such a society without having to provide a view on their morality or wisdom, that is, without understanding law 'naturalistically'. Think of the Ten Commandments in the context of the exiled, prophet-led Hebraic community. Some important political consequences follow from such a stance. One being the formalization of social standards in term of laws. The positivist pull is in the direction of codification of law. However, it is not obvious to what extent formalization addresses all aspects touching social standards or whether formalization may not transform the substance of those social standards in the legalization process. As a creative act, codification of law occasionally re-creates law (not to mention codification's effects that may rather accord the previously non-codified customary law in its customariness a recreational status).

of human rights; it cannot analyze it. Likewise, talking about the manner human rights interact with rationalities guiding particular institutions (prisons, schools, factories), or the manner legal system interacts with other social systems, is of non-positivist interest. However, when rights-holders argue that the public authorities limit air traffic in order to respect their private lives, the discourse relating to public health constructs them as certain subjects (e.g., healthy, vulnerable, hygiene-sensitive), whose discursive resources they use in order to put forward rights claims securing the social good in a certain form. Thus, positivism talks about law and morality as distinctive languages, but is not particularly helpful to analyze the rationalities that determine the form of their interaction.

Importantly, albeit law-applying institutions play an important role in determining the interaction of rights with organized social power, law-applying institutions (or law creating ones) do not determine the entirety of the interpretive process on their own. A court judgment dealing with a rights claim draws on different factual assessments and expertise that articulate knowledge. In the light of such specific interpretations of different social aspects, judiciary applies legal codes and standards. For judicial purposes, 'objectivity' does not entail a professional detachment or an institutional ethic, but, importantly, certain epistemic deference. Thus, when human rights protect life, liberty, security, or prohibit inhuman treatment, discrimination, forced labor, they presuppose how a society understands life, liberty, security, inhuman treatment, discrimination, or forced labor. The enforcement of human rights accordingly refers to social practices rationalizing these standards. Thus, a positivist theory of rights can describe the role of rights in a legal system; it cannot describe how their interpretation in specific cases works. True, the latter may in fact not be the focus of a positivist theory. However, to repeat, it is impossible to explore such an aspect using positivist lens.

More, albeit it brings value questions into focus, analyzing things on their 'merits' does not necessarily entail bringing narrowly understood morality necessarily into view. Questions of knowledge and expertise, which positivists leave out while outlining social rules, do well have legal and moral relevance. Think of a case akin to Pierre Rivière's (Foucault 1975b). As courts engage in an interpretive process to determine whether a murderer is a psychopath or an evil genius, they assess legally relevant questions without strictly touching either law or morality. Take Article 9's text and interpretation as another example. When Article 9(2) limits the exercise of the right to freedom of religion, it does not seek to justify those limits with reference to the religions it protects. Similarly, when law protects the right to freedom of religion, it does not base that protection on the subjective views of religious communities concerning their religion. Likewise, the form of governing religious manifestations does not depend on either the truth or the value of the religious practice in question (see, §3.1). The rationalization of social facts allows human rights law to impose constraints on rights-holders without necessarily considering (as far as its self-understanding is concerned) that it is

regulating social facts with reference to deep moral values. The question of knowledge deals with ontology. As such, it influences the perspective with which one explores legal and moral problems.

§3. Human rights as governmentality: A dialogue with political theory

I now see how our perspective contributes to political theory. Then, I juxtapose our findings with the findings of certain influential postures that aim to capture human rights-based practice. Later, I comment on the universal status of human rights in political theory. I do this by selectively focusing on the project concerning the universalization of human rights.

Regulation through rights and political theory

In general, political theory analyzes two things. First, what kind of norms underpin human rights. Second, how these norms influence institutional structures (legal, political) and the provision of collective goods. Unlike practicing lawyers that do not consider it necessary to engage with the theory underpinning human rights, political theory helps us understand how human rights norms structure, say, the actions and arguments of the participants engaged in human rights-based litigation. Unlike legal scholars that focus on legal interpretation of human rights to comment on the theoretical status of human rights, political theory considers legal interpretation important but not decisive to understand human rights norms. Thus, political theory understands human rights both as a normative and as an evaluative resource. Generically, we can illustrate the focus of political theory as follows:

Collective goods

/ ↕ \

Subjectification processes ↔ **Human rights** ↔ *Law*

\ ↕ /

Institutional structures

(largely, political and legal)

(Note: In bold, points of central focus
In italics, point of secondary focus)

However, when political theory reconstructs human rights by exploring the normative structure underlying the human rights-based practice, it considers the rationalities underlying that practice marginal for developing a theoretical account of human rights. It is indeed strange to assume that one's reconstruction of the notions of interest or personhood underlying human rights-based practice remains equivalent with those inputs that articulate interest or personhood in specific contexts.[172] Importantly, human rights practice already presumes certain subjectification processes that rationalize human aspects. Think of the idea of child's best interests and care/ custody proceedings. Think of the scientific-medical discourse and abortion. Thus, disassociating, say, interest or personhood from the skillset of relevant professionals, experts, and institutional sites robs a narrative on human rights-based practice of its analytical worth.[173]

On the other hand, political theory studies human rights claims and the influence of those claims on judicial and legislative structures. However, focusing on the rationalities of government allows us to expand the institutional focus our analysis. Thus, viewing human rights as governmentality helps us see what kind of roles rights-holders occupy, how those subject positions structure the interpretation of rights, and how laws shape and protect rights-holders' freedom. For example, we can understand using political theory what kind of normative claims police officer P advances, when P lobbies for the eradication of racial discrimination in its workplace. However, the constraints and freedoms that shape P's authority as an officer are part of a social reflection over the course of a particular history. Thus, neither the structural form of freedoms and constraints nor that particular social history is wholly open to abstract normative analysis. True, one can evaluate law enforcing agencies' justifiable scope of violence using rights. However, rights-holders located in such institutional setups are specific subjects. Thus, their rights claims become intelligible with reference to their subject positions.

With their focus on collective goods and institutional structures, political theorists rightly study human rights beyond the legal codes of violation and protection. The function of collective goods in enabling the proper enjoyment of rights and the justifiable scope of coercive power figure prominently in their works. Thus, they see rights-holder as one

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[172] Remarking on the 1789 French Declaration, Burke in his characteristic style noted:

> 'What is the use of discussing a man's abstract right to food or to medicine? The question is upon the method of procuring or administering them. In that deliberation I shall always advise to call in the aid of the farmer and the physician, rather than the professor of metaphysics' (Burke 1993, 61).

[173] One can object that political theorists speak of the 'concept' of interests or personhood, regardless of the way different participants conceptualize them or develop specific conceptions. However, the point is different. Even when one may indeed show that there is no finality to the rationalization of interests or personhood, the valid conceptions of interests or personhood presume, say, discursive competence and institutional location. The problem is that any generalization of the concept of interests or personhood that ignores the valid conceptualizations of these notions functions as a general term devoid of meaning or utility.

who has human rights, and, who, theoretically, must be justifiably interfered with in the exercise of its rights. However, such a normative stance leaves out the way a social system makes itself rights friendly by developing broader rules to justifiably regulate rights-holders' conduct. Take care proceedings in the context of Article 8 on the right to respect for private and family life as an example. A human rights claim assumes, say, rehabilitation centers, welfare agencies, care providers. Rights of the family members allow the public authorities to develop apt institutions, tailor rules and standards guiding those institutions, train the care personnel with a view to the rights of those they handle, and allow those institutions to make normatively sound interventions in family life. Crucially, rights friendliness of a society depends on the capacity of its legal system to produce settings that respect holders' rights (see, §2.2 and §4.2). For example, to the extent that the idea of oikopolitics structures rights-holders' Article 8 claim, a change in the practices rationalizing rights-holders' autonomy influences their conduct because of their rights. Thus, to the extent that care institutions treat rights-holders in a rights compliant way, rights do not give their holders a license to make rights claims in order to claim exemptions. Viewing human rights as governmentality shows us that the aim of achieving a limited *political* government by using human rights as constraints depends on an extensive government of conduct by using human rights as regulative principles.

Governmentality: On originary and convergence models

To the extent that political theory finds human rights practice relevant for offering an account of human rights, it frequently proceeds in two ways, i.e., locating foundations or discerning commonalities.[174] I now see what our view of human rights as governmentality entails for such models.

1) On originary models; or, on human rights and dignity

The idea that something foundational inheres in all human rights that requires apt provision of collective goods and that shapes institutional structures is an influential way to understand human rights-based practice (Nussbaum 1997, 286. 292, 295, Gewirth 1982, 41-6, Griffin 2008, 8-9, 24, 32-3, Ignatieff 2001, 88, Forst 2010, 729,

[174] Obviously, I greatly simplify things and overlook important nuances. Indeed, there are other, better ways of classifying theories. The broad distinction I make uses methodological routes used by theories as a heuristic device with which to classify models that offer an account of the practice based on human rights norms. This is not to deny that certain sophisticated accounts may use a two-pronged methodology to develop their theories, i.e., one focuses on different inputs from different actors engaged in human rights in order to discern something foundationally similar underlying actors' inputs. Think of Dworkin's *Justice for hedgehogs* or Griffin's *On human rights*. Rather than saying that in cases of such theoretical models the distinction that I have drawn itself collapses, I believe that the account I offer here rather criticizes each prong of such a methodology on a separate basis.

Wellman 2011, 17-41, Dworkin 2011, 335). This model believes that participants engaged in human rights litigation may differ about valid interpretations of the core normative ideas but not about their centrality. As long as political theory illuminates the normative meaning and aspirations of these normative ideas, the contributions of political theory remain relevant to understand human rights-based practice (Griffin 2008, 29, 81-2, 94, 170; c.f., Beitz, 2009, 7). Think of the centrality of the idea of dignity.

However, such a model suffers from same objections that critics have posed against the natural law understanding of human rights. That is, one can neither refer intuitively to dignity as a parameter nor refer dignity to another general signifier, when participants interpret dignity in different ways. This problem is further aggravated because political theorists give secondary importance to law and legal interpretation of human rights. For example, it is unclear, from an analytical perspective, what precisely one talks about, when one talks about human rights without specifying which particular human right one is talking about. Similarly, take Article 17 and 18 of ECHR as examples. These articles are important because they address the public authorities, not rights-holders. Thus, the implementation of rights remains sensitive to the factual and situational circumstances, while rights bring the form of the legal guarantor in line with their normative content. Importantly, this fact limits the application of the conceptual lens of human dignity (or, related concepts that one would rather understand in essentialist terms) to analyze the case law of ECHR systematically. To wit, Article 15 and Article 18 talk about discretion and obligations of a legal entity that is not a human and which, as a complex of institutional structures, does not possess itself any *human* dignity as such.

Crucially, Roman law spoke of the *dignitas hominis* of the Roman state, office-holders, patricians, and the like, and punished Romans accordingly. Thus, the idea of *human* dignity is conceptually and analytically different from that of the Roman idea of *dignitas hominis*.[175] The latter notion remained connected: a) with the honor of *certain* statuses, b) with what law should give to those legal subjects depending on what they *deserve*, and c) was additionally applicable to *inanimate* entities that were neither natural persons nor reducible to them, i.e., the state.[176] Be as it may, Article 15 limits the

[175] True, one cannot simply question an idea by questioning the popular version of its purported pedigree. Even historical concepts abhor argumentum ad hominem. In fact, as *Begriffsgeschichte* tells us, one can acknowledge and accommodate conceptual difference within a broader similar conceptual tradition. My point here is banal: neither the Roman idea of dignity nor its contemporary variant are useful tools with which to illuminate, let alone analyze, human rights based practice. Predictably, the additional value of dignity over and above specific human rights remains unclear in the case law.

[176] Even for Kant, for example, the state, as an idea and as a fact, has dignity. Thus, the state dignitaries remain connected to the idea of, and possessed, dignity (*Würde*) (Kant 1991a, 92). Within contemporary understandings of human rights, we still need to see if and in what sense the state has any dignity at all, one that would be conceptually and analytically distinct from the one that human rights instruments give to holders of human rights. Perhaps one can say that the state has dignity as long as it guarantees human rights. However, the dignity that one thus accords to the state works as an empty obverse signifier of human rights, unlike its Roman counterpart. One only opines that there is no dignity attached to the state over and above that of human dignity as espoused by human rights. It remains hard to see

enforcement of certain fundamental human rights by permitting public authorities to justifiably derogate from the guarantee of human rights in time of emergency. Resultantly, it divides the concept of dignity into two halves, i.e., in an expansive sense and in its core sense, which corresponds to derogable and non-derogable rights. However, even non-derogable rights do not apply to everyone in plain, categorical terms (§6.1). More, Article 18 works through double negation. If dignity affirmatively grounds rights and freedoms, then limitation and exception clauses contextualize rights and freedoms. Consequently, limitations and exceptions define what we are not to understand by dignity only in abstract terms.[177] More, Article 18 ECHR limits the discretion of a legal guarantor of rights with respect to the legitimate breadth of limitation clauses, while moving a step away from the concept of dignity. As such, the application of Article 18 understands the violation of rights with respect to its proper limitations. The use of Article 18 entails that a limiting act did not fall in line with the limitation clauses and only this, therefore, leads to the violation of Article 18.

Now, if one instead analyzes limitations and exceptions to rights-based on dignity, the possibility of deriving the basis of all rights and freedoms affirmatively from the very same concept appears tautological. In other words, the same concept cannot ground both what things are, what their limits are, what limits are imposed on them, and what they are not, without losing its analytical clarity. On the other hand, albeit the ECHR does not mention dignity, the Universal Declaration does. However, the UDHR too does not specify in what sense dignity grounds each right, whether and what kind of gradations the idea of dignity permit, or in what sense specific rights elaborate or protect dignity. Despite the fact that the UDHR mentions dignity, it eschews, given the idea's non-explanatory nature, from explicitly giving rights-holders a right to dignity.

Alternatively, one can instead argue that dignity (or, for that matter, 'sanctity', or 'respect', or 'sacredness') rather signifies loosely, and broadly, what lawyers call, following Aristotle (*Politics*, 1213[a]), a 'legal intuition' (Radbruch's *Rechtsgefühl*). However, without grounding legal intuitions contextually within social practices, institutional structures, and legal norms that articulate those intuitions, one's analysis of the ECHR case law using such a concept would remain anything but coherent.[178] Or, what amounts to saying the same thing, analytical coherence forces intuitively

in what sense such a narrative can shed light on, for example, the right that human rights instruments like ECHR give to the states to derogate from the guarantee of certain human rights in times of emergency.

[177] Limitations and exception clauses also bring another problem confronting dignity to the fore, i.e., the lack of clarity surrounding the fact that whether one ought to understand or apply the idea of dignity in general (species level) or specific (individual level) terms (c.f., Kant 1991a, 230-1).

[178] Rawls contends that it is misplaced to use an idea that does not specify what it tries to explain or that simply substitutes what it explains by switching terms or that itself calls for interpretation with reference to independently derived principles. He explains:

> 'The notion of [inherent worth and dignity] of persons is not a suitable basis for arriving at [the principles of justice]. It is precisely these ideas that call for interpretation … Once the conception of justice is on hand, however, the ideas of respect and human dignity can be given more definite meaning' (Rawls 1999a, 513).

obtained concepts to shed their essentialist form and to merge with the context from which they appear to emerge in the first place. This takes us to the second model of rights that performs such a task.

2) On convergence models; or, on human rights and interests

Another influential way to proceed focuses on different criteria that participants engaged in human rights-based practice use, in order to clarify the meaning and scope of human rights (Beitz 2009, 8-9, 11, 104, 107-8, Angle 2004, 27-41, Talbott 2010, 7-8, 13, 28-37). To the extent that such models consider focusing on institutional setups and discourses secondary, they comment on the convergence of discursive inputs without however commenting on their generation. For example, convergence models tell us that the idea of prevention of terrible harm or protection of urgent individual interests remains common to all human rights. Thus, they would explore the norms underlying the prevention of harm in order to clarify the status of rights as axioms. However, the relation of human rights either with the idea of harm or with that of interests is unclear. If one simply finds interests standing behind all of the human rights, one would rather consider them both equivalent. One would then face the similar problems that one confronts when one equates human rights with the idea of dignity. If one rather finds human rights as protecting urgent interests, the extent to which one understands 'urgency' exists independently of the human right itself. One would then talk of human rights and interests, wherein both ideas would lack explanatory power.

Let us explore this point by briefly looking at the idea of harm. The manner a society addresses or determines harm is not obvious from the principle of harm itself. We can agree on reducing the harm done to solitarily confined convicts. Nevertheless, the idea a society should confine in prisons those criminals who seriously harm a society does not necessarily proceed from our intuition of harm. More, how a society understands harm relies on specific rationalities that articulate harm. Take public health matters, hygiene, or variables informing life expectancy as examples. Banally speaking, both a cadet undergoing military training and a rebel training in the mountains harm themselves in the short run and plan to harm others in the longer run. Both a child forcibly sent to school and undergoing compulsory rounds of vaccination there and a poor child who works as a day laborer (and who is exposed to all the risks associated with unhygienic conditions) are being forced to do something because of the circumstances they have not consented to in the first place. However, the way rights contest one kind of harm and protect another as being in line with rights-holders' interest does not itself flow from the principle of harm or interests.[179] In other words,

[179] At such a point, Mill considers the overall background provided by his 'principle of utility' as helpful in determining the apt place of his 'harm principle' (Mill [1859] 1992, 14). From the perspective of human rights, two problems immediately confront this strategy. First, if one understands human rights as those normative instruments with which one prevents harm to its holders, it does not make sense to speak of

the management of harm through rights attaches law and legal regulations to certain rationalities that articulate harm.

Thus, in general, convergence models see how participants articulate interests without considering that such an articulation would have ontological effects. For example, when rights-holders contest the decision of authorities to build a waste disposal factory near their homes because of their right to life or right to respect for private life, the way they articulate interests or harm remains connected to the rationalities that in turn influence their status as affected subjects. To the extent that such models consider subjectification processes trivial, they describe how norms bind institutions without describing how norms regulate conduct.

On the universalization of human rights: Of interpretation and the place of norms

Hobbes's idea that covenants without swords are but words is uncontroversial among human rights' activists and professionals. However, a number of political theorists now take a step further, and rightly so. Given the focus and scope of human rights, they consider according human rights a constitutional status in every legal system insufficient in itself for a proper enjoyment of human rights by everyone in the world (Raz 2010b, 43-4, Beitz 2009, 58, Tasioulas 2002, 86-88, Tasioulas 2010, 672, Donnelly 2013, 86-7, 99). This issue visibly comes to the fore in two major instances. First, when the relevant institutions are not in place. One has a dagger or a kitchen-knife, not sword. Second, when the relevant institutions are dysfunctional. One has a sword, but one that is either blunt or is without its grip. Thus, for example, political theorists tell us that societies that are too poor, fragile, or unsafe cannot guarantee human rights (they lack 'adequate' capacity), even when their legal systems do not deviate from rights framework (they do not lack will). Similarly, political theorists tell us that political systems that lack, say, separation of powers cannot use rights-based justifications to substantiate their organized violence. Thus, like rights' advocates that speak of 'capacity-building', 'capacity-strengthening', or 'capacity-enhancement', political theorists tell us that focusing on the variables that enforce and contextualize human rights is a question of human rights, even when those variables may not stem from the textual-legal standards of human rights.

utility in terms that structure human rights and exist beyond human rights' legal determination. However, if one understands both utility and harm in terms of human rights, both principles become redundant, either when read in conjunction or when read separately. Second, when we deal with a particular case (e.g., termination of an unwanted pregnancy), the definition of harm precedes our determination and regulation of it. When we want to know what constitutes harm, we seek a principle that rationalizes our intuitions. The fact that harm, utility, or interests presume certain rationalities that spell out harm, utility, or interests in specific cases betrays their connection to an interpretive structure. As such, these notions function as post facto devices with which a society may justify its specific responses to certain issues, and not as tools that determine the interpretive processes on their own.

However, when we see human rights as governmentality, two related factors additionally pinpoint the limits of a project of human rights universalization, especially when one interprets universalization in a limited textual-legal manner. First is the role of rationalities in articulating norms. Let us stretch Hobbes's metaphorical image to its limits. Swords can enforce covenants; they cannot make covenants speak. True, covenants do speak under the shade of the sword; they do not speak in its name or speak what the sword makes it speak. One can imagine a situation where covenants speak the language of the sword. However, it is not the covenant but the sword that speaks then; the sword silences the covenant.

Let me illustrate. The illustrations are atypical, though hypothetical. When rights' advocates speak about norm-enforcement or norm-contextualization, they assume normative commitment by public authorities to human rights as the resource with which any legal system becomes progressively rights friendly. Now, legal systems may subscribe to human rights. They may have protocols concerning the protection of property, privacy, religion, personhood, or life. However, in order to have valid interpretations of human rights, such legal systems need to refer to relevant background practices that rationalize property, privacy, religion, personhood, or life. Consider a society that understands that diseases are both a bodily and a spiritual matter. Additionally, assume that this society considers that being healthy requires having a 'healthy soul'. Its medical understanding refuses to disentangle body from soul. It believes that any such disentanglement is reductive. Now, consider that this society agrees to guarantee human rights. Think it guarantees the right to life of its inhabitants. However, it is impossible to imagine how such a society would guarantee the right to life of its inhabitants without violating their right to respect for private life, religion, or association. In fact, it is hard to legitimize its detention of 'sick souls' as a justifiable deprivation of liberty. Remember, Article 5 of the ECHR tells us that the detention of those who suffer from infectious diseases does not violate their right to liberty or security. More, such a society cannot guarantee the right to life itself because it may protect or prevent threats to life but would remain unable to consider optimizing lives as its focus or priority, e.g., by ensuring that people unconditionally live longer and healthier lives, preempting health related hazards, regulating architectural forms, or requiring food inspections. The problem here is not of unwilling, unable, or incompliant legal structures, as human rights lawyers generally tell us. It is of willingness, ability, and compliance merged with 'falsity'. In other words, the willingness is simply not 'proper'. Those who interpret human rights wrongly in such an instance do not misinterpret human rights; they violate them.

A connected issue involves having proper institutional basis. Using swords dexterously is an independent skill. This skill cannot be reduced either to the sharpness of the sword or to the persuasiveness of the covenant that the sword aims to back. Sword is an instrument that is not very useful for one who does not know how to use it, even if the end for which that person wants to use the sword for is laudable. Think of a society

not having prisons for convicted criminals, but dungeons. Think of society that does not possess detention centers for juvenile delinquents, but detains them in lower compartments on abandoned ships. Or, more realistically, think of a society that lacks educational structures, or lacks 'proper' education. This society believes that the simple fact of growing old within its social structure amounts to education enough or that when children work in its marketplace that participation itself educates them. It is difficult to legitimize that society's detention of minors for the sake of 'educational' supervision as a worthy social good justifying curtailment of liberty. Instead, as per the intuition of rights' activists, one would either have a minor being indoctrinated or confront a case of child labor/ bondage. That is to say, when human rights standards limit or restrict rights, they presume the 'proper' existence of that social good and activity in the light of which law restricts or limits rights. The 'capacity-building' projects that rights' advocates pursue consider it as their task to entrench such 'proper' institutions in a society.

This observation entails a crucial point. One cannot speak of international human rights law either as providing a global constitutional standard or as a domestic human rights regime writ large. This is not because of the absence either of a global sovereign or of effective enforcement standards. Instead, speaking of international human rights law in the aforementioned terms assumes that the practices through which legal systems rationalize human rights remain broadly invariable internationally and cross-culturally.[180] Thus, when one speaks of international human rights law in such terms,

[180] By invariability, I do not ignore difference, or deny the threshold of acceptable difference – what Donnelly (2013) terms as 'legitimate variation' (103). In fact, the idea of freedom presumes certain difference. I simply pinpoint that different conceptions of human rights need to be valid, if one is to see them as valid interpretations of the concept of human rights. Indeed, human rights both incorporate cultural differences and transcend them. Yet, human rights are a particular normative discourse. If we can see human rights as governmentality, it is important to note that a governmentality is always a specific art of government. It may be universally appreciated or globally implemented. However, this does not rob it of its specificity. By invariability, I, initially, bring to the fore the assumption guiding universalization projects that allows the one spearheading them to believe that different legal systems contain resources to produce valid interpretations of human rights. The idea of invalidity, i.e., the point where the agreement concerning the valid use of the concept ends, allows us to critically evaluate such an assumption. Finnis, for example, notes: 'Laws and decisions declaring and giving effect to human rights have the complexity characteristic of positive law … Unjustly established legal human rights are 'human rights', not human rights' (Finnis 2011, 3). Thus, the idea that certain interpretations of human rights are downright invalid, even when well-intentioned, allows us to see the fact that not simply legal or institutional issues, but also certain knowledge-based and substantive variables, guide the valid legal interpretation of human rights. This point becomes obvious when one speaks of universalizing human rights. Whereas one can introduce apt legal or institutional setups in other societies to – more or less – influence their social dynamics accordingly, knowledge-based and substantive variables evolve over time and more thoroughly resist centrally guided projects aiming at social transformation through law or politics. To put it in another way, it would be naïve to say here that the conditions that guarantee effective and valid of interpretation of human rights are cross-culturally present. Nonetheless, one can perhaps introduce, encourage, or promote such conditions, albeit it remains arguable whether one may be able to control their shape or to determine their effects. To produce such conditions that would allow everyone to enjoy valid human rights and that would in turn allow those holders to consider human rights as valid requires a specific interpretive *infra*structure in its full and prior sense. However, textual-legal standards of human rights offer weak support for such social projects. More, it would be then naïve to think that

one's assertion concerning the law presumes points touching the non-law, where the law remains unable to summon appropriate resources on its own touching the non-law.

Second related factor is the place of norms in guiding conduct. Playing with the Hobbesian image one last time. The use of sword depends on socially transmitted skill patterns and understandings. A society that uses swords as a prop with which its members perform traditional dance but uses daggers to coerce people to do something may want to use daggers to enforce its covenants. Thus, the way covenants speak and the way force backs them presume a social context. When we speak of covenants, their interpretation, and their enforcement, we need to understand the place of all these variables within such a context. Coming back to our point. Generally, when rights' advocates speak of compliance with norms, they assume it important to have an effective but limited political government in place. However, in order to universalize, this stance focuses on rights as constraints, not as regulative principles. Think of a legal system having a strong judicial structure, limited political government, and effective enforcement competence. However, for the purposes of deciding legally, the judiciary of this society bases its decision on the evidence that the prosecuting authorities obtain after running divinely inspired tests. Without having background practices concerning truth, verifiability, and consistency, it is hard to see how such a legal system even guarantees the right to a fair trial of its rights-holders.

Let us make the example extreme. Suppose that a society comprehensively regulates itself in line with a specific worldview. Think that it lacks a public health discourse because that worldview does not offer any such place to it. It would then be impossible for its law either to secure such a social good, or to acknowledge rights claims touching such concerns, or to develop settings that deliver such a social good in a rights compliant manner. Even when such a society gives its members a right to exit and even when it may not legally violate the rights of its members, it is hard to determine the sense in which such a society is rights friendly at all.[181] Rights as axioms that in a rights friendly society maintain a reciprocity with the rationalities of government would meet their limit because the prior social regulation occurs in a context that does not refer to the rationality of those that that society governs. In other words, given such a

such a process is without its violence. True, one can consider it to be justifiable violence instituting a promising change. Nevertheless, this does not make the process any less violent.

[181] The fact that rights-holders consent to, or are satisfied with, invalid interpretation of their human rights does not entail that they can waive their rights. In fact, in *Refah*, the ECtHR noted: Legal system of a rights friendly society has 'a positive obligation to ensure that everyone within its jurisdiction enjoys in full, and without being able to waive them, the rights and freedoms guaranteed by the Convention' (para. 119). Griffin analyzes this dynamic by contrasting liberty and autonomy. He notes: 'The enemies of autonomy are indoctrination, brain-washing, domination, manipulation, conformity, conventionality, false consciousness, certain forms of immaturity. The enemies of liberty are compulsion, constraint, impoverishment of options in life ... One can be at liberty but not autonomous … one does not live autonomously without autonomy' (Griffin 2008, 151).

society's worldview that possesses a thick teleology, there would neither be social evolution in terms of autonomy nor an evolutionary interpretation of rights.

If human rights signify a normative parameter that regulates actions in a prescriptive manner, and if any legal application of a prescriptive normative standard necessarily develops a certain form of interaction with the surrounding social norms of a particular society, it is naïve to expect that a congruent relationship always exists between the two or to expect that no kind of violence is involved in the projects of congruence. True, a consensus concerning the validity of human rights norms may come from different social histories.[182] However, a consensus on human rights itself cannot produce valid, even when different, interpretations of human rights on its own, if that consensus is unable to influence those social histories in turn.[183] Thus, focusing on the variables relating to the interpretation and the position of human rights norms (with its effects, means, and form) is something that the practice based on human rights norms forces on us, especially when we analyze the projects that aim to universalize human rights. This point remains valid even when those variables may not explicitly proceed from the textual-legal standards of human rights – and, it is on this point that the initial insight concerning the limits to universalization of human rights of the political theorists we mentioned vindicates itself.

[182] It is also equally unclear whether by consensus one means general agreement, especially because the terms of the consensus remain unclear. Theorists and practitioners talking about consensus on human rights additionally presume that all the participants engaged in reaching a consensus will not reasonably disagree with the substance of human rights (c.f., Donnelly 2013, 116-117). It is only the initial premise with which they begin and the means that they use to reach the endpoint that remains open to the participants.

[183] Taylor talks about an 'unforced consensus' on human rights (c.f., Ignatieff, 2001, 56). Such a consensus would make use of those moral resources of a tradition that are supportive of human rights, i.e., 'creative reimmersions of different groups, each in their own spiritual heritage travelling different routes to the same goal' (Taylor 1999, 144). However, while mentioning Theravada Buddhism, Taylor acknowledges:

> '[Reform Buddhism has] awareness that very exigent demands are being made that go way beyond what the majority of ordinary believers recognize as required practice … in developing a doctrine of democracy and human rights, Reform Buddhists are proposing to extend what has hitherto been a minority practice and entrench it in society as a whole' (Taylor 1999, 137).

Likewise, Cohen talks about 'justificatory minimalism'. Like Taylor, Cohen observes: 'Showing that [human rights] can win support within different ethical traditions may require fresh elaboration of those traditions by their proponents' (Cohen 2004, 201). Beitz notes: 'Changes in law and administration are unlikely to be successful in securing their objectives without corresponding changes in background beliefs and social practices' (Beitz 2009, 194).

Appendix. Section I of the European Convention on Human Rights: Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.1950

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

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

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

ARTICLE 1

Obligation to respect Human Rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

RIGHTS AND FREEDOMS

ARTICLE 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defense of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article the term “forced or compulsory labour” shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

ARTICLE 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13

Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

ARTICLE 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 15

Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16

Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

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