

University of Helsinki
Faculty of Law
Helsinki, Finland

DARK AND BRIGHT SIDES OF HUMAN RIGHTS

Towards pragmatic evaluation

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ACADEMIC DISSERTATION

Academic dissertation, submitted with the permission of
the Faculty of Law of the University of Helsinki,
for public examination on Friday, 11 October at 12 o'clock
in auditorium XII of the University's Main Building (Unioninkatu 34)

Helsinki 2013

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ISBN 978-952-10-9310-4 (paperback)

ISBN 978-952-10-9311-1 (PDF)

<http://ethesis.helsinki.fi/>

Cover designed by Sara Jacobsen

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Unigrafia Oy
Helsinki 2013

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LIST OF ORIGINAL PUBLICATIONS

- I Jari Pirjola: "Culture, Western Origin and the Universality of Human Rights", *Nordic Journal of Human Rights* (*Nordic Tidkskrift for Menneskerettigheter*), Vol. 23, 2005, No. 1. pp.1-15.
- II Jari Pirjola: "Universaalit Ihmisoikeudet ja "eksoottinen Toinen". (In English: Universal human rights and the exotic Other.) *Oikeus* 2007 (36); 1, pp. 107-114.
- III Jari Pirjola: "Palauttamiskielto. Non-refoulement periaatteesta kolmessa ihmisoikeussopimuksessa" (In English: Prohibition of Return: The Principle of non-refoulement in three human rights conventions), *Lakimies*, no. 5, 2002, pp. 741-756.
- IV Jari Pirjola: "Shadows in Paradise – Exploring Non-Refoulement as an Open Concept", *International Journal of Refugee Law*, 19:4, 2007, pp. 639-660.
- V Jari Pirjola: "European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language", *European Journal of Migration and Law*, 11, 2009, pp. 347-366.
- VI Jari Pirjola: "Freedom of Religion in Multi-Faith Europe: Protecting Universal or Western Sensibilities?" *Nordic Journal of Human Rights*, 29:1 (2011), pp. 38–55
- VII Jari Pirjola: "The Parliamentary Ombudsman of Finland as a National Preventive Mechanism under the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", *Nordic Journal of International Law*, 77, 2008, pp. 163-174.

ACKNOWLEDGEMENTS

My thesis is a collection of articles that I have written during my work career as a lawyer in different kinds of organizations which deal with international human rights law. My experiences as a lawyer in the Finnish Red Cross, as a member of the Asylum Appeals Board or my period with the International Organisation for Migration (IOM) and with the European Commission have created opportunities and incentives to write articles dealing with refugee law and human rights law. In my present work in the office for the Parliamentary Ombudsman of Finland I have been able to work, for example, with the Optional Protocol to the UN Convention against Torture and have also drafted one article dealing with that topic. This has been useful also in the light of my current membership (2012-2015) on the European Committee for Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

Being not only a lawyer but also a cultural anthropologist by education has also affected the choice of topics for my articles. In the light of my anthropological interests, my visits in research institutions in Philippines, Malaysia and Thailand, for example, have been extremely interesting and provided insights to some of my articles.

During my writing periods I have received assistance from many people. It is time to thank some of them.

First of all, I would like to express my thanks to Professor Martti Koskeniemi, who was the supervisor of my thesis and who has also, over the years, kindly commented on some of my articles. For a civil servant like myself, it has been a privilege to receive advice and criticism from Martti, who is one of the leading scholars of international law in the world. I would like to thank him for his valuable assistance and comments when I was finalising my thesis.

I also would like to thank Professor Elina Pirjatanniemi and Dr Päivi Leino-Sandberg for acting as pre-examiners of my thesis. I would also like to thank both of them for their excellent comments and proposals to improve the introduction part of my thesis. Additional thanks also goes to Elina Pirjatanniemi, who also agreed to act as an opponent at the public defence of my thesis.

It is impossible to thank all the people with whom I have discussed the ideas in my articles. Daily discussions on the theory and practice of rights with colleagues in former and current work places have been extremely important. In addition, I would especially like to thank Barbara Bernath, Heiner Bielefeldt, Mikko Eteläpää, Matti Heinonen, Kimmo Nuotio, Eeva Nykänen, Anne Orford, Pasi Pölönen and

Martin Scheinin who provided comments on my articles or commented on the synthesis section of my thesis.

I would also like to thank my friends for their encouragement and interest in my work. I am grateful to my mother Kirsti and to my late father Osmo.

My warmest thanks, however, go to my wife Marketta, and to my children Iiris and Lenni. I would like to thank you all for support, love and fun – whether in Santio or Melbourne or somewhere in between.

I am grateful to Sara Jacobsen who designed the cover of my book.

I have received small grants from Emil Aaltonen Foundation, Finnish Lawyers' Society, the Jenny and Antti Wihuri Foundation and the Church Research Institute. I am very grateful for their financial support.

In Helsinki, 26 August 2013

Jari Pirjola

*"Principle without compromise is empty;
compromise without principle is blind"¹*

¹ The sentence is taken from an article dealing the political philosophy of Abraham Lincoln. "Lincoln's moral universe..." by Steven B. Smith. International Heral Tribune, 16-17.2.2013, p.20.

1 INTRODUCTION

The idea of universal, inalienable and equal human rights is an attempt to find a solution to the tension between freedom and order. In liberal society people want to decide how they live their lives, and what they consider as good and right. This freedom cannot, however, be unlimited as people may want things that are harmful for themselves and others. For this reason, we need standards and principles to know what is acceptable and what is not. One solution for this dilemma is the idea of human rights that are often thought to provide us with absolute, non-negotiable and un-political guidance in complex situations in plural societies.

When abstract human rights principles are turned into practice, their meaning is not that clear anymore. Human rights are open and conflicting concepts that can be used to promote almost any kind of goal. On the one hand, human rights are universal, but on the other hand in every concrete situation they have to be defined or balanced by those who have power to do so. Don't rights in this balancing exercise lose their universality, and how do we know what is the right interpretation of an open human rights norm? Human rights principles are at the heart of modern political debate, but when implemented in practice they can also become a part of power, bureaucracy and governance.

Democracy and rights are not necessarily friends either. Free election can bring to power governments that do not respect minority rights or rights of women, for example. In Libya or Tunisia it remains to be seen whether democracy will entrench or endanger the rights of Christians, dissidents or sexual minorities, for example. Then there is the question of human rights and culture: is human right a Western concept or can it be applied universally in all cultural contexts?

As human rights seem to be rather complicated concept, it is interesting to look at the problem of rights critically and from different contexts and perspectives. I try to do this with my seven articles or "case studies" and the synthesis that complements them theoretically. In the following pages I will explore the claimed universality of rights and its relation to the democracy. I discuss human rights and its relation to the concept of culture and freedom of religion. I analyze the ability of human rights to provide protection to refugees as well as some paradoxes that might compromise the abstract promise of protection. I look at human rights as important universal standards that also make it possible to exclude particular people from this universalism.

Some of my articles discuss human rights in rather formal and abstract way, and some articles raise more practical and critical perspectives to the operation of rights. I try to show that we have to look human rights simultaneously as a theory

and practice, if we are to avoid a clichéd concept of human rights. It is clear that my research reveals only partial truths, and is limited to the perspectives that I raise in my articles. Other articles would probably raise different kinds of dark and bright sides of rights. As my articles were written during a long period of time, I also provide some comments and afterthoughts (section: comments) in the synthesis to some of my articles.

Human rights rhetoric has had a liberating and positive meaning for societies. The human rights movement has received good results in naming and shaming repressive governments and those who commit abuses. But when more and more claims are dressed up in human rights terms, there is a danger that human rights will lose their capacity to make any difference at all. For this reason, it is interesting to explore human rights from pragmatic perspective. The successes of human rights movement and institutions have never based on wishful or utopian thinking. Therefore, it is necessary to keep on asking what human rights do achieve in practice, and who are the winners and losers.

I have organised the rest of this synthesis in the following way. In section 2 I provide an introduction to the problem with rights. In section 3 I say a few words about the key concepts used in this synthesis. In section 4 I examine human rights from a theoretical perspective. However, I want to analyse and discuss the theoretical aspects of rights only to the extent they provide some additional theoretical value for my articles. In that section I first discuss human rights as so-called universal, inalienable and equal rights. After this I will say a few words about the theoretical discussion of the link between human rights and democracy. I will end section 4 by looking at human rights as rules, standards and institutions.

In section 5 I will look at the practice of human rights. I am mainly interested in the critical perspectives regarding the practical operation of rights. In this section I will explore both modern and historical criticisms of rights to provide some new and complementary perspectives to my articles. One way to deal with the tension between abstract human rights and their practical realization is to look at the operation of human rights from a pragmatic perspective. This is done in section 6. After setting up the general theoretical framework of my synthesis, I will focus on the structure of my thesis (section 7). In section 8 I will provide short summaries of my seven articles, and in section 9 I will describe the methods that were used in them. Finally, in section 10, human rights as theory and practice are discussed in the context of my articles. In my concluding observations, (section 11) I will try to approach a non-clichéd view of human rights.

I will start my synthesis by looking at the problem of rights as an interplay between theory and practice.

2 THE PROBLEM WITH RIGHTS

By constantly challenging the relations of inclusion-exclusion implied by the political constitution of the “people” – required by the exercise of democracy – liberal discourse of universal human rights plays an important role in maintaining the democratic contestation alive. On the other side, it is only thanks to the democratic logic of equivalence that frontiers can be created and a demos established without which no real exercise of rights could be possible.

Chantal Mouffe: The Democratic Paradox

Human rights operate in two different, but connected worlds: on the one hand, human rights are abstract conventions, norms, principles and ideals, while on the other hand these same rights receive their meaning in professional practice.² When human rights operate in professional contexts, the two perspectives merge into each other: a desired policy goal or appropriate outcome is justified by referring to human rights, and human rights norms give guidance and inspiration to practice.

In human rights work – in the human rights movement, for example – or in general human rights arguments, this distinction between theory and practice is sometimes lost. Human rights are seen as a fairly unproblematic whole that in practice leads to good results. The duty of the human rights lawyer is to make sure that in concrete cases the theory and the practice look compatible, or to convince others that the abstract right and its practical realisation are “correctly” understood. Otherwise, it would not necessarily be wise at a general level to “promote human rights”, to create “human rights policies” or to support “human rights friendly decisions”: it would not be clear whether we were promoting abstract human rights norms, or their different – good and bad – practical consequences. Often the main challenge for the human rights community seems to be to make it clear that everyone has human rights, and to “move with determination from rhetoric to enforcement of human rights standards.”³ At the outset of this introduction, however, I want to keep theory and practice separate. This is one way to discuss the problem with human rights and the tensions that are involved in their practical operation.

2 According to the Encyclopaedia Britannica “human rights refer to a wide variety of values and capabilities reflecting the diversity of human circumstances and history. They are conceived of as universal, applying to all human beings everywhere, and as fundamental, referring to essential or basic human needs.” <http://www.britannica.com/EBchecked/topic/275840/human-rights>. Visited in October 2011.

3 Commissioner for Human Rights press release, Strasbourg 27.1.2007. In the file of the author.

Indeed, human rights and their operation in practice are two interconnected realms. For example, at an abstract level it is easy to claim that human rights are “universal” or that “non-discrimination”, “freedom of religion” or “not to be subjected to inhuman treatment” are important human rights. In practice, however, we can have very different understandings of the practical meaning, interpretation and consequences of these rights. Placing an abstract human right into a concrete situation causes problems of correct interpretation and balanced reasoning. The more we emphasise one human right, or one interpretation of that right, the more we might have to exclude other possible human rights or interpretations of rights. If resources are limited, whether we prioritise, for example, the human right to education, instead of the human right to housing is not irrelevant. If we prioritise freedom of religion in a multicultural society, we may have to accept practices that are contrary to human rights to equality. Indeed, when abstract human rights are turned into practical measures they can create unexpected consequences and thus become a “part of the problem”.⁴

This tension between human rights and their practical realisation is, of course, nothing new or dramatic to people who are working with human rights conventions. Human rights lawyers like me, are, on a daily basis, dealing with abstract human rights conventions and language, which in every concrete case must be turned into practical measures. This is not an easy task, however, as the concrete meaning of human rights does not logically follow from their abstract formulation. Freedom of religion, for example, is a fundamental human right, but does it in practice include a right to wear a headscarf at school, or to establish a political party, or to have or not to have an abortion? The European Convention on Human Rights stipulates (in Art. 5) that everyone who is arrested or detained shall be brought “promptly” before a judge, and shall be entitled to trial within a “reasonable time”. But how do we decide what is a reasonable time? It is clear that no-one should fear persecution, but can family violence or extreme poverty in one’s home country in some cases constitute persecution or degrading treatment? Degrading treatment is prohibited, but how many days in solitary confinement reach the level of severity to constitute inhuman or degrading treatment? The abstract language of human rights cannot provide us with answers to these questions, or determine our choices in practice. We have to look beyond rights to the context, to the decisions of monitoring bodies and to society at large. Human rights articles and principles may represent goals, towards which governments and administrations try to move, but in practice it is also necessary to look at policy considerations: what is fair and reasonable in a given concrete situation, what works in this or that context, and in what kind of community

4 David Kennedy, “The International Human Rights Movement: Part of the Problem?”, *European Human Rights Law Review*, Issue 3, 2001, pp. 245-266.

do we want to live? But is this type of political manoeuvring and prioritising not something that universal and inalienable human rights should prevent?

As to the theoretical perspective on rights, there is, indeed, something very appealing in the idea that every person everywhere in the world, irrespective of citizenship, residence, race, culture, class, caste or community, is entitled to enjoy some universal and inalienable human rights standards which others should respect.⁵ The substance of these rights could be taken from the main human rights conventions.⁶ Indeed, many view human rights conventions, articles and principles as rather unproblematic tools which can give an expression to absolute and good values and “standards” that must in practice lie outside political calculations. As I wrote in my article “Freedom of Religion”, abstract human rights can be seen as important because they are thought to offer us objective and non-political guidance in a complicated world.

In the same way, the abstract ideas of “human rights mainstreaming” and “human rights friendliness” have become popular management tools in legal bodies and governmental administrations. Human rights, and human rights principles as such, are often seen as something self-evidently progressive and unproblematic, an institution in the “fight against evil” as a senior human rights officer in the Council of Europe put it to me during a conference break.⁷

According to Samuel Moyn:

*There is no way to reckon with the recent emergence and contemporary power of human rights without focusing on their utopian dimension: the image of another, better world of dignity and respect that underlines their appeal, even when human rights seem to be about slow and piecemeal reform.*⁸

5 Amartya Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press, 2009), p.355.

6 Human rights are sometimes described as the “birthright of all human beings”. For more detailed analysis on the claimed properties of human rights, see Marek Piechowiak, “What are Human Rights? The Concept of Human Rights and their Extra-Legal Justification”, in Raija Hanski and Markku Suksi (eds.), *An Introduction to the International Protection of Human Rights. A Textbook* (Institute for Human Rights (Åbo Akademi University, 1999), pp. 3-14, (second edition).

7 According to Costas Douzinas, “Human rights are the fate of postmodernity, the energy of our societies, the fulfilment of the enlightenment promise of emancipation and realization. Human rights are the ideology after the end, the defeat of ideologies, or to adopt a vogueish term, the ideology of globalisation at the ‘end of history’”. Douzinas has claimed that the concept of human rights unites left and right, the pulpit and the state, the Minister and the rebel, the developing world and the liberals of Hampstead and Manhattan. As he puts it, the idea of human rights is taken seriously and human rights are talked about favourably by politicians, academics, NGOs, parliamentarians, governments, interest groups representing everyone from sexual minorities to the disabled, journalists, columnists, chefs and osteopaths. See Costas Douzinas, “Six Theses on the End(s) of Human Rights”, in *Finnish Yearbook of International Law* (Kluwer Law International, 2002), p. 201.

8 Samuel Moyn, *The Last Utopia. Human Rights in History* (Harvard University Press, 2010), p. 4.

Thus, from one perspective, as I show in more detail in section 4 below, human rights can be discussed as theoretical norms and ideals or as a form of critique (“I too should have these rights”), something that in this paper I call “human rights as theory”.

But while human rights can be looked at from a theoretical perspective, they are also used in practice as discussed in section 5. Analysing human rights mainly as theoretical concepts without any reference to practice or context - if that is possible - has a mainly academic interest. As Florian Hoffmann has argued, the idea of an abstract human right separated from context and purpose can become a “cliché” concept, because referring to abstract human rights or emphasizing their general value does not tell us whose preferences or ideas of justice the human rights are promoting, or what consequences the human rights have in practice.⁹

Indeed, both historical and modern critics of rights – as also analysed in more detail in section 5 below – have claimed that, in practice, human rights can have both good and bad consequences, and that for that reason they have to be viewed critically and pragmatically. Karl Marx, for example, claimed that the rights of man are yet another political theology that mainly protects the possessive individual of a capitalist society.¹⁰ According to him, the human right to property is good for those who have property, but not so important to the poor. Some modern critics have underlined that, in practice, open human rights language does not provide us with clear standards or principles, but instead defers to policy requirements. This can, of course, be good or bad, depending on the circumstances of the matter. Some cultural researchers have criticised the idea of human rights from different perspective. When the Universal Declaration of Human Rights was drafted after World War II, some prominent cultural anthropologists criticised human rights as being a Western concept promoting Western interests; I elaborate on this in my article “Culture and Human Rights”.

Some observers have stated that implementing human rights in practice rarely gets beyond being a masquerade for politics. States agree on human rights conventions, but it is also state bodies and their experts who in practice agree on the priority of rights, their “correct” interpretation, and the necessary action and resources required for their implementation. In addition to this, some critics of rights, as discussed below, particularly in section 5, have argued that when abstract rights are put into practice, they can become a hypocritical and bureaucratic state language which upholds power structures rather than really challenges them.

9 See Florian F. Hoffmann, “Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights”, in Anne Orford (ed.), *International Law and its Others* (Cambridge University Press, 2006), pp. 226-229.

10 Karl Marx, “On the Jewish Question” (1844), see <http://www.marxists.org/archive/marx/works/1844/jewish-question/>, visited December, 2011.

So, while theoretical ideas of universal human rights have an appeal, it is also necessary to ask what kind of practical consequences these rights have. What kind of support do abstract human rights commitments and norms offer, in practice, for individuals (refugees, minorities, the poor, the excluded, etc); how do rights operate in the professional sphere; and do human rights sometimes, as Anne Orford has claimed, constrain our capacity to think about and counter the ways power circulates in law and politics?¹¹ For this reason, it is not enough to look at what human rights could be or ought to be at an abstract level, but also at how human rights are turned into governance and professional practice, and why human rights often end up supporting one set of positions or preferences instead of another.

Looking at human rights from a critical perspective does not mean denying the good things human rights have achieved in practice. As David Kennedy has written, human rights have freed individuals from great harm, providing emancipatory vocabulary and institutional machinery for people across the globe. Human rights have functioned as a language in which experiences of injustice, suffering and violence are spoken of in such a way that they have gained general attention because it is a language that everyone understands. Human rights discourse and human rights conventions have provided a platform for advancing visions of good institutions and right practices.¹²

But while human rights can do good things in practice, they can also have non-liberating, or even harmful, practical consequences. An abstract definition of family in human rights law is, in practice, valuable to those who are included in that definition but “bad” for those – sexual minorities, grandmothers of refugees, etc – who are excluded. Freedom of religion is good for those who practise their religion in line with Strasbourg case law (if that kind of line of cases can be found), but problematic or even harmful for those who have a different kind of definition for freedom of religion. Thus, in professional practice the claimed universality of freedom of religion might reveal a Western or institutional bias, or be conditioned by certain cultural ways of thinking of a good life; this is discussed in my article “Freedom of Religion”. Refugee law is especially beneficial for those who can meet the criteria of the definition of refugee, but not for those seeking asylum for other reasons. The human right to property is an important right, but when big companies start to buy land in Africa and to make reference to their “right to property”, it becomes clear that referring to human rights is not necessarily a progressive move towards a more just world. The building of institutions can also have negative practical consequences. Establishing a new human rights institution may sometimes

11 Anne Orford, “Biopolitics and the Tragic Subject of Human Rights” in Elizabeth Dauphinee and Christina Masters (eds.), *The Logics of Biopower and the War on Terror* (Palgrave, 2007), p. 205.

12 See David Kennedy, “The International Human Rights Movement: Part of the Problem?”, *European Human Rights Law Review*, Issue 3, 2001, pp. 245-266.

take resources away from more efficient NGOs, as a colleague from the Association for the Prevention of Torture (APT) reminded me in the Ukraine. In other words, implementing human rights law in practice is not a technical question, but a question about priorities, resources and political choices.

One way to analyse the interplay between abstract rights and their practical realisation in a given context, is to look at their operation from a pragmatic perspective. I will elaborate on this perspective on human rights in section 6. Open or conflicting rights, for example, never remain so in practice, but are always interpreted or given content or an order of priority by a human rights expert, a treaty institution or another expert body. The pragmatic perspective does not aim to understand human rights in terms of what they could be in theory (as universal standards or a basis for democracy, for example), but instead aims to focus on the practical consequences of rights. How, for example, do abstract human rights in this or that context protect human beings against cruelty, oppression and degradation?¹³ The pragmatic approach to human rights is concerned with the making of the legal choices that are always present in the operation of human rights.

Can human rights law or human rights institutions sometimes offer false promises, by claiming to know what justice is and by saying that to promote justice in the world all you need to do is to adopt, implement and interpret human rights?¹⁴ Ms Navi Pillay, United Nations High Commissioner for Human Rights, for example, claimed in her opening statement to the 18th session of the Human Rights Council in Geneva that the “dire emergency in the Horn of Africa is both the product of devastating natural phenomena, and the failure of governments – individually and collectively – to meet their preventive and remedial human rights obligations.”¹⁵ Could the African problems really be prevented if governments implemented human rights conventions?¹⁶ What would that mean in practice?

From theoretical perspective, one could say that every practical consensus in the field of human rights, appears to be a stabilisation of something essentially unstable. This can be good (for those who in practice benefit from the interpretation), but consensus can also be risky (for those who are excluded), since stability can mean

13 “When human rights are honoured and enforced, they are effective instruments to protect individuals from abuse, cruelty, oppression, degradation and the like” Michael Ignatief, *Human Rights as politics and idolatry* (Princeton University Press, 2001), pp. x and xi.

14 See, for example, David Kennedy, “The International Human Rights Movement: Part of the Problem?”, *European Human Rights Law Review*, Issue 3, 2001, pp. 245-266.

15 Opening statement by Navi Pillay, United Nations High Commissioner for Human Rights, Geneva, 13 September 2011. In the file of the author.

16 Could the human rights system be creating poverty? There are researchers who have argued that international law must also be seen in terms of establishing the conditions for impoverishment, and even of fostering it. Thus the international human rights system may contribute not so much to the reduction of poverty but more to its production. See Susan Marks, “Human Rights and the Bottom Billion”, *European Human Rights Law Review*, Issue 1, 2009, pp. 37-49.

that politics and ethics are no longer considered.¹⁷ A decision or an expert opinion based on human rights, can create a false sense of harmony and hide the arbitrary, political or even irrelevant nature of that decision. When abstract rights encounter power and practice, human rights might turn out to protect particular (political, economic, institutional, religious, or fundamental) interests and values while leaving other interests in darkness.

So maybe a clearer sense of choice and freedom at the moment of decision in the practical application of human rights is needed? As David Kennedy puts it:

*There is a freedom here – the freedom of discretion, of deciding in the exception, a human freedom of the will. It is at once pleasurable and terrifying. It entails responsibility to decide for others, causing consequences that elude our knowledge but not our power.*¹⁸

We can never be completely satisfied that we have made a good choice, since a decision in favour of one alternative is always to the detriment of the opposite decision. It is in this well-known tension between the theory and the practice of human rights that I try to discuss and position the seven articles of my thesis.

As noted above, in professional practice, theory and practice fuse into one. Human rights are popular tools in the fight for strategic power precisely because they make it possible to incorporate abstract universalism with concrete particularism (as discussed in my article “European Asylum Policy”, for example). The power of rights lies in the ability to present every particular claim as a claim for universal human rights. In the same way, human rights lawyers can refer to abstract human rights, while being aware that in practice these rights can be invoked in support of almost any purpose or goal.

From the outset, I want to make one thing clear. I am not “for” or “against” human rights, but only interested in the conceptual problems that emerge with the use of rights language, both in my articles, and in this introduction to my articles. I think that we want to prevent human rights from becoming a cliché. For this purpose,

¹⁷ See Chantal Mouffe, *The Democratic Paradox* (Verso, 2009) at p. 136.

¹⁸ David Kennedy, “Reassessing International Humanitarianism. The Dark Sides” in Anne Orford (ed.), *International Law and its Others* (Cambridge University Press, 2006), p. 151. Compare this to Carl Schmitt who famously stated that “Sovereign is the one who decides on the exception”. See Carl Schmitt, *Political Theology*. Four chapters on the concept of sovereignty (The University of Chicago Press, 2005), p. 5. Later, on page 36, he argues that “The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries”. Compare Chantal Mouffe who talks about the “moment of decision” which characterizes the field of politics. According to her, this has serious consequences, since it is precisely those decisions – which are always taken in an uncertain terrain – which structure hegemonic relations. The decisions have an element of force and violence that can never be eliminated and cannot be adequately apprehended through the sole language of ethics or morality. See Chantal Mouffe, *Democratic Paradox*, p. 130.

more sensitivity to human rights norms, as well as to their practical consequences is needed.

Indeed, in any society governed by the rule of law, where human rights are often mentioned in the administration of justice, it is important to learn to look at the problems of rights. It is necessary to analyse human rights, not in devotional terms such as truth or religion, but as a practice that has strengths and weaknesses, winners and losers, and costs and benefits. In my experience, human rights practitioners, civil servants and so-called human rights experts too often stop short of considering the practical downsides or negative aspects of their enthusiasm for the good things about human rights, because the “promotion of human rights” seems so obviously beneficial.

Can human rights practitioners or human rights institutions, national or global, even become blind to the problem of rights we discussed above? Can good-hearted and well-intentioned people also go wrong when they work to promote human rights? This can only be discussed in context, but many concerned with the protection of human rights may feel reluctant to evaluate human rights systems, human rights institutions and human rights bureaucracies pragmatically, fearing that such a critical look may reduce the advances made by human rights in promoting a “better world”.

In contrast, in a private context – in lunch hours, corridors, and free time – one does hear critical and sceptical views on the real practical meaning of human rights jargon, or the real practical benefits of human rights institutions. As David Kennedy has written, human rights deal with appealing ideas, but when translated into governance, they also create costs; however, we discuss the dark sides only privately, often cynically, and rarely strategically.¹⁹

¹⁹ See David Kennedy, “Reassessing International Humanitarianism: The Dark Sides”, In Anne Orford (ed.) *International Law and its Others* (Cambridge University Press, 2006), p. 133.

3 KEY CONCEPTS

Before starting to discuss human rights as a theory and practice in more detail, a few more words need to be said about concepts like “human rights”, and “dark and bright side of rights”, that are used in this introduction. I have no difficulties in agreeing with Costas Douzinas, who has pointed out that the term human rights has a wide scope and undetermined meaning. He writes that “human rights” encompasses multiple, diverse and even conflicting practices and discourses.²⁰ Human rights denotes, for example, a diverse group of constitutional, legal, judicial, academic and popular texts and commentaries; legal, political and cultural institutions and practices at domestic, regional and international levels using human rights as their organizing principle; governmental and non-governmental agencies working around human rights; the personnel working in these institutions; diverse campaigns, groups and organisations at various levels; the people involved in them; and multiple situations, events and people who use the term in order to describe or evaluate these situations. Douzinas’ wide definition of human rights is also suitable for my purposes.

What, then, do I mean by the dark and bright sides of human rights? As already discussed in previous section, human rights are simultaneously an abstract system and a practice. In abstract discussions, human rights are sometimes said to be universal, inalienable and equal. Human rights are said to create standards, vocabularies and institutions to free human beings from different kinds of harm and oppression. Human rights conventions and principles are regarded as valuable, and often rightly so, because they can sometimes in practice protect the dignity, agency, and freedom of human beings. Human rights law can give us access to national and international human rights institutions, and provide humanitarians with advocacy tools, vocabulary and resources to challenge oppressive governments, etc.

This type of “romantic” narrative of human rights is not wrong, but it is inadequate. When we look at human rights in practice, it is easy to see that indeterminate and conflicting rights often defer, in different ways, to policy considerations as discussed in section 5. Human rights can serve powerless, but they can also serve those who have power. When abstract rights are used in practice, they may start to support either “good” or “bad” priorities or values, depending on one’s perspective on the matter. For example, human rights law is not only for peace, as rights language can also in practice be used to justify military operations. Is this type of use of human rights good or bad? The bright side for one person can be the dark side for another.

20 On different usages of human rights, see Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, 2007), pp. 8-13.

On an abstract level human rights look value-neutral, fundamental, universal and inalienable, but in practice they may promote existing privileges, or create costs for those who are excluded from their “established” meaning. This is discussed in “Shadows in Paradise” or “Freedom of Religion”, for example.

I do not think that the dark and bright sides of rights are separate aspects or permanent features of human rights, but different and, in many ways, related, context-bound and changing aspects and understandings of the practical operation of human rights. Thus, in my discussion of the dark and bright sides of human rights, I do not refer to exclusive but to relational aspects of human rights, permanent or changing arguments that can or should keep the discussion on the practical meaning of human rights alive.

If we think that human rights only promote good consequences in practice, and that the main challenge is for everyone to have these rights, we might end up with a clichéd concept of rights. But if we only look at the bureaucratic or negative consequences of rights, we might end up with human rights cynicism. In practical human rights work one should avoid both these traps. Implementing human rights norms in professional practice is about making one interpretation, or one kind of use of human rights become “correct”. It is precisely in these particular contexts or cases that a pragmatic evaluation of human rights – discussed in more detail in section 6 - can draw our attention to the possible dark and bright sides of human rights.

But before exploring the dark and bright sides of human rights practice further, it is necessary to say a few words about the theoretical qualities that are claimed for human rights (human rights as theory). Human rights as “universal” rights that can provide “standards” are also discussed in my articles “Culture and Human Rights”, “Prohibition of return” and “OPCAT article”.

4 HUMAN RIGHTS AS UNIVERSAL, INALIENABLE AND EQUAL RIGHTS

The value of human rights is often linked to the universal, inalienable and equal nature that is claimed for them, to the role of human rights in democratic decision-making and to the meaning of human rights “standards” for developing just societies.²¹ As these abstract qualities of rights are also discussed in my articles, it is necessary to examine these theoretical perspectives in more detail.

First of all human rights are sometimes claimed to be “universal”, that is, to belong to each and every human being, no matter what she or he is like. The Charter of the United Nations, for example, commits the United Nations and all member states to action promoting “universal respect” for, and to observance of, human rights and fundamental freedoms. The Universal Declaration of Human Rights was also proclaimed as a common standard of achievement for “all peoples and all nations”. Universality of rights – discussed in my “Culture and Human Rights” – is often rooted in the inherent dignity of the human being. Human rights are said to be inherent rights that exist independently of the will of an individual human being or of any group of people. As human rights are neither obtained nor granted through any human action, they belong universally to every individual.²²

The rights which derive from the inherent dignity of human beings are also said to be “inalienable”. According to the preamble to the Universal Declaration of Human Rights, for example, human rights are “inalienable rights” of all members of the human family, and thus a foundation for freedom, justice and peace in the world. Inalienability means that nobody can deprive anybody else of these rights, and nobody can renounce these rights himself. In this approach, human rights are

21 Klaus Günther has stated that the strength of human rights language lie in their ability to make people sensitive to the voices of those human beings who suffer from pain and humiliation or who live with fear, and who reject it as injustice. This approach links the core meaning of human rights to something of negative universality. It is the universality of recognition of those “who suffer now or in the past from deliberate infliction of pain, humiliation, and fear, and who have reason to reject it as injustice.” See Klaus Günther, “The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture”, in Philip Alston (ed.) *The EU and Human Rights* (Oxford University Press, 1999), p. 125. Secretary General of United Nations claimed in his inaugural speech at the 1993 Vienna World Conference on Human Rights that human rights constitute a “common language of humanity”. See Boutros Boutros Ghali, *The Common Language of Humanity*, at the UN World Conference on Human Rights, *The Vienna Declaration and Program of Action* (1993).

22 See Marek Piechowiak, “What are Human Rights? The Concept of Human Rights and their Extra-Legal Justification”, in Rajja Hanski and Markku Suksi (eds.), *An Introduction to the International Protection of Human Rights. A Textbook* (2nd edition). Institute for Human Rights, Åbo Akademi University, 1999) pp. 3-14, at p. 6. According to Piechowiak, human rights are also claimed to be indivisible, interdependent and interrelated, but it is not necessary in this paper to discuss these abstract qualities of human rights.

not related to duly adopted legal norms, but, instead, the adoption of the appropriate norms is postulated to protect human rights, and to determine how they are realised. In other words, positive legal norms do not establish human rights but guarantee them. This idea refers back to natural law: we possess rights “naturally”; they are an automatic part of our humanness.²³

“Equality” is another major element of the traditional conception of human rights. The Universal Declaration of Human Rights famously states that all human beings are born free and equal in dignity and rights. Equality means that no human beings are more important than other human beings. Equal dignity requires equal respect, equal protection and equal possibilities and means for development. However, equality does not necessarily mean equal treatment, as in practice differences in treatment are acceptable or even desirable (so-called positive discrimination) if there are well-grounded reasons justifying them.

These theoretical qualities of rights – universality, inalienability, equality – are commonly discussed in popular human rights textbooks. One example is enough here. According to Jack Donnelly, human rights are significant precisely because they are universal, inalienable and equal. These qualities, he thinks, enable them to regulate the fundamental structures and practices of political life. Human rights are universal rights in the sense that today, as Donnelly puts it, we consider all members of the species *homo sapiens* as ‘human beings’ and thus as holders of human rights. He underlines that human rights are also inalienable rights: one cannot stop being human in spite of one’s human behaviour. Donnelly argues that human rights are equal rights; one either is or is not a human being, and one therefore has the same human rights as everyone else.²⁴

Furthermore, Donnelly claims that human rights take priority over other moral, legal and political claims. Rights inform us how to treat someone as a human being.²⁵ Human rights are valuable as they respond to the most important aspirations of individuals, families and groups. It is claimed that human rights realise the underlying moral vision of human nature.²⁶ For Donnelly, human rights are not just abstract values but call for realization in practice. Denying someone something that it would be right for him/her to enjoy in a just world is very different from denying

23 Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edition, Routledge, 1997), p. 209.

24 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003), p. 1.

25 *Ibid.*, p. 1. Compare to Päivi Leino-Sandberg who has observed that: “The starting point of most human rights literature is the claim of the universal validity of human rights. It is believed that because human rights and the human condition are universal, and despite diverse decisive social elements ‘all of us want the same thing’.” See Päivi Leino-Sandberg, “Particularity as Universality. The Politics of Human Rights in the European Union”, *The Erik Castren Institute Research Reports*, 15 (2005), p. 38. For a general overview on the concept of human rights and the main universal and regional human rights instruments, see, for example, Peter Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th edition, Routledge, 1997), pp. 209-221.

26 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003), p. 15.

her something that she is entitled (has a “right”) to enjoy. We need human rights, Donnelly points out, because they promote fundamental values like liberty, equality and security. Human rights are good, because they respond to the changing world, and to the practical suffering that exists.²⁷

In human rights literature, human rights are also sometimes divided into different generations. This division is not irrelevant when we discuss the practical implementation of abstract human rights norms. The distinction between civil rights, in the sense of individual freedoms from state interference (first generation), on the one hand, and social rights, in the sense of rights to claim welfare benefits from the state such as the right to work or the right to education (second generation), is a traditional one. A third generation of rights refers to more collective goods: the right to peace, the right to self-determination, the common heritage of mankind, the right to development, minority rights or the right to a clean environment, for example.

It has been claimed, however, that the concept of successive generations of human rights which replace each other is unsound, because it in effect abolishes the concept of human rights as the basic rights of an individual human being. Moreover, it is often suggested that first generation of rights are “hard” and enforceable while second generation of rights are more “soft” and programmatic. This undermines their claimed inalienability and equality. With regard to the second generation of rights, it remains unclear how the “right to work”, for example, helps an individual to get a job. With regard to the so-called third generation of human rights, it is entirely unclear who is supposed to be the subject and who the object of the right to peace or to a clean environment.²⁸

Thus, the above abstract ideals of human rights (universality, inalienability and equality) are problematic. For example, what is the practical meaning of universal and inalienable rights, if their practical implementation and prioritising is dependent on political decision-making and available resources? As Samuel Moyn has put it, “The rights of the poor is a hollow phrase”.²⁹ When so-called universal

²⁷ Ibid., p. 40.

²⁸ In addition to this, Peter Malanczuk argues that national courts and international decision-making bodies can only effectively protect civil rights as freedoms from state interference. In the case of social and economic rights, binding decisions in individual cases are hardly ever available because the enforcement of this kind of right, as a rule, requires the allocation of finances and resources, and policy decisions by legislative and executive bodies. In the case of alleged third generation rights, there are no special enforcement procedures available at all, apart from the usual mechanism in inter-state relations. See Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edition, Routledge), 1997, p. 9.

²⁹ Samuel Moyn, *The Last Utopia. Human Rights in History* (Harvard University Press, 2010), p. 40. Hannah Arendt makes an interesting point about the rights of, say, illegal undocumented migrants, when she observes that, “The calamity of the rightless is not that they are deprived of life, liberty, and the pursuit of happiness, or of equality before the law and freedom of opinion – formulas which were designed to solve problems within communities – but that they no longer belong any community whatsoever. Their plight is not that they are not equal before the law, but that no law exist for them: not that they are oppressed but that nobody wants even to oppress them.” See Arendt, *The Origins of Totalitarianism* (Harcourt, 1951), p. 295.

and inalienable human rights are put into practice, their universality is easily lost. The professional practice of human rights law includes and excludes and gives priority to one interpretation or application of human rights over another possible interpretation or bias, as discussed in my articles “Shadows in Paradise”, “Freedom of Religion” and “European Asylum Policy”. Some observers of rights have stated that the abstract universal can be universal only to the extent that it “remains untainted by what is particular, concrete and individual”.³⁰

What about the claimed equality of human rights? All human beings are said to be born free and equal in dignity and rights. But more interesting, in my view, is the practical meaning of this abstract equality. It is not easy to measure exactly how “equality of human rights” as an abstract commitment in practice protects those whose rights are most often violated, such as people who live in extreme poverty or conflict zones, or people who are victims of human trafficking. Surely, in some contexts, human rights language and institutions can be useful in seeking protection against these types of pain, injustice and humiliation as well, as I discuss in my article “Culture and Human Rights”. The abstract language of universal, inalienable and equal rights is, however, difficult to combine with the fact that in practice human rights can protect individuals only insofar as they belong to the community that wants to protect them.

Another type of challenge to the universality, inalienability and equality of rights comes from those who claim that our current conceptions of human rights are not in fact universal but reflect Western bias; this is discussed in my articles “Culture and Human Rights”, “Human Rights and the Exotic Other” and “Freedom of Religion”.³¹ Already when the Universal Declaration of Human Rights (UDHR) was being drafted, the American Anthropological Association (AAA) expressed its famous criticism of that very idea.³² The AAA advised the UN to prepare a declaration of human rights that took into consideration not only the rights of

30 See Judith Butler, “Restating the Universal” in Judith Butler, Ernesto Laclau and Slavov Zizek (eds.), *Contingency, Hegemony, Universality. Contemporary Dialogues on the Left* (Verso 2000), p. 23. Butler also observes that “the abstract requirement of universality produces a situation in which universality itself becomes doubled: in the first instance it is abstract; in the second it is concrete” (p. 17) and “abstraction is thus contaminated precisely by the concretion from which it seeks to differentiate itself” (p. 19).

31 In an interview (23.1.2009) Bob Geldof pointed to the apparent paradox at the heart of human rights: rights are Western but the West considers them universal. He said that “we cannot impose our ideas to other people”. www.guardian.co.uk, accessed 5.12.2010.

32 American Anthropological Association: ‘Statement on Human Rights’ reprinted in *American Anthropologist* (4/1947). See also Dianne Otto, “Everything is Dangerous: Some Post-structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law”, *Australian Journal of Human Rights* 1, Vol 17, 1999. p. 2-4. At that time another challenge to the claimed universality of human rights was from the group of UN member states who abstained from voting for the adoption of the UDHR. Saudi Arabia, one of those who abstained, underlined the basic legal and philosophical differences between the Islamic tradition and the approach of the UDHR. The early opposition of communist states, who formed the majority of the abstainers, saw civil and political rights as Western and capitalist concepts.

individuals, but also the culture of individuals.³³ The AAA felt at that time that the idea of the universality of human rights was an imperialistic project that must be opposed.³⁴ American Anthropological Association stated that the rights of the man in the twentieth century cannot be circumscribed by the standards of any single culture, and advised the UN to prepare a declaration of human rights that took into consideration not only the rights of individuals, but also their culture.

This type of theoretical universalism-relativism debate has continued up to the present day.³⁵ In the 1990s, political scientist Samuel Huntington stirred up a well-known debate when he claimed that Western ideas of individualism, liberalism, constitutionalism, human rights and equality have little resonance in other cultures.³⁶

In the same way, the universality of human rights has also been challenged by those observers who claim that the human rights concept is not in conformity with so-called “Asian values”. This position rejects the globalisation of the “Western” human rights concept, and claims that Asia has a distinct set of values which provides the basis for a different understanding of human rights and thus justifies the “exceptional handling of rights” and rights holders by Asian governments. In the Bangkok Governmental Declaration, endorsed at the 1993 Asian Regional preparatory meeting for the Vienna World Conference on Human Rights, governments agreed that human rights “must be considered in the context of the dynamic and evolving process of international norm setting, bearing in mind the significance of national and regional peculiarities and various historical, cultural and religious backgrounds”. From this perspective, human rights are not inalienable or universal, but must reflect the cultural and other backgrounds of states and individuals.³⁷

33 Costas Douzinas has argued that “undoubtedly their [human rights’, JP] family tree is Western. Confucianism, Hinduism, Islam and African religions have their own approaches to ethics, dignity and equality – many of them similar to the Western version”. He thinks that non-Western philosophies and religions retain a stronger communitarian base with their emphasis on duties arising from strong social links, and were not part of the early development of the human rights movement. See Costas Douzinas, “Are Rights Universal?”, *The Guardian*, 11.3.2009, in www.guardian.co.uk/commentisfree, accessed 5.12.2010.

34 Besides my article “Culture and Human Rights”, for a more detailed analysis see Jari Pirjola, “Human Rights and Cultural Relativism – Views to the Twenty-first Century” (in Finnish), *Oikeus*, no. 4, 1998, pp. 433-440.

35 For example, the Vienna Declaration and Programme of Action noted that: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.” See A/Conf, 157/23, 12.7.1993, point 5.

36 See Samuel Huntington, “The Clash of Civilisations? The Debate” in *Foreign Affairs* (New York 1996). Huntington’s view is rightly criticised as essentializing cultures and religions, but his contribution can also be read as an argument for a constructive politics of conflict that leaves behind the illusion of consensus in a plural world.

37 See Xiarong Li, “Asian Values and the Universality of Human Rights”, in Patrick Hayden (ed.), *The Philosophy of Human Rights*, Paragon Issues in Philosophy (Paragon House, 2001), pp. 397, 399-400. According to Xiarong Li, Asian views on human rights include claims like “the community takes precedence over the individual”; “social and economic rights take precedence over civil and political rights”; and “rights are a matter of national sovereignty”.

The “Asian view” on human rights has been criticised by stating that there is no ground for believing that norms originating “elsewhere” should be inherently unsuitable for solving problems “here”. It is stated that such a belief leads to “genetic fallacy”, in that it assumes that a norm is suitable only to the culture of its origin. In other words human rights, under this criticism of the “Asian view”, should be protected, whether the idea for them originated in the West or in Asia.³⁸ I have discussed this argument in my article “Culture and Human Rights”.

Moreover, some legal scholars have been sceptical about the ability of abstract human rights to construct universal, impartial and neutral standards at all, and they see human rights as synonyms for male, Christian and monotheistic perspectives.³⁹ For example, the feminist critique of rights has argued that rights language is indeterminate and thus highly manipulable in both a technical and a more general way, and that rights may give a rhetorical flourish to an argument, but in practice provide only an ephemeral polemical advantage and thus obscure the need for political and social change. To assert a universal human right is to mischaracterise our social experience and to assume the inevitability of social antagonism by implying that social power rests in the state and state institutions, not in the people who compose the state.⁴⁰ Women’s experiences and concerns, it is argued, cannot always be easily translated into the narrow, individualistic, language of rights. Rights discourse overly simplifies complex power relations, and their promise is constantly thwarted by structural inequalities of power. Some critical

38 Ibid., p. 401. Xiarong Li argues that that the universal validity of the human rights concept can be confirmed in cross-cultural conversation. This “is a conversation that proceeds by opening those assumptions to reflection and re-examination. Its participants begin with some minimal shared beliefs: for example, that genocide, slavery, and racism are wrong. They accept some basic rules of argumentation to reveal hidden presuppositions, disclose inconsistencies between ideas, clarify conceptual ambiguity and confusions, and expose conclusions based on insufficient evidence and oversimplified generalisations. In such a conversation based on public reasoning, people may come to agree on a greater range of issues than seemed possible when they began. They may revise or reinterpret their old beliefs. The plausibility of such a conversation suggests a way of establishing universal validity: that is, by referring to public reason in defence of a particular conception or value.” (ibid., p. 407).

39 See, for example, Hilary Charlesworth, “Feminist Methods in International Law”, *The American Journal of International Law*, Vol. 93:361 (1999), at p. 392.

40 See Charlesworth and Chinkin, *The Boundaries of International Law*, (Juris Publishing, 2000) p. 209 . On the other hand, Ayaan Hirsi Ali, for example, has suggested that the real challenge for feminism in the next century is to make sure that women’s human rights are universally respected and that the globalisation of feminism in practice trumps cultural relativism. She has written that, “Western feminists need to be suspicious of the celebration of cultural diversity unless they want inadvertently to celebrate polygamy, child marriage, marital rape, honour killings, wife beating, selective abortion of female fetuses and other traditions that are legitimized in the name of the culture. Passionate egalitarians need to broaden their agenda from socioeconomic issues and find courage to identify cultural factors that create not just material poverty but also intellectual poverty, cultural poverty and moral poverty.” She has also stated that demands for greater recognition of diversity, “multiculturalism” or faith-based agendas are no substitute for demands for equality and human rights. See Ayaan Hirsi Ali: “Women’s rights coexist with wrongs”, in *The Weekend Australian*, March 13-14, 2010.

observers have argued that campaigns for “women’s legal rights are at best a waste of energy and at worst positively detrimental to women”.⁴¹

It is acknowledged, however, that human rights language can certainly provide a framework and language for a debate on the basic values and concepts of a good society. In the same way Pragna Patel has observed that “for most women within minority communities, in the absence of internal democratic and accountable mechanisms for resolving disputes, the legal system becomes an indispensable tool in the struggle for freedom. It is not luxury but it is necessity.”⁴²

From the pragmatic point of view, the origin and abstract qualities (universality, Western origin, monotheistic or male nature, etc.) of human rights are irrelevant. Human rights are useful if in practice they can provide protection against oppression and pain. The fact that the human rights movement has a specific cultural or historical origin, says nothing unless Western origin renders human rights less useful. This can, of course, be the case: for example, the definition of refugee in the Geneva 1951 Refugee Convention links the need for international protection to the individual’s circumstances in a way that in practice can also be harmful to the protection seeker as discussed in “Shadows in Paradise”.

As I noted at the outset of this synthesis (section 2), human rights operate in two different but connected worlds. Interestingly, a discussion on the meaning of human rights can often, in different contexts (academic, professional, human rights activism, etc) and societies, start either from abstract and theoretical ideas of human rights or from practical needs emerging from the community. In practice the same content or understanding of human rights may be argued or justified from a theoretical assumption about rights (the idea that rights are universal, inalienable, equal, ahistorical and based on equality, for example) or from an association of human rights with utilitarian or practical cost/benefit calculations of the community. Often theoretical as well as practical or policy modes of justification may be discussed, and these may be seen as complementary or mutually supportive. Freedom of speech may be justified by a claim that it is a universal and inalienable human right inherent in human dignity. But it can also be justified as good policy (instead of being claimed as an “inalienable right”) that can contribute to the wellbeing and development of societies.⁴³ Human rights do indeed operate in two interconnected worlds.

41 See Hilary Charlesworth, “Feminist Methods in International Law”, *The American Journal of International Law*, Vol. 93:361 (1999), at p. 392.

42 Pragna Patel, “Faith in the State? Asian women’s struggles for human rights in the U.K.” *Feminist Legal Studies*, Vol 16, 2008, pp. 9-36, at p. 23.

43 On different understandings of rights, see Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context. Law, Politics, Morals*, (Oxford University Press, 2008), p. 490.

4.1 HUMAN RIGHTS AND DEMOCRACY

Human rights operate in the context of the legislative activities of States. Through legislation, rights become positive law and receive meaning and applicability. Through, legislation, also, conflicts between abstract rights are resolved and claims of rights are put in a hierarchical order of preference. All this, however, tends to undermine the universality, inalienability and equality of rights. Are rights mainly a legislative construction? If rights depend on democratic, legislative processes – then they must differ between different communities.

Political philosophy and political theory has sought to analyse the relationship between rights and democracy, or more specifically, the relationship between abstract right and concrete political decision.⁴⁴

One way to articulate trust in theoretical human rights language, is to see human rights as “trumps” that help us to formulate right decisions and guide us through multicultural and morally plural societies. Ronald Dworkin’s well-known thesis on the “rights as trumps”, for example, is aimed at limiting the administrative and political discretion of authorities and courts for the benefit of rights holders. From this perspective human rights are thought to be non-political, universal and absolute – in other words, independent of time and place, and beyond political controversy. They precede legislation and establish limits to what may be done by even democratic legislatures. This lifts them outside democratic decision-making, and poses the question of the relationship of rights to democracy. In conflict, which side should win?

John Rawls seeks to resolve the problem by situating rights as the foundation of acceptable social order. A political order, he claims, is not only about fulfilling utilitarian needs or preferences. The principle of rights limits what may become acceptable objectives of legislative action. Rights, including equal liberty, impose restrictions on what are reasonable aspirations for the good life.

Rawls defines the meaning of rights by stating that:

*In justice as fairness the concept of right is prior to that of the good. A just social system defines the scope within which individuals must develop their aims, and it provides a framework of rights and opportunities and the means of satisfaction within and by the use of which these ends may be equitably pursued.*⁴⁵

44 See for example, Seyla Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era* (Princeton University Press, 2002). In her book, Benhabib, drawing from Jurgen Habermas and John Rawls, discusses how a liberal democracy based on universal human rights could be realized in a multicultural world.

45 For more detailed analysis, see John Rawls, *A Theory of Justice* (Oxford University Press, 1999), p. 28.

Rawls' theory as such can, of course, be criticised for being a formalistic and alienating theory of liberal society. The idea that principles of justice are agreed behind a "veil of ignorance" of individuals' particular characters, abilities, desires, cultures, religions and histories, is claimed to be an ideological fiction. It does not view people in the world – in practice – with their different cultures, lifestyles and worldviews, but as abstract concepts that have been emptied of any definitive background.⁴⁶

One theoretical and also critical interpretation regarding the significance of human rights in modern democratic societies is provided by Jurgen Habermas.⁴⁷ Habermas has written that individual rights make up the core of modern legal orders. As we can no longer ground the legitimacy of a legal order in a religiously or metaphysically grounded natural law, Habermas advises us to turn to two concepts: popular sovereignty and human rights. The principle of popular sovereignty lays down the procedures, such as rights of communication, which justify the presumption of a legitimate outcome. Human rights, by contrast, give the grounding of an inherently legitimate rule of law. Human rights guarantee the life and private liberty – that is, scope for the pursuit of personal life plans – of citizens.

Habermas asks what basic rights free and equal citizens must mutually accord one another, if they want to regulate their common life legitimately by means of positive law. This approach to the drafting of a constitution links popular sovereignty to the creation of rights. Human rights then provide one key perspective from which the enacted laws can be legitimated as a means to secure both the private and the civic autonomy of the individual.⁴⁸ Habermas is, however, aware of the tension between the "universal meaning of human rights and the local condition of their realisation",⁴⁹ but for him the solution to this tension seems to be the global expansion and respect of human rights. In other words, all existing states could either be transformed into constitutional democracies or each individual should attain the "effective enjoyment of human rights immediately, as a world citizen. In this sense, article 28 of the United Nations Declaration of Human Rights refers to a global order in which the rights and freedoms set out in this Declaration can be

46 See Martti Koskeniemi, "The Effect of Rights on Political Culture", in Philip Alston with Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford University Press, 1999), p. 104.

47 Jurgen Habermas, "Remarks on Legitimation through Human Rights" in Jurgen Habermas, *The Postnational Constellation. Political Essays* (ed. and translated by Max Pensky) (Polity, 2001), p. 114.

48 *Ibid.*, pp. 114-116.

49 *Ibid.*, pp. 118-119. Habermas argues that, "Thus a peculiar tension arises between the universal meaning of human rights and the local conditions of their realization – but how is that to be achieved? On the one hand, one can imagine the global expansion of human rights in such a way that all existing states are transformed – and not just in name only – into constitutional democracies, while each individual receives the right to nationality of his or her choice. (---) An alternative route would emerge if each individual attained the effective enjoyment of human rights immediately, as a world citizen".

fully realized, but even the goal of an actually institutionalized cosmopolitan legal order lies in the distant future.”⁵⁰

But Habermas, of course, is also aware of the tension between theory and practice, and the possibility of false universality, and he observes that:

*Nevertheless, the general validity, content, and ranking of human rights are as contested as ever. Indeed, the human rights discourse that has been argued on the normative terms is plagued by the fundamental doubt about whether the form of legitimation that has arisen in the West can also hold up as plausible within the frameworks of other cultures. The most radical critics are Western intellectuals themselves. They maintain that the universal validity claimed for human rights merely hides a perfidious claim to power on the part of the West.*⁵¹

At least in the light of my examples above, Dworkin, Rawls and Habermas discuss human rights as rather abstract conditions for the legitimate government of modern democratic societies. This kind of understanding of rights was also very much my perspective on human rights in “Culture and Human Rights”, for example, which discussed the role of human rights in a multicultural context. The key argument of the article was that the culture concept, or so-called Western origin of human rights, cannot as such challenge the value of human rights language. Even in a multicultural context, human rights language can open up political culture for experiences of fear and injustice.

So what Dworkin, Rawls and Habermas are saying is that if we want to live in a democratic state, the task of the state can only be realised within the limits of respect for fundamental rights and freedoms. In this model, rights are foundational for acceptable political society. There is no conflict between rights and democracy because democracy is based on rights and seeks to guarantee their fulfilment in actual social context.

But the idea that human rights are a kind of higher law that prevails over national politics, is of course a problematic one, as it is precisely states and

50 Ibid., p.119.

51 Habermas continues that the “so called equal rights may have only been gradually extended to oppressed, marginalised, and excluded groups. Only after tough political struggles have workers, women, Jews, Romanies, gays, and political refugees been recognised as “human beings” with a claim to fully equal treatment. The important thing now is that the individual advances in emancipation reveal in hindsight the ideological function that human rights had also fulfilled up to that time. That is, the egalitarian claim to universal validity and inclusion had also always served to mask the de facto unequal treatment of those who were silently excluded. This observation has aroused the suspicion that human rights might be reducible to this ideological function. Have they not always served to shield the false universality – imaginary humanity, behind which an imperialistic West could conceal its own way and interest?” Ibid, p. 119-120.

state institutions that in practice are the guardians of human rights.⁵² It is true that, in a liberal democratic society, limits are always put on the exercise of the sovereignty of the people. Those limits are usually presented as providing the very framework for the respect of human rights and thus as being non-negotiable. But in fact they depend on the way indeterminate human rights are defined and interpreted at a given moment.⁵³ In other words, democratic politics give meaning to human rights.

In practice, human rights and democracy can frequently be in conflict with each other. For example, democratic logic always entails drawing a frontier between “us” and “them”. It is possible to agree through a democratic procedure that certain minorities or foreigners are excluded from certain rights. Thus, no final solution can be found to the tension described above between human rights and democracy. There can only be temporary, pragmatic and unstable negotiations of the tension between them.

According to Chantal Mouffe, both Habermas and Rawls claim to have found the solution to the problem of the compatibility of liberty and equality which has accompanied liberal democratic thought since its inception:

Their solutions are no doubt different, but they share the belief that through adequate deliberative procedures it should be possible to overcome the conflict between individual rights and liberties and the claims for equality and popular participation. According to Habermas such a conflict ceases to exist once one realizes the ‘co-originality’ of fundamental human rights and of popular sovereignty. However, as I indicate, neither Rawls nor Habermas is able to bring about a satisfactory solution since each of them ends up by privileging one dimension over the other: liberalism in the case of Rawls and democracy in the case of Habermas.⁵⁴

But democracy (based on rational deliberation by Rawls or Habermas) should not hide the conflict between human rights and democracy, but should provide an arena where differences and conflicts can be confronted. Martti Koskenniemi has expressed this paradox as follows: “If we assume the existence of a set of objective (descending) fundamental rights, then we have moved beyond liberalism. If we

52 Costas Douzinas, “Are Rights Universal”, *The Guardian* 11.3.2009, in www.guardian.co.uk/commentisfree, accessed 5.12.2010.

53 See Chantal Mouffe, *The Democratic Paradox* (Verso, 2009), p. 4.

54 Chantal Mouffe, *The Democratic Paradox* (Verso, 2009), p. 8. See also Juha Lavapuro, *Uusi Perustuslakikontrolli* (In English: *The New Constitutional Review*), *Suomalaisen Lakimiesyhdistyksen julkaisuja, a-sarja n:o 301* pp. 142-146.

deny their existence, we cannot achieve the reconciliation between freedom and social order. The former is constantly in danger of being devoured by the latter”.⁵⁵

The solution for this dilemma has been the formal and abstract nature of human rights as discussed above. It is easy at an abstract level to agree that everyone should have “human rights”, for example, but very difficult to agree what this means in practice. Abstract rights can also impoverish political discourse, as complex and sensitive practical issues may not easily translate into “rights language” without loss of meaning. The scope of human rights (freedom of religion or “non-refoulement”, for example) can only be negotiated in different ways; I tried to demonstrate this in “Freedom of Religion” and “Shadows in Paradise”.

4.2 TOWARDS PRACTICE: HUMAN RIGHTS AS RULES, STANDARDS AND INSTITUTIONS

When human rights are translated from abstract principles into legislation or policy, this takes place through making this language more concrete - in practice by translating these abstract demands in more determined rules or standards. In practice, legal norms differ in extent to which they constrain those who are charged with applying them.

It is customary to distinguish between rules (apply either/or fashion) and principles (apply more or less fashion). Rules are constraining and rigid, and must be followed if they are applicable in the case. Principles, on the other hand, do not determine the solution of the case, but brings out arguments in favour of one solution or another.⁵⁶ Principles leave open the possibility that also other consideration may be relevant to the decision.

55 Martti Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge University Press, 2005), p. 85.

56 Martin Scheinin has elaborated on this aspect of human rights by suggesting that human rights can operate, for example, as rules or principles, directly or indirectly (as an interpretative aid) or as “norm fragments” or standards that can provide interpretative assistance for the interpretation of human rights norms. Scheinin has argued that the operation of human rights norm in a concrete legal decision may vary. For example, a decision on the applicability of a rule authorizing expulsion of a foreigner, may be followed by the weighting of reasons for and against the expulsion. In order to cover these different ways of application of human rights norms, the concepts of rule effect and principle effect are used in this study. They refer to the distinction between rules and principles but, at the same time avoid the simplification of treating the human rights provision as a rule or principle in itself. Rules and principles applied in concrete cases are concrete norms formulated on the basis of the whole legal order. Principles, on the other hand, are legal norms of a “more or less” character. In their application the crucial issue is to define the weight of principles and to optimize the application of each of them. Since principles do not conflict, the different principles can be weighed against each other, and even the principles that lose out in this process remain legal norms which are relevant in the case. Scheinin suggests that rules and principles must be formulated on the basis of “the whole legal order”. Human rights can also operate as “standards” even though they are not formally applied in legal decisions. On how human rights can contribute to the application of legal norms, see Martin Scheinin, *Ihmisoikeudet Suomen oikeudessa (Human Rights in Finnish Law)* (Gummerus, 1991), *(A Study in Constitutional Law of the Domestic Validity of International Human Rights Treaties and the Applicability of Human and Constitutional Rights in the Finnish Legal Order)*, at p. 28-29,

In this translation process, rights become more concrete but also more contestable and political. First, it is not clear how to deal with interpretative difficulties. For example, what does the prohibition of inhuman treatment or a right to the “freedom of religion” mean in practice? The translation of human rights language into practical measures is not a technical or automatic exercise. Second, it is not always clear what laws should be adopted to give effect to rights and how rights conflicts should be resolved.⁵⁷ Furthermore, there is a question of governance and bureaucracy. When rights are translated into the practice they do not only set limits but also create opportunities. Human rights language can promote, shape or prevent the conduct of wars, it can be debated in the context of climate change or good governance. And when rights are part of power and governance, they are not only tools for emancipation. They can also start to produce costs and restrictions. I will examine these questions in section 5 below.

In the field of law, institutions (European Court of Human Rights, UNHCR, courts, ombudsmen, national human rights institutions, etc.) are empowered to produce interpretations (decisions, recommendations, positions, views, observations, etc.) to the problems that emerge when abstract human rights are transferred into the concrete practice. To know the value of the human rights institution, it is necessary to know what kind of policies and priorities it will support in a particular matter. As human rights institutions use rights language and this language can be used for almost any purpose, it is not automatically clear that human rights institutions and bodies support the preferences and interpretations we want to support.

For example, applying abstract human rights “standards” or deciding between conflicting rights can mean promoting the preferences of the powerful (migration authorities, EU institutions, or human rights court, for example), instead of those who are in marginal positions or who are unrepresented in human rights or other decision-making bodies. The vocabulary of rights or the commitment for human rights does not always represents the interests of the powerless but can also support the status quo or end up becoming a bureaucratic and institutionalised language, a kind of empty phraseology. This is discussed in “European Asylum Policy” and in “Freedom of Religion”.

Indeed, human rights institutions often end up promoting their own priorities and preferences. They also operate in context and promote their policy priorities. For this reason, when we know what institution is getting together (humanitarian organisation, religious organisation, governmental organisation, expert committee,

⁵⁷ There is no doubt that the idea of human rights can also apply in a less formal way as an inspiration or as a requirement for a commitment to action. The general promotion of human rights “standards” or “principles” at an abstract level is often linked to the humanitarian will to do good, to remake the world fairly and to strengthen the hand of tolerance. The general call for abstract human rights is often a means by which lawyers, institutions and NGO activists attempt to constrain the power exercised by a state over individuals within its territory or jurisdiction.

etc.) we sometimes know in advance what their policy proposals will look like. And there is necessarily nothing wrong about this type of bias. As I write in “Shadows in Paradise”, human rights conventions do not in itself guarantee a consistent interpretation of the conventions or provide them with “correct” interpretations. For this reason, human rights institutions are needed to determine the meaning of rights in practice. However, interpretation of rights is a process which is influenced by a large number of different factors as I try to elaborate in “European Asylum Policy”, for example.⁵⁸

In other words, if we look at human rights from an abstract and theoretical perspective, it is not difficult to speak of human rights rules, standards or institutions as something useful and rather unproblematic. But, as will be discussed in section 5, when we start to translate rules and standards into concrete practical measures, the picture becomes more complicated. However, whether human rights or human rights institutions have good or bad consequences cannot be discussed in the abstract. For this reason, in the next section 5 I will look at rights in practice.

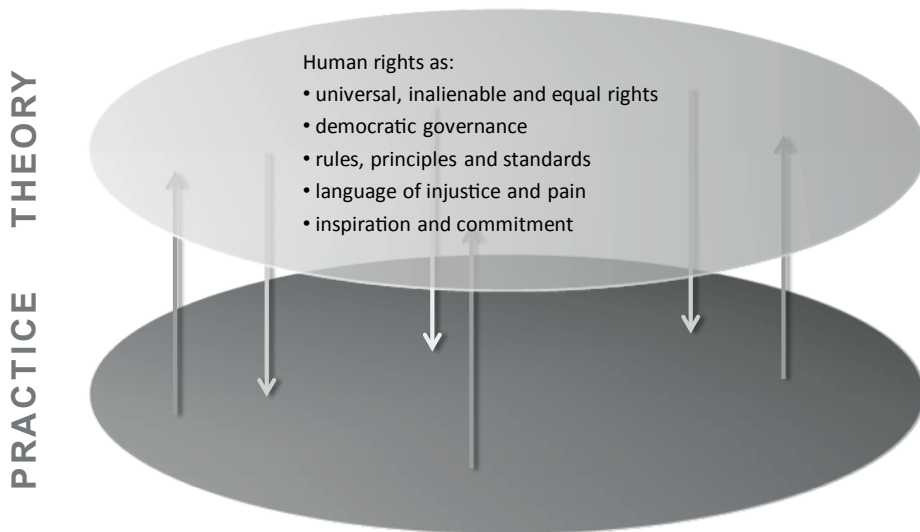


Figure 1 Human rights as a theory as discussed in section 4.

⁵⁸ See Anne Orford, “Biopolitics and the Tragic Subject of Human Rights”, in Elizabeth Dauphinee and Christina Masters (eds.), *The Logics of Biopower and the War on Terror* (Palgrave, 2007), p. 205.

5 HUMAN RIGHTS IN PRACTICE

I stated at the outset of this synthesis that when abstract rights are put to use in practice, they can have both liberating and disempowering practical consequences. Abstract rights can turn out to be empowering experiences for those whose rights and goals are respected in practice, but can be disempowering and non-liberating experiences for those whose rights and priorities are excluded. This dual aspect of human rights was, at a general level, well analysed in an article by Susan Marks on the UN World Conference on Human Rights which took place in Vienna in 1993.⁵⁹ She claimed in her article that the World Conference on Human Rights was both “a nightmare and a noble dream”. The nightmare, she writes, was that human rights had nothing to offer to the Bosnian women, the Tibetan Buddhist monk, or the Kurds who had come to tell of their suffering. It was a nightmare that human rights could make no difference in practice to the future of the families these people had left behind.

According to Marks, it was a nightmare that the law and the institutions which are supposed to protect human rights are often in practice powerless to constrain the excesses of governments. The nightmare was that human rights could even operate counter-productively, by justifying abuses and defending the legal, social and political systems that produce or condone those abuses. In doing that, human rights are not only ineffective but also bad.

On the other hand, the noble dream of the conference was that human rights could also sometimes, in real life, transform the lives of exiles mentioned above and their families, “empowering them in their respective struggles and simultaneously dissolving the objections, excuses and rationales of their oppressors.” It was the dream of human rights as the “ultimate norm of all politics”. The noble dream was that human rights could constrain abuses, provided only that the right treaties, monitoring organisations, implementation strategies and enforcement methods were put in place.⁶⁰

In other words, human rights language may sometimes just be an ideological cover for politics indifferent to the human condition, but human rights can also address the real causes of human suffering. What Marks tries to suggest is that, in practice, human rights can simultaneously be empowering and decisive but also deceiving and irrelevant. On the one hand, human rights seem to be ineffective

59 Susan Marks, “Nightmare and Noble Dream: The 1993 World Conference on Human Rights”, *The Cambridge Law Journal*, Vol 53, 1994, pp. 54-62.

60 *Ibid.*, p. 54.

and there should more rights. On the other hand, human rights are irrelevant and there seem to be too many of them.

These two perspectives on rights – or tension between dream and reality, described by Marks – are also discussed in my seven articles. Human rights can be a useful and empowering language when plural societies are discussing the rules of co-existence, for example (see my “Culture and Human Rights”). But human rights can also be rather ineffective tools in practice to restrict the necessary policy choices made by states (as I discuss in “European Asylum Policy”).

As I write in my article “Shadows in Paradise”, the human rights language of international conventions gives people crossing national frontiers a comprehensive and absolute promise of international protection. But when we assess this promise in concrete situations, the commitment to protection is no longer so clear. The tension between abstract human rights and their practical realisation leaves room for legal and political manoeuvring and creativity by states. In professional practice, the universal human rights language includes and excludes by referring to the same human rights language. The promise of “freedom of religion” might, in practice, reveal a Western bias or be conditioned by certain cultural or Christian ways of thinking of a good life or of the right way to practise religion; I discuss this in “Freedom of Religion”. In the same way, new human rights institutions, like National Preventive Mechanisms, discussed in my article “OPCAT Article” can be good on paper, but the real meaning of human rights mechanisms can only be evaluated in practice.

But before further discussion of the dark and bright sides of human rights in practice, it is necessary to say a few words about the so-called early critics of rights who also noticed the tension and interplay between rights and their practical realisation.

5.1 EARLY CRITICS OF RIGHTS

The sharp contrast between the widespread use of the idea of rights and the intellectual scepticism about its conceptual soundness is not new.⁶¹ The early critics of rights language – among them Edmund Burke, Karl Marx and Jeremy Bentham – were already suggesting that human rights, or natural rights as they were called at that time, are not as powerful and significant as they claim to be. Critical discussion of the practical meaning of “rights” is of course nothing new, and many themes

⁶¹ Amartya Sen writes that “the dichotomy remains very alive today, and despite persistent use of the idea of human rights in the affairs of the world, there are many who see the idea as no more than ‘bawling upon paper’”. See Amartya Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press, 2009), p. 356.

of the early debates on rights are reflected in current critiques, including my own articles. This is why I briefly want to open up my analysis of human rights here from the point of view of the early critical stories of rights.

The idea that political morality and social choice are based wholly or partly on some account of the rights of the human individual is a familiar theme in Western politics. This theme can be found, for example, in the theories of John Locke (1632–1704) and Jean-Jacques Rousseau (1712–1778), in the moral and political philosophy of Immanuel Kant (1724–1804), and in the constitutional innovations of the American and French Revolutions. But this idea of the power of rights has never gone unchallenged, however.⁶²

Many of the most famous philosophers of the seventeenth and eighteenth centuries saw the development of the rights rhetoric as a positive phenomenon for the development of just societies. Rights were seen as a means to construct a political order that would not be dominated by conflicts caused by the subjective values of political passion. Natural rights were seen to protect both absolutism as well as liberty.

In particular, the English philosopher John Locke and the eighteenth-century philosophers Jean-Jacques Rousseau, Montesquieu and Voltaire developed ideas regarding the relationship between those who govern and those who are governed. As is well known, for example, John Locke saw that rights – rights to life, liberty and property – create a positive foundation for society, and could structure a political order that would not be dominated by civil war or tyranny. To better guarantee such rights, mankind has entered, through means of a contract, into society, and individuals have conceded some of their natural rights to the sovereign, together with the power to defend them.

On the other hand, since the historical rights declarations of the eighteenth century it has also been suggested that human rights (or, at that time, natural rights) are not as powerful in practice as they claim to be. Early critics of rights claimed that rights language carries with it a number of challenges, weaknesses and limitations. Jeremy Waldron has written that “just as the theories of natural rights and of the rights of man that developed in the seventeenth and eighteenth centuries are the ancestors of the modern idea of human rights, so the critiques of those theories that appeared in that period are the starting point of modern misgivings and the direction this idea is taking us in our moral and political thinking”.⁶³

One of the major criticisms of the doctrine of natural rights was the fact that the list of natural rights varies, an observation that is also relevant for the current

62 Jeremy Waldron, *Theories of Rights*, Oxford Readings in Philosophy (Oxford University Press, 1984), p. 1.

63 See Jeremy Waldron, “Nonsense Upon Stilts”, *Bentham, Burke and Marx on the Rights of Man* (Methuen 1987) p. 2 where he compares the differences between old and modern critiques of rights.

debate on human rights. It was unclear which rights are “natural rights”, where these rights originate and how to “discover” them.⁶⁴

The most famous and often cited critiques of natural rights are probably those of Edmund Burke (1729–1797), Karl Marx (1818–1883), and Jeremy Bentham (1748–1832).⁶⁵ It is useful to raise some of their themes here, and these are also considered in my articles, “Culture and Human Rights” and “European Asylum Policy”.

Edmund Burke’s main criticism was that rights discourse suffers from metaphysical idealism and rationalism. He felt that their abstraction is their main weakness. He thought that effective rights are created by particular history, tradition and culture. Burke wrote: “I cannot stand forward, and give praise or blame to anything which relates to human actions, and human concerns, on a simple view of the object, as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction”.⁶⁶ According to Burke, government cannot be based on abstract theories but has to take into consideration the circumstances, context and chance – in other words the historical peculiarities of particular societies. According to Burke, rights are defective because their simplicity and plainness cannot match the messiness of life.⁶⁷ Absolute and universal rights can blind the politician to the realities of the particular and concrete, turning him or her into a metaphysician and prophet full of rhetorical hyperbole but unable to rule.⁶⁸

Karl Marx’s contribution to the critique of human rights has been fundamental. As I write in my article, “Culture and Human Rights”, “Karl Marx criticised the idea of human rights and the French Declaration because the application of the rights of man propagates the rights of the selfish individual detached from the society and other people”. For Marx, rights promoted the narrow interests of the bourgeoisie and its dominance in society. Rights belong to the abstract universal man, but in

64 On this discussion, see Margaret Macdonald, “Natural Rights”, in Jeremy Waldron (ed.), *Theory of Rights*, Oxford Readings in Philosophy (Oxford University Press, 1984), p. 31.

65 Current criticism, which will be discussed later in more detail, is based on old critiques like those of Edmund Burke and Karl Marx. Criticism has expanded their views in new directions. According to Costas Douzinas, Burke and Marx offer the foundational critiques of rights. Douzinas interestingly claims that Burke’s position on rights and the role of the constitution still lurks behind contemporary debates on British parliamentary sovereignty, membership of the European Union and the introduction of a Bill of Rights”. He feels that Burke’s legacy is mixed but that it would not be inaccurate to say that all major later critiques of rights share some aspect of his position. See Douzinas, *The end of human rights. Critical legal thought at the turn of the century* (Hart publishing 2007)pp. 147-157.

66 See Edmund Burke, “Reflections on the Revolution in France”, at www.constitution.org/eb/rev_fran.htm, visited 21 January 2010.

67 “These metaphysic rights entering into common life, like rays of light which pierce into a dense medium, are, by the laws of nature, refracted from their straight line. Indeed in the gross and complicated mass of human passions and concerns, the primitive rights of men undergo such a variety of refractions and reflections that it becomes absurd to talk of them as if they continued in the simplicity of their original direction. The nature of man is intricate; the objects of society are of the greatest possible complexity: and therefore no simple disposition or direction of power can be suitable either to man’s nature, or to the quality of his affairs.” *Ibid.*

68 Costas Douzinas, *The End of Human Rights* (Hart, 2000), pp. 149-150.

practice they promote the possessive individual of capitalism. The aim of human rights is to remove politics from society and depoliticize the economy.⁶⁹

Marx noted the fact that rights to religion and property are especially protected by state institutions. He claimed that the practical application of man's right to liberty is man's right to private property.⁷⁰ As Marx saw it "none of the so called rights of man, therefore, go beyond egoistic man, beyond man as a member of civil society – that is, an individual withdrawn into himself, into the confines of his private interest and private caprice, and separated from community".⁷¹ Rights, he felt, which are often presented fraudulently as freedoms, in practice maintain social inequality and class domination. Rights of factual subordination are, however, made to appear to be like equality.⁷²

To Marx the rights of man are yet another political theology where the state replaces religion. Human rights is "yet another personification of something transcendental over human-species-nature".⁷³ Human rights are formulated in such a way that it seems that everybody should profit from them. They are, on the one hand, presumed to exist naturally and to set limits to political power, and are, on the other hand, applied by those same authorities whose power they should limit.⁷⁴ The problem with human rights, in Marx's view, is that they cannot trump the authority of the state, since the jurisdiction over those rights and over the resolution of conflicts belongs to the state authorities. This is one of the paradoxes I explore in "Shadows in Paradise" and "Freedom of Religion". States have committed themselves to uphold a human rights law the content of which they or their institutions decide.

In his famous essay "Anarchical Fallacies", Jeremy Bentham attacked the view that the object of government is the "preservation of the natural and imprescriptible rights of Man". In his view, natural rights is simple nonsense, "nonsense upon stilts" in his often cited expression.⁷⁵ Lawyers should not refer to utopian rights language

69 In a current discussion, Immanuel Wallerstein draws from Karl Marx, who he follows in emphasizing underlying economic factors and their dominance over ideological factors in world politics. See, for example, his *European Universalism: The Rhetoric of Power* (New Press, 2006). In this book he tries to demonstrate how the so-called universal values promoted by Western Europeans ever since the sixteenth century, be they Christian, democratic or scientific, were merely a justification for Western intervention around the world. These values are, in Wallerstein's opinion, neither truly universal nor beneficial to humankind.

70 Ibid.

71 Karl Marx, "On the Jewish Question" (1844), p.17, see <http://www.marxists.org/archive/marx/works/1844/jewish-question/>, visited December, 2011.

72 Cf. Charlesworth and Chinkin, who have stated that: "It is also claimed that the only consistent function of rights has been to protect the most privileged groups in society". See Charlesworth and Chinkin, *The Boundaries of International Law*, (Juris Publishing, 2000), p. 209

73 Martti Koskenniemi, "What Should International Lawyers Learn from Karl Marx?", *Leiden Journal of International Law*, Vol 17 (2004), p. 234.

74 This is why human rights commitments do not effectively prevent the EU from carrying out appropriate policy choices in the field of asylum and migration, as I write in my article, "European Asylum Policy".

75 See Jeremy Bentham, "Anarchical Fallacies", reprinted in Waldron, "Nonsense upon stilts, Bentham, Burke and Marx on the Rights of Man (Methuen 1987) pp. 46-76.

to find out what the existing state of law is, and what – in the light of the demands of utility – the effects are of the operation of laws in society.

Bentham felt that natural rights are “vague and declamatory generalities” which in practice come into conflict with each other. Bentham was concerned that declarations of natural law would be a harmful substitute for effective legislation.⁷⁶ For Bentham, rights were devoid of meaning, a kind of phraseology full of contradictions. Natural rights are full of expressions “which in themselves refer to nothing but which are nevertheless used as though they were meaningful, and assertions which at face value seem evidently false but which are nevertheless accepted and given legal effect in order to secure some desired outcome”.⁷⁷

Bentham’s views also seem to be relevant in the current context. In my article “Shadows in Paradise”, for example, I observe that “inhuman treatment” is a kind of open concept in international law which, in practice, must be filled with meaning by states, or by the European Court of Human Rights. In my article “European Asylum Policy”, I explore human rights as a kind of empty phraseology. As I write there, open and abstract human rights commitments or rights language can only guide the development of migration and asylum policies in a limited way.

It is clear, therefore, that the early promoters and critics of natural rights raised themes that are still relevant today in the discussion about the dark and bright sides of human rights. John Locke and Jean-Jacques Rousseau, for example, saw that rights create a positive foundation for society. They thought that rights could structure a political order that would not be dominated by civil war or tyranny, but they did not show the precise and objective scope of rights in practice, or how to deal with situations when there are disagreements on the scope of rights or when rights are in conflict. Locke did not question the concept of good in society, but took for granted his conception that it would be beneficial for all to obtain as much property as possible.⁷⁸ Burke, Bentham and Marx, for their part, criticised rights language – its abstractness, openness, generality, contradictions, partiality, indeterminacy and political nature. These early critics were thus aware of the limitations of rights in practice, but paid less attention to the potential of rights language: its possibility to empower individuals for change and increase the freedoms of individuals, or its normative and institutional potential for the promotion of more just societies.

The idea of natural rights was soon transferred into the concept of human rights. During the twentieth century a large number of human rights treaties were made to protect individuals against various forms of injustice. The abolition of slavery,

76 See Jeremy Waldron, “Nonsense Upon Stilts”, *Bentham, Burke and Marx on the Rights of Man* (Methuen 1987) p. 32.

77 *Ibid.*, p. 34. As noted by Waldron, Bentham was quite clear about the “political usefulness of rights talk”, see p. 36.

78 John Locke, *Tutkielma hallitusvallasta* (Second Treatise of Government) (Gaudeamus, 1995), p. 26.

factory legislation, public education, trade unionism, universal suffrage, and the protection of refugees show that at least the idea of “rights” as something useful was not extinguished.⁷⁹

5.2 MODERN CRITICS OF HUMAN RIGHTS

Many current observers of human rights have also noted the paradoxes that relate to the practical operation of rights: their conflicting nature, open-endedness, political nature and hypocrisy, and the tension between abstract universalism and concrete particularism – themes that are particularly discussed in three of the articles in my thesis: “Freedom of Religion”, “Shadows in Paradise” and “European Asylum Policy”.⁸⁰

Many critical observers have expressed their reservations about the shift away from pragmatic or utilitarian modes of political evaluation, noting the fact that we no longer ask what is in the interests of all, but instead what rights individuals are entitled to. Others, as discussed below, are alarmed about the individualism in this discourse at the expense of a proper awareness of community, solidarity and civic virtue in human life. Some are worried by the abstract and formalistic character of modern claims about rights. These misgivings “may be regarded as the shadow that is cast by the ascendancy of rights talk in modern political discourse”.⁸¹

Some feel that talking about human rights is somewhat useless. Alasdair MacIntyre, for example, has written that the truth is plain: there are no such rights (that is, no human rights, natural rights, or rights of man), and belief in them is at one with belief in witches and unicorns. According to him, the best reason for

79 These changes were not the result of human rights, however, but rather a result of civic movements, as Samuel Moyn has stated. See, *The Last Utopia. Human Rights in History* (Harvard University Press, 2010). According to Jeremy Waldron, “In the years that followed the publication of these works by Bentham, Burke and Marx, the theory of human rights suffered a decline, then a renewal. Its attractiveness as a touchstone of normative thought about politics suffered a decline in the nineteenth century with the rise of large-scale social theory (for example, Emile Durkheim, Max Weber)”, Waldron, “Nonsense upon stilts.” Bentham, Burke and Marx on the Rights of Man (Methuen 1987) , p. 151.

80 Adam Tomkins, for example, (see Campbell, T., Ewing, K.D. and Tomkins, A., (eds.), *Skeptical Essays on Human Rights*, Oxford University Press, 2001), distinguishes three main variants of scepticism regarding human rights. First, there is scepticism concerning rights as such (which may lead to a communitarian approach stressing community values or the importance of political debate in a pluralist world). Secondly, there is scepticism about allocating a large political role (distributing values is, after all, a political task) to bodies of unelected, unrepresented and unaccountable judges. Thirdly, there is scepticism about the rights advocated: civil and political rights rather than economic or social rights, for example. Quoted from Jan Klabbers, *Sceptical Views on Human Rights* (Book review), *Nordisk Tidsskrift for Mennesskerrettigheter* (Nordic Journal of Human Rights) Vol 21 (2003), pp. 206-210, at p. 209.

81 Jeremy Waldron, “Nonsense upon stilts”. Bentham, Burke and Marx on the Rights of Man (Methuen, 1987), pp. 1-2. For a critical overview on the proliferation of rights language, see Carl Wellman, *The Proliferation of Rights. Moral Progress or Empty Rhetoric?* (Westview Press, 1999), pp. 1-38. Wellman argues that the recent proliferation of the language of rights has been harmful because it has devaluated that currency in public debate.

asserting so bluntly that there are no such rights is precisely the same as the best reason we have for asserting that there are no witches and the best reason we have for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed.⁸²

In the next section I will argue that human rights are not as powerful in practice as they claim to be when we look at them at an abstract level. Human rights do not provide us with clear standards that could be followed in the administration of justice. That rights in practice often defer to policy requirements is, as such, neither good nor bad. The effect depends on what kind of priorities and values are promoted when abstract rights are put into practice.

5.3 INDETERMINACY AND RIGHTS CONFLICTS

Human rights language is notoriously indeterminate. It is clear that the interesting aspect of indeterminacy is not, however, that international legal words are semantically indeterminate or “open”. States have been able to agree on human rights precisely because they are indeterminate, and can operate in different contexts and support different kind of goals and values. Indeterminacy of rights language is interesting because open human rights concepts never remain open in practice – instead they are issued with content or are interpreted by referring to the values or preferences of the interpreting organ and in the context of the society where rights operate; I explore this in my article “Shadows in Paradise”.

The interpretation of legal concepts is a process which is influenced by a large number of factors. What I mean is that when we know that someone has the right to enjoy human rights (freedom of religion, principle of non-refoulement, or freedom from persecution, for example), we know relatively little. The abstract right in question must be made specific in order to have practical meaning. Making the right specific is not a “technical problem”, and does not emerge from the language of the right itself. Rights require meaning after the complex assessment of the context and premises of the right. In other words, when an abstract human rights norm is put into practice this must be done in a concrete situation filled with meaning. Open and abstract expressions like “inhuman treatment” or “persecution” or “freedom of religion” or “right to work” bring with them questions regarding political and economic values (the inhuman treatment of which people we should try to prevent, for example) as well as interpretative controversies regarding “correct” and “appropriate” interpretations of these concepts and the practical actions or procedures needed.

82 Alasdair MacIntyre, *After Virtue*, (3rd edition, Notre Dame, 2007) p. 69.

Certainly everyone agrees that nobody should be persecuted, but without supplemental work we cannot answer the question of what counts as “persecution”. For example, what kind of hardship (political, economic, environmental, war, terrorism, human trafficking, family violence, extreme poverty, etc.) is required, how often must the mistreatment occur to count as persecution, by whom can persecution be carried out, how can persecution be proved, should one seek help from other countries, and can private bodies persecute? If we know that no-one should be treated in a degrading manner, we do not know (from that human right norm alone) if returning a sick or very old asylum-seeker to his home country is degrading treatment. Prisoners are, of course, entitled to freedom of religion, but does this include the right to wear a headscarf in prison? This type of interpretative question is nothing new or dramatic for lawyers who deal with international legal concepts, but the questions show that abstract human rights do not provide us with clear indicators as to how to answer problems that emerge in practice. The practical implementation of human rights is about making choices not about technical or automatic production of legal decisions.

For example, on the concept of persecution, the famous UNHCR (United Nations High Commissioner for Refugees) ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’ states that:

There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.

In the same way, when discussing the concept of “degrading treatment”, the European Court of Human Rights has come to the conclusion that:

the assessment [of degrading treatment, JP] is, in the nature of things, relative: it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution.⁸³

⁸³ Tyrer case, ECHR (1978), Series A. No. 26, 15.

So, what constitutes “degrading treatment” (poverty, illness, environmental degradation, homelessness, war, etc) depends on the context (reasons, balancing, values, etc). And this is true even though the very idea of human rights is precisely to do away with that type of context-dependent policy discretion. In other words, when we are promoting human rights at an abstract level, we have not started to tackle the hard (policy) questions discussed above. In my article “Shadows in Paradise”, for example, I put forward some factors that can make one interpretation of formal and open human rights concepts in professional practice feel more correct than another, and I explain why the content of certain interpretations remains fairly stable within institutions.

The tension between theory and practice is, of course, visible also in the operation of human rights institutions and mechanisms. As I write in my “OPCAT article”, a National Preventive Mechanism under the OPCAT protocol should carry out “regular” visits to places of detention. But the protocol does not clarify what “regular” means in practice, or what should happen at the visit. This is left to the mechanism itself to decide. What reference to human rights mean in a particular context is often dependent on how the institution that has the task to apply them understands it. Possessing powers is one thing, making the most effective use of them is another. So we can see that abstract standards do not set clear guidelines for practice.

The above discussed indeterminacy of human rights is a problem only if it starts to produce bad or biased practical consequences, or if it is used, for example, to promote alien or otherwise unacceptable aims under the camouflage of a universal human rights commitment. Whether consequences are good or bad, depends – of course – on one’s perspective on the matter as well as on the priorities and values one wants to promote. This is discussed in “Shadows in Paradise” and “European Asylum Policy”.

But there is wider indeterminacy than such linguistic openness in refugee or human rights law articles. For example, Article 9 of the European Convention on Human Rights stipulates in a rather comprehensive manner that: “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.” Despite the clarity of this formulation, however, on a practical level there is a wide variety of conceptions of what this freedom entails. Does it, for example, include the right to establish a religious party, or the right to wear a beard in prison? The interpretation of freedom of religion by the European Court of Human Rights, as I argue in my article “Freedom of Religion”, can turn out not to give universal protection for freedom of religion but rather to be a European and Christian way of thinking of the freedom of religion, a kind of Christian interpreted

universalism. Immanuel Wallerstein has written in his “European Universalism. The Rhetoric of Power” that:

The concepts of human rights and democracy, the superiority of Western civilisation because it is based on universal values and truths, and the inescapability of submission to the “market” are all offered to us as self evident ideas. But they are not at all self evident. They are complex ideas that need to be analysed carefully, and stripped of their noxious and nonessential parameters, in order to be evaluated soberly and put to the service of everyone rather than a few. Understanding how these ideas came to be asserted originally, by whom and for what ends, is a necessary part of this task of evaluation.⁸⁴

In other words, freedom of religion in Europe – at least in the light of the examples in my article “Freedom of Religion” – is protected in the context of the policy requirements and sensibilities of European societies. This can be a bad practical consequence of an abstract human rights norm. Again, this type of assessment of different political, religious, moral and strategic interests and perspectives is something that human rights – freedom of religion in this case – is often said to prevent. What is the meaning of human rights, if they are a synonym for good policy? How can human rights be universal, inherent, absolute and beyond politics, if in practice they are simultaneously and constantly subject to different kinds of political and strategic balancing? And if human rights are just a synonym for good policy, what is the real and practical meaning of human rights “experts” and new human rights institutions?

It is clear that problems related to indeterminacy of rights language are not limited to the themes of my articles. International human rights law is full of open concepts like “fair trial”, “family life”, “freedom of expression”, “effective remedy”, “discrimination”, “highest attainable standard of physical health”, “right to education”, and “right to adequate standard of living”, which remain open to different politically appropriate interpretations. The practical implementation of these concepts can have good or bad consequences as discussed above.

Furthermore, human rights also often defer to policy requirements in other ways. This may happen for example when different human rights are found to be in conflict with each other. Conflicts may even occur between the same right claimed by different rights-holders. Again, conflicting rights claims cannot be solved by resorting to rights, but by looking to circumstances beyond rights, to culturally conditioned and politically agreed ways of deciding what is appropriate in a society

84 Immanuel Wallerstein, *European Universalism. The Rhetoric of Power* (The New Press, 2006), p.xiii.

or in a particular administration – what leads to good and workable results. Often both sides in a social conflict refer to their human rights. For example, freedom of speech can be in conflict with the right to security. The *Jyllands-Posten* Muhammad cartoons controversy that took place in Denmark in 2005 was also about freedom of religion and freedom of speech, as I note in “Freedom of Religion”. The supporters of the cartoons felt that the cartoons were a legitimate exercise of the freedom of speech. The critics felt that the cartoons were blasphemous and insulting, infringing the freedom of religion. Can either freedom of religion or freedom of speech, as abstract rights or as decisions of international human rights monitoring bodies, provide us with neutral and objective grounds for solving such conflicts? Should freedom of speech always prevail in spite of the consequences? There is no single solution for rights conflicts, no single vision for the good life that rights would express.⁸⁵ The solution for choosing between the rights can thus become only from outside rights themselves – typically from some institutionally entrenched bias or set of preferences.

Furthermore, conflicts between different kinds of rights are likely to increase as rights are used more widely in the conduct of world affairs. Human rights lawyers and humanitarians increasingly invoke rights language when confronted with the fate of people abandoned by the state or excluded from the community. Rights claims can also be invoked to protect the business rights of companies, the rights of the foetus or human rights to euthanasia, for example. The right to sexual pleasure, the right to peace, the right to a secure, healthy and ecologically sound environment, and the right to preservation of the air, soil, water, flora, fauna and biodiversity are examples of new or evolving human rights.⁸⁶ Referring to the powerful language of rights can be very attractive as a general belief, and effective also as political rhetoric.⁸⁷ Indeed, rights language has a powerful emotional and political appeal, and arguments and demands expressed in rights language are often taken seriously.

Proliferation of “rights” creates new rights conflicts which cannot be solved by referring to rights, but only to the political, cultural and economic circumstances outside rights. And whether this is good or bad depends on how the balancing exercise between conflicting rights is carried out, and what kind of (political, economic, ethical, and global) priorities and concepts of good the exercise supports.

In addition, as human rights practitioners know very well, human rights come with the possibility of restrictions, and the doctrine of margin of appreciation can

85 See Martti Koskenniemi, “The Effect of Rights on Political Culture”, in Philip Alston with Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford University Press, 1999), pp. 105-116.

86 On the proliferation of rights language, see Miia Halme, *Human Rights in Action* (Helsinki University Print, 2008).

87 Amartya Sen, *The Idea of Justice* (The Belknap Press of Harvard University Press, 2009) p. 355.

compromise the abstract promise of protection. As to the margin of appreciation, I wrote in my article “Freedom of Religion” that:

The justification of the so-called “margin of appreciation” also lies in the wish of the Court to recognize that the cultural, historic and philosophical differences between states party to the European Convention on Human Rights may justify different interpretations of the Convention. This doctrine makes it easier for the Court to take into account policy and other arguments of governments regarding what is “necessary” when freedom of religion is interpreted in practice.⁸⁸ It is a doctrine designed to balance state sovereignty with the need to ensure observance of the Convention and thereby avoid confrontations between the ECHR and states parties. In this way human rights (or freedom of religion) become conditioned by policy choices of European state institutions which are justifiable by reference to alternative conceptions of a just society. Thus, it is not insignificant who decides what the freedom of religion entails and when restrictions are needed.

In professional practice abstract rights are also subject to restrictions. The difficulty is that the scope or conditions for the application of the exception are not clearly defined. According to Article 9 of the European Convention on Human Rights, the 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 the protection of the rights and freedoms of others”. When we look at the above grounds for restrictions to freedom of religion and find phrases like “necessary in democratic society”, “public safety” or “health and morals”, we can see that there is no automatic, context-independent or non-political rule or standard criterion that would provide the answer for when to apply the rule and when exceptions are needed. In practice this depends on particular circumstances of the case. Often this is left to the state to decide.

From indeterminacy and rights conflicts it follows that the content of human rights depends very much on the institution that has power to define their meaning and correct interpretation. Different institutions and bodies (courts, human rights NGOs, governmental authorities, European Union, international human rights committees, etc.) can have very different kind of views as to the appropriate interpretation of open human rights standards. In practice, institutions prefer

⁸⁸ See, for example, *Lautsi v. Italy – Request for third party intervention* (Article 44.2 of the Rules of Court) by the European Humanist Federation (23 May 2010) at www.humanistfederation.eu.

some values or choices over some other preferences. Thus, human rights language always ends up promoting some particular policies over some other policies. In other words, as human rights do not “naturally” lead us towards justice or political good, it is not irrelevant what institutions are entitled to assign human rights (freedom of religion or inhuman treatment, for example) with content and how this type of institutional power is monitored.

The above section raises at least the following questions: What does it mean in practice to “promote human rights”? What does it mean to strive for “human rights friendly” decisions to the conflicting demands of a plural society? In my articles “Shadows in Paradise”, “European Asylum Policy”, “OPCAT article” and “Freedom of Religion”, I have explored some factors and perspectives which offer some responses to such questions.

5.4 HUMAN RIGHTS AS POWER, GOVERNANCE AND DISTORTION

The general acceptance of human rights relate to their great level of abstraction. However, an agreement on human rights in abstract level does not provide us with guidance as to what is needed for their implementation in practice. In the previous section, I already discussed some problems – indeterminacy and rights conflicts, for example – that can complicate the translation of abstract rights – freedom of religion, inhuman treatment, for example – into practical measures.

The powerful language of rights can also be used, of course, in many other “external” contexts and arenas that I have not touched upon (at least directly) in my articles. For example, rights language can be employed for military campaigns, development projects, projects that have to do with environment and climate change, trade, good governance, poverty reduction, empowerment of women, and so on. Whether the use of human rights language in these and other context is a useful strategic tool, remains to be studied in each case separately. Also, in these contexts rights can have good and bad consequences depending of the perspective to the matter.

Human rights language can be a useful strategic tool in above mentioned contexts as it does do not only restrict, but also create opportunities. Human right can be used for resistance but it can also be used for hegemony. It can help to challenge prevailing power relations but in can also help efforts to keep things as they are.⁸⁹ The lack of agreement on the content and use of human rights, gives the people and

89 See Susan Marks , “Human rights in disastrous times” in Cambridge Companion to International Law (eds. James Crawford and Martti Koskenniemi) (Cambridge University Press, 2012) p. 321.

institutions implementing them the role of deciding how they are used and what is their substance in particular context. Indeed, when examining human rights in practice (instead of as abstract norms and goals), one can easily see that human rights are not only trying to set limits to the use of power, but are often also part of power and governance. Human rights are not only about setting limits, but are also linked to the question of the legitimacy of the power to rule.

Upendra Baxi has argued that:

The sovereign power constantly negotiates the imperatives of the rule of law in ways that, for example, somehow render legitimate the affluence of the few with the extreme impoverishment of many; locally and globally. The form of reproduction of rights and legality often, at least from the standpoint of those violated, combines, and recombines, the rule of law with the reign of terror.⁹⁰

Human rights language can, for example, create opportunities by hiding other interest of the powerful. At the present time, in the wake of September 11 and the conflicts in Afghanistan and Iraq, for example, human rights and humanitarian rhetoric are sometimes seen as means to hide imperial self-interest which is likely to make human suffering worse. Contemporary humanitarianism is no longer always the cry of dissidents, campaigners and protesters, but a common vocabulary that brings together the government, the army, radicals and human rights activists. Human rights people who sometimes felt marginal to power, have been admitted to the corridors and back rooms of power and this unnatural coupling paves the way for the future. This development may be shocking news to the Amnesty International members stuffing envelopes to support political prisoners. Before the Afghanistan war Colin Powell stated that:

NGOs are such a force multiplier to us, such an important part of our combat team... [we are] committed to the same singular purpose to help the humankind. We share the same values and objectives so let us combine forces on the side of civilisation.⁹¹

90 Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 2002), p. 8. On the other hand, as Baxi also notes, the normative quest for governance structures that produce legitimate laws with a more serious regard for human rights emphasizes the democratic participatory rights of the people (by free and fair elections) to challenge the government's visions of human rights.

91 Quoted in Costas Douzinas, "The Many Faces of Humanitarianism", at www.mrzine.monthlyreview.org/2009, accessed 23.11.2010

Indeed, contrary to common expectations, modern war can engage also human rights institutions that we usually associate for peace and protection of human beings. Whether these types of alliances are good or bad is difficult to say in an abstract level. As David Kennedy has noted, international law – including human rights law – is part of the war even though it is often thought to be against war and setting limits to military conflicts. Strange as it sounds, human rights language can be used to legitimate pain and suffering as humanitarian vocabulary can open opportunities for killing and humiliating people. Military actions are often legitimated by underlining the legality of bombings. Thus, universal, inalienable and equal human rights are not necessarily violated when somebody is killed according to the rules of warfare, including human rights law. Humanitarian vocabulary of human rights law is often mobilised as a strategic asset in modern conflict.⁹²

To give another example, Tiina Pajuste has examined how human rights language have been used in the context of European Security and Defence Policy (ESDP) and who benefits from this policy.⁹³ She has noted that due to the indeterminate and complex nature of human rights, the specific content of human rights is often determined by the entity interpreting it. In practice, the right to interpret means power to decide and to choose between several in themselves possible alternatives. This often involves prioritising some actors' preferences over the claims or priorities of some other actors. In ESDP operation this might mean, for example, on deciding the concrete meaning of certain human rights in practice: for example where the limits of the freedom of expression of some group should lie, or how to balance the right of movement of a person as against the right of security of another person of group. In operational level, what rights in practice should be given priority and what rights should be dealt with later. The various institutions of EU can have different understandings on how particular rights should be understood or put to effect. Whether this is good or bad can only be evaluated in context.⁹⁴

Human rights are also part of a governance language – both nationally and internationally. Often rights language is thought to be rather unproblematic aspect of good governance. In national level, for example in Finland, this is probably the case. But if we examine the use of rights language as part of good governance in

92 For detailed analysis on law and war see, David Kennedy, 'Lawfare and warfare' in Cambridge Companion to International Law (eds. James Crawford and Martti Koskenniemi) (Cambridge University Press, 2012), pp. 158-183.

93 Tiina Pajuste, *Mainstreaming Human Rights in the Context of the European Security and Defence Policy* (The Erik Castrén Institute Research Reports, 2008) p. 93-94.

94 And it is always debatable what exactly "respect" or "promotion" of human rights entail. Does it mean that no violation of that right should occur? Surely not. Such a situation is not even achievable in the EU member states themselves. Furthermore, what does it mean to say that there should be general 'respect for human rights'? For example, the CONOPS (Concept of Operations) for EUPOL Afghanistan states as one of the objectives 'institutional respect for and adherence to international Human Rights Law. Tiina Pajuste, *Ibid*, p. 96.

international arena we can see that rights language is often accompanied by other policy suggestions and arguments. The UNDP, the World Bank and the Council of Europe, for example, can promote different and competing aspects of good governance. In his study on governance and international law, Samuli Seppänen has observed that “The European Committee of Social Rights advances a state-centered policy approach to governance, whereas the World Bank fosters economic liberalism”⁹⁵ In other words, good governance as a human right can also hide the policies that are conducted under it. Whether this is good or bad depends on the context and the goals that are promoted.

Yet another example of the many uses of human rights language in different arenas could be development co-operation. It is clear that the language of human rights can help raise funds, organise campaigns and provide means for setting checks and balances for recipients of development aid. The focus of human rights on individual actors can also increase the sensitivity of development programs to the difficulties and – what Martha Nussbaum would call – capabilities of so called vulnerable groups.⁹⁶ But again little is achieved by simply restating that human rights are essential for development. To make abstract human rights relevant for the practical development, they need to be connected to reality and in this process they go beyond legal norms. It is a human right argument to say that everybody has right to food but from this rule we cannot conclude whether to start financing small scale micro credits project in Africa. If this logic is followed to the end, it appears that human rights based approach is not, after all, the decisive development policy.⁹⁷

Probably most comprehensive general list of possible costs, distortions and preferences of human rights language is provided by David Kennedy.⁹⁸ While acknowledging the achievements of human rights, Kennedy argues that they can also be “part of the problem”. The purpose of Kennedy’s list of concerns is to encourage

95 Samuli Seppänen, *Good Governance in International law* (Erik Castrén Institute Research Reports 2003), p. 114.

96 Martha Nussbaum, *Creating Capabilities. The Human Development Approach* (The Belknap Press of Harvard University Press, 2011). This approach holds that the key question to ask, when comparing societies and assessing them for their basic decency or justice is: “What is each person able to do and to be?” (p. 18). She writes that the capabilities approach is closely allied with the international human rights movement. The common ground, according to Nussbaum, lies in the idea that “all people have some core entitlements just by virtue of their humanity, and that it is basic duty of society to respect and support these entitlements (p. 62).

97 Samuli Seppänen, *Possibilities and Challenges of the Human Rights-Based Approach to Development* (Erik Castrén Institute Research Reports 2005), p. 55.

98 See David Kennedy, “The International Human Rights Movement: Part of the Problem?”, *European Human Rights Law Review*, Issue 3, 2001, pp. 245-266. Kennedy’s work has been criticised as being ineffective, abstract, and personal, and an academic quest or confession. It has been suggested that his arguments should for this reason be taken as isolated and highly personal, and not as something that need concern the real life of the human rights movement. See Jan Klabbers, *Sceptical Views on Human Rights* (Book review), *Nordisk Tidsskrift for Mennesskerettigheter* (Nordic Journal of Human Rights) Vol 21 (2003), pp. 206-210, at p. 207.

“well-meaning legal professionals” to adopt a more pragmatic attitude towards human rights. He aims at developing a stronger practice of weighing and calculating the costs and benefits of human rights, instead of treating human rights as an object of devotion. In the context of this introduction, it is necessary to mention only a few of the possible “cost” of human rights that relate to the topic of this section.

First of all, Kennedy is worried that human rights language occupies the field of emancipatory possibilities. As a dominant and fashionable vocabulary for thinking about emancipation, human rights can, Kennedy argues, crowd out other ways of understanding harm and recompense. This is easiest to see when human rights attracts institutional energy and resources and excludes initiatives that are not expressed as human rights projects. A “universal” idea, like human rights, of what counts as a problem, can be harmful to local political and social initiatives.

He also argues that human rights often view the problem and the solution too narrowly. Rights language mainly criticises the state and seeks public law remedies, but it leaves unattended the powers of private actors. Interestingly, problems and solutions are also defined in a way that is not likely to change the economy.

But human rights can also over-generalise. Human rights propagates an abstract idea about people, politics and society. One-size-fits-all emancipatory practice often fails to recognise, and reduces the quantity of and possibility for, particularity and variations. To come into an understanding of oneself as a person who has human rights can be a problem. In Kennedy’s view this can mean a loss of awareness of the unprecedented and plastic nature of experience, a loss of a capacity “to imagine and desire alternative futures”.⁹⁹

Human rights also particularises too much. The focus on right-holding identities and individuals blunts an awareness of diversity, of the continuity of human experience, and of overlapping identities. By consolidating human experience into the exercise of legal entitlements, human rights strengthens the national governmental structure, and equate the structure of the state with the structure of the freedom. Encouraging people to see themselves as right holders can discourage negotiation and politics. The difficult effort to codify a “right to asylum”, for example, illustrates the difficulty of addressing solutions as matters of legal entitlement. According to Kennedy, we should question whether the effort to define the identity and rights of the refugee is more part of the problem than of the solution.

For Kennedy, human rights express the ideology, ethics, aesthetic sensibility and political practice of a particular Western eighteenth to twentieth century liberalism. The human rights movement is a product of particular moment and place: post-enlightenment, rationalist, secular, Western, modern, and capitalist. But

99 David Kennedy, “The International Human Rights Movement: Part of the Problem?”, *European Human Rights Law Review*, Issue 3, 2001, p. 254.

from the pragmatic point of view, origins are irrelevant. The fact that the human rights movement is really the product of a specific cultural or historical origin, says nothing unless that origin renders human rights less useful in practice. The Western origin of human rights can become a problem when general difficulties of the liberal tradition are carried over to the human rights movement. The human rights movement contributes to the framing of political choices in the third world between local/traditional and international/modern forms of government. Human rights are similar to universal, rational and civilised.

One problem with rights, in Kennedy's view, is that they promise more than they can deliver. Human rights promise a way of knowing the difference between just and unjust, universal and local, victim and violator. But in practice, justice is something which must be made, experienced, articulated, and performed each time anew. Justice is seen as an instrument of law rather than as a political actor, but this is simply not possible given the porous legal vocabulary with which judges must work, and the likely political context within which judges are asked to act.

The legal regime of "human rights", taken as a whole, can also do more to produce and excuse violations than to prevent and remedy them. Human rights remedies treat the symptoms rather than the illness. The vague and conflicting norms of human rights, their uncertain status and broad justification, the possibility of exceptions to them, their lack of enforcement and the attention paid to them as a problem that is peripheral to a broadly conceived programme of social justice, may in some contexts place the human rights movement in the uncomfortable position of legitimating more injustice than it eliminates. This is particularly true when human rights discourse is absorbed into foreign policy processes.

Sometimes the human rights movement can strengthen bad international governance. Human rights share with the rest of international law a tendency to treat only the tips of icebergs. Deference to the legal forms upon which human rights is built – the forms of sovereignty, territorial jurisdictional divisions, and subsidiarity – makes it seem natural to isolate aspects of a problem for special handling at the international level, often entrenching the rest of the iceberg more firmly in the national political background. The human rights vocabulary emphasises the development of law and strengthens the tendency of international lawyers to focus on legal regimes, rather than on questions of distribution in broader society.

Indeed, human rights promotion can be bad politics in particular contexts. The transformation of political questions into legal questions, and then into questions of legal "rights", can make other forms of collective emancipatory politics less readily available. But this, of course, is not always the case. The point of an ongoing

pragmatic evaluation of the human rights effort is precisely to develop a habit of making of such an assessment.¹⁰⁰

In the light of the above concerns by Kennedy and others, the human rights community should indeed be sensitive to the expanding human rights bureaucracy and the possible costs and benefits related to this process. This is underlined by the fact that the human rights bureaucracy as a whole has faced a dramatic and substantial expansion. Miia Halme has noted that six decades after the adoption of the Universal Declaration on Human Rights “a community of endless NGOs, experts, policy makers, volunteers, educators, politicians and ordinary citizens has emerged around the human rights discourse”.¹⁰¹ The expansion of human rights is also reflected in the increasing number of human rights conventions, human rights institutions, human rights experts, human rights monitoring bodies, human rights policies and programmes, etc.¹⁰² Human rights are used more widely in the conduct of world affairs than ever before.

But it is not clear if expanding the human rights language is always the best way to tackle emerging problems at a national or global level. For example, if new human rights conventions in practice defer to the policy requirements of states (as discussed in section 5), a proliferation of human rights can also diminish the general value of so-called fundamental human rights for the general population. Every effort to use human rights for new purposes or to cover new problems requires people to make arguments they know to be less persuasive.

The human rights movement attracts and mobilises thousands of good-hearted people around the globe every year. But the human rights vocabulary and commitment to human rights should not become blind to the real and practical results of this commitment as discussed above. Human rights are part of the

100 For detailed analyses of Kennedy’s concerns, see his article “The International Human Rights Movement: Part of the Problem?” cited above, as only some of his ideas are used above. Compare David Kennedy to David Held who, from another perspective, has cast a shadow over the appeal of human rights by arguing that, instead of human rights, the world needs a new universal language and principles, a “layered cosmopolitan perspective” to form a basis for a new “cosmopolitan orientation”. He feels that new cosmopolitan values can be expressed in terms of universal principles and standards that can protect and guide our realm of humanity. For him these principles are: (1) equal worth and dignity, (2) active agency, (3) personal responsibility and accountability, (4) consent, (5) collective decision making about public matters through voting procedures, (6) inclusiveness and subsidiary, (7) avoidance of serious harm, and (8) sustainability. It is not clear what additional value Held provides to other current lists of rights. One practical problem regarding human rights can be the fact that things that are worthy of praise in human beings do not always find relevant space in rights language, which is an idea I adopt in “Shadows in Paradise” and “Freedom of Religion”. See David Held, “Principles of Cosmopolitan Order”, in *Law and Justice in Global Society*, a publication of the IVR Congress (2005), International Association for Philosophy of Law and Social Philosophy. University of Granada, (2005), pp. 146-147.

101 Miia Halme, *Human Rights in Action* (Helsinki University Print, 2008), p. 7-8.

102 Mary Ann Glendon has stated that a rapidly expanding catalogue of rights – extending to trees, animals, smokers, nonsmokers, consumers, and so on – not only multiplies the occasions for collisions but risks trivializing core democratic values. A tendency to frame nearly every social controversy in terms of a clash of rights impedes compromise, mutual understanding, and the discovery of common ground. See Mary Ann Glendon, *Rights Talk. The Impoverishment of Political Discourse* (The Free Press, 1991), pp. xi and 14.

institutional power. As I tried to show in this section, institutions can often decide how open ended human rights language is used in concrete situations and where human rights language is taking us. But we do not necessarily always agree on how institutions are using their powers. This is another reason why it is necessary to approach human rights from a pragmatic perspective, and it will be discussed in section 6.

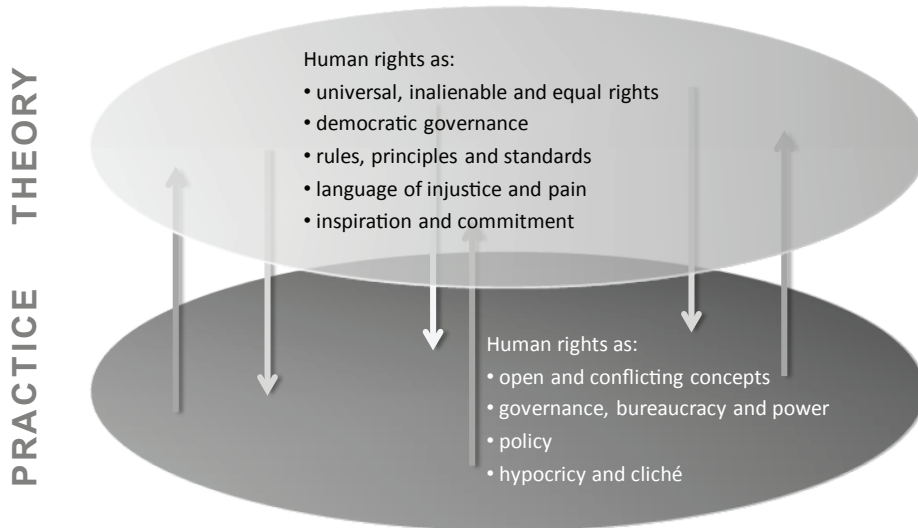


Figure 2 Human rights is not only a theory, it is also a practice as discussed in section 5

6 TOWARDS A PRAGMATIC EVALUATION OF RIGHTS

In previous sections I have discussed human rights from a theoretical as well as from a practical perspective. When human rights operate in professional contexts, these two perspectives merge into each other. The fusion of rights with practice is part of the dynamism and appeal of human rights.

The theoretical and practical perspectives on human rights are also present in my articles. In "Prohibition of Return", "OPCAT article" and "Culture and Human Rights", I discuss human rights from a somewhat theoretical perspective as standards, rules, institutions and language that can provide protection against cruelty and oppression. In "Shadows in Paradise", "Freedom of religion", and "European Asylum Policy", I am more interested in how abstract norms are turned into practical measures. The overall aim of my article writing has been to show that when human rights are put into practice, they can be both "triumph and disaster", simultaneously something significant and something problematic.¹⁰³

As discussed in section 5 above, a gap can be seen to exist between an abstract human rights norm and its realisation, a thin line between promise and practice (or between rhetoric and reality). I have so far only tried to argue that implementing human rights in practice is not a technical or logical operation but often a question about priorities, choices and political battles. Both at the international and national level, human rights related resources are often limited. For this reason, it is necessary to choose and prioritize between different kinds of human rights concerns. Human rights conventions as such do not help us to decide whether we should fight poverty abroad, or put our human rights resources in improving the human rights of prisoners at home. By reading human rights articles, we cannot decide whether it is more important to focus resources on preventing HIV/AIDS in Africa or improving the human rights of the old people in homes for the elderly, or minorities at home. In other words, when an abstract norm is put into practice, a choice and a decision regarding the priorities and interpretation of "universal" human rights is needed. Often this interpretation of human rights is made by the authorities, the UN, the relevant national or international court, human rights monitoring bodies or committees, human rights NGOs, human rights experts or believers, for example.

103 Costas Douzinas "Six Theses on the End(s) of Human Rights", in *Finnish Yearbook of International Law* (Kluwer Law International, 2002) p. 201

This decision or practice by one of the above human rights bodies is sometimes portrayed as non-political, neutral or progressive. If human rights decisions were to be portrayed as particular, subjective or political, the role of human rights “standards” would become unclear, as it is precisely human rights law that is often thought to set limits to the political and particular manoeuvring of states and other relevant bodies. But, as discussed above, implementing human rights is never non-political: it is about taking sides, setting priorities, negotiating compromises, allocating resources and balancing different interests and values. There is nothing necessarily wrong or bad in this, as the balancing and prioritising can lead to good results. However, understanding the political and partial operation of human rights invites us to evaluate human rights from a pragmatic perspective. When human rights are at the service of practice they can have both dark and bright sides, if they are to have any meaning at all.

It is interesting to explore the practical operation of human rights and human rights institutions, as no particular use or meaning given to human rights can be the final word on the meaning of the concept. Instead of treating human rights as self-evidently something “good” or significant or progressive, we have to look at the different and changing aspects and understandings of their practical operation. Instead of debating whether human rights are universal or inalienable, it is necessary to be sensitive to the good and bad consequences of these rights. In the same way, a pragmatic approach to human rights is not interested in whether human rights are theoretically a Western concept or a bourgeois luxury, as proposed by Marx, but in whether these rights can sometimes, in a particular discussion or context, be used to reconcile conflicting parties and enable them to listen to each other’s interpretation of universal claims; I try to elaborate on this in my article “Culture and Human Rights”.

The practical meaning of rights can be evaluated by adopting a more pragmatic attitude towards human rights, and developing a stronger practice of weighing the costs and benefits or dark and bright sides of the articulation, institutionalisation and enforcement of human rights.¹⁰⁴ I would agree with Martti Koskenniemi, who noted that the virtues and vices of international law cannot be discussed in the abstract.¹⁰⁵ He has written that the effects one’s formalism or anti-formalism have on one’s legal practice, or the effects legal institutions have on society, can only be “contextually determined”. We need a great deal of supplemental work and detailed reasoning to know where rights are taking us, and if they are taking us in a direction we want to support. For this reason it is not always wise on a general

¹⁰⁴ David Kennedy, *The International Human Rights Movement : Part of the Problem?*, *European Human Rights Law Review*, Issue 3, 2001, p. 246

¹⁰⁵ Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge University Press, 2005), p. 616.

level to “promote human rights”; when we promote indeterminate and conflicting rights, do we always know whose rights and priorities we are promoting?

The pragmatic evaluation of human rights, means specifying the concrete and practical benefits and harms which might attend human rights decisions or initiatives in particular cases and contexts. Only by looking at human rights in practice, can we acquire more information about the world around us and evaluate whether abstract rights can live up to their promises. At its best, the pragmatic evaluation of rights can make visible the dynamism and operation, but also the vulnerability, of human rights arguments, and the effectiveness of human rights bureaucracy in professional practice. A pragmatic perspective might show, for example, whose policy priorities human rights support, and who are included and who are excluded when human rights norms are interpreted and decisions on allocations of resources are made. Pragmatic perspective to rights can assist in looking the implementation of human rights as a kind of policy. It might also show how human rights are part of governance and bureaucracy, and how they really make a difference to those who suffer or are humiliated (disabled people, old people in institutions, Roma people, etc). It has also been suggested that a pragmatic approach to rights is helpful in showing the boundaries to what state and non-state actors can and cannot do in practice in the field of human rights.¹⁰⁶

This type of pragmatic approach to human rights looks at human rights as a form of power. The abstract story of rights is questioned, and its practical operation is analysed, by examining the connections between the regimes of power served by human rights, and the construction of the practices and diversities it enforces. This type of analysis, which is of course nothing new, can sometimes, I hope, bring about progressive political change and at least keep alive the arguments about the interpretation and different strategic uses of human rights.

In contrast to H. L. A. Hart’s well-known external/internal perspectives to rights, a pragmatic approach seeks to link the facticity of human rights discourse to its practical use.¹⁰⁷

Florian Hoffmann deserves to be quoted at length:

The pragmatic perspective aims to comprehend human rights discourse not in terms what it could be but what it arguably is, namely a plural, polycentric and ultimately indeterminate discourse amenable to use by everyone (nearly) everywhere. Whether individuals and groups wish to challenge what they perceive as oppressive or hegemonic structures,

106 Todd Landman, “Politics, Pragmatism, and Human Rights”, *Human Rights & Human Welfare*, Vol 3.1, 2003, p. 31.

107 Florian F. Hoffmann, “Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights”, in Anne Orford (ed.), *International Law and its Others* (Cambridge University Press, 2006) p. 225.

*they can avail themselves of that discourse, as they might use a hammer to send shockwaves through a concrete wall. The logic of plurality implies, however, that the effect of these discursive irritations is beyond control of those creating them, and is ultimately uncertain. There is no single “correct” signification, and, therefore, use of human rights, but only context-specific uses. This, in turn means that a pragmatically inspired acceptance of epistemological scepticism need not lead to the summary dismissal of human rights and the abrupt discontinuance of their active promotion. Instead, it may be just a precondition for the new discursive form, one that accepts at once the multiple validities of human rights, and the singular validity of their promotion.*¹⁰⁸

In other words, despite the haziness and fluidity of the concept of human rights, they are nonetheless being used almost everywhere and by everyone, whether in good faith or in bad faith, and with whatever connotations they are given. From this perspective, a human rights system should not only be viewed as something good and unproblematic (as in the kind of cliché described by Hoffmann), but also as a living normative system that in practice can be used for “good” or “bad” causes.

So, the practical meaning of human rights can only be understood in a concrete context, and through the subjective sense made of it by actors in that context. No set of discourse rules can pre-determine the outcome of the use of human rights. In other words, human rights discourse cannot control the way human rights is used by human rights actors. Human rights cannot be disassociated from the subjective meanings actors bestow on them in concrete situations. This means, for example, that there are no objective or non-political ways to determine the “correct” use of human rights; I try to elaborate on this in my articles “Shadows in Paradise”, “European Asylum Policy” and “Freedom of Religion”.¹⁰⁹

Furthermore, a pragmatic approach to human rights looks at the unresolved tension between the juridical world of rights and the political world of their realisation. It considers the sometimes dramatic encounters between abstract

¹⁰⁸ Ibid, pp. 225-226.

¹⁰⁹ It is clear that objections can easily be raised to this emptying of human rights of its objective and normative substance. One concern relates to the practice of international and national human rights courts and bodies. These forums, it could be argued, constitute particular interpretative communities which are presumed to understand each other. They could be claimed to have a reasonably clear understanding of the meaning of human rights – the meaning of degrading treatment, for example. But, as I try show throughout this introduction, this is not the case. Human rights are open and political concepts, and there is always a lot of room for the construction of their meaning, for their indeterminacy and for their evolution. Human rights law is full of indeterminacies, making the implementation of human rights an open process. Human rights are never safe from subsequent modification. This is true for human rights language, standards and institutions as well as for human rights decisions. Human rights are only instantiated momentarily “when particular meanings emerge through the interaction of discourse and consciousness.” On this, see also Hoffmann (ibid.) at p. 230-233.

rights language and legal, political and religious power; this is discussed by me in “Freedom of Religion”, for example. Establishing a new human rights institution or monitoring body, for example, can be an excellent idea in theory, but only in its practice is it possible to analyse the costs and benefits, or the dark and bright sides, of that institution. International refugee law is beneficial for those who need international protection against persecution, but it also creates artificial definitions, giving opportunities and mechanisms for governments to send asylum seekers back to their home countries without violating their human rights.

What a pragmatic approach can do, is to focus on the making of (political) choices, and on the power that is always present in the operation of human rights. Pragmatic calculations can help us to understand why certain interpretations of human rights law are produced and privileged over other interpretations. I discuss this in “Shadows in Paradise” and “Freedom of Religion”, for example. Demonstrating this type of contingency in the operation of open human rights concepts can assist us seeing that it is not possible to arrive at a consensus without exclusion.

From a pragmatic perspective, it becomes more difficult to “promote human rights” or “do human rights” without the risk of promoting “wrong” preferences. Florian Hoffmann summarises the current situation as regards the operation of human rights as follows. For as long as the “criticism of human rights seemed to be safely confined to a few neo-Marxists, cultural anthropologists and friends of the Chinese government, human rights activists could ignore critical voices”. He continues that it seemed possible to spend one’s entire working life “doing human rights” without ever stepping back to reflect on why one was actually doing them, on what grounds and with what final vision of the world and the human beings in it. It seemed self-evident that human rights were both real and good, and that their absence essentially denoted intolerable human suffering.

This kind of unreflective view represents the clichéd version of human rights. The clichéd account of human rights is but a thin veneer that conceals the concept’s deeper foundation – or lack thereof. What are human rights, after all? What is the relationship between theory and practice? Are human rights moral, or legal, or something else, in character? Are they local or global discourse, ideas, legal/moral prescripts, cultural practices, or, indeed, inverted empirical descriptions of their lack, namely human rights violations? And what assumptions underlie the claim

that the concept of human rights can be known in socio-cultural contexts different from that in which it emerged?¹¹⁰

A pragmatic approach to human rights also has its weaknesses. The critique of pragmatism is not that human rights practice would not implement human rights law “correctly” or neutrally, or that practitioners would fail to live up to the expectations emerging from international law or from the “field”. A pragmatic evaluation is vulnerable to criticism because it offers no clear objective vocabulary that would distance the practitioner from his or her daily work, in order to carry out a critical evaluation which would include referring to alternative practices.¹¹¹ One way out of this dilemma is to see the dynamics of the interaction between abstract rights and their practical realisation. We can agree that human rights should be respected, but often disagree what this means in practice. Human rights are popular tools precisely because they make it possible to incorporate abstract demand with particular situation; every particular claim can be presented as human rights claim. But if abstract human rights claims start to support wrong priorities, we have to return to rights claims again. Because of this tension between rights and their realisation, practical interpretation and uses of rights must be carefully monitored by democratic institutions and civil society. We have to ask if rights are taking us to the direction we want to support, what kind of priorities and preferences rights language supports, and what kind of priorities are excluded. And in this (political) process, it is often necessary to return to the idea of universal human rights according to which every person everywhere in the world, irrespective of citizenship, residence, race, culture, class, caste or community, is entitled to enjoy some universal and inalienable human rights standards which others should respect.

As I argue in the concluding remarks of my article “Freedom of Religion”, it is necessary “not to silence pragmatic analysis of human rights as the main task of the critical approach to the practice of human rights is to try to keep visible the circular relationship between rights and politics that are always involved in the application of human rights norms”. Focusing on the intersection between the human rights commitments of the state and the claimed rights of the individual, pragmatism can

110 Hoffmann, *Ibid.*, pp. 221, 224 and 227. On page 226, Hoffmann claims that human rights standards are often considered universal in the sense that “everyone has, or should have them; that they are indivisible in the sense that the international bill of rights essentially forms a coherent package of claims to a certain type of personhood and community – subsumed precisely under the label of human rights; that, on account of the latter, empirical conditions of human beings can – and indeed should – be measured against the “standards” set by these human rights norms; and finally, that the foundations of these human rights norms lie in some mixture of common (rational) morality and cross-cultural equivalence.”

111 Martti Koskeniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge University Press, 2005), p.601. On the other hand, if we acknowledge that human rights decisions are always subjective, hegemonic and temporary it is also possible revise them – to keep the argument open. Harm is done when the complexity of the Other is simplified and when essentialism and cultural categories are introduced – I discuss this in my “Freedom of Religion”.

try to demonstrate who are included in, and who are excluded from, the protection of human rights, and what kind of factors are involved in this process.

This is precisely what my thesis aims to do. Using different approaches, contexts and strategies, the seven articles and this introduction focus on revealing different theoretical and practical aspects of human rights, including the “political” or the contesting nature of human rights, as Chantal Mouffe has put it.

Chantal Mouffe has described, in an interesting manner, modern democratic society as a society in which power, law and knowledge experience a “radical indeterminacy”. According to her, this is the consequence of the democratic revolution, which led to the disappearance of power that was previously embodied in the person of the prince and tied to a transcendental authority. In modern democratic societies, a new kind of social institution has been inaugurated in which power has become “an empty space”. In this empty space, human rights can play a role by challenging inclusions and exclusions and thus keeping democratic discussion alive.¹¹²

*What is specific and valuable about modern liberal democracy is that, when properly understood, it creates a space in which this confrontation is kept open, power relations are always being put into question and victory can be final. However, such an ‘agonistic’ democracy requires accepting that conflict and division are inherent to politics and that there is no place where reconciliation could be definitively achieved as the full actualization of the unity of the “people”.*¹¹³

112 Chantal Mouffe, *The Democratic Paradox* (Verso, 2009), pp. 1, 10.

113 *Ibid.*, p. 16.

7 STRUCTURE OF MY THESIS

The aim of the above sections concerning different understandings of human rights was to set a general theoretical frame of reference for my seven articles (or, in a way, seven case studies), and thus to complement them theoretically. As already noted, some of my articles discuss human rights in rather formal and abstract ways, and some articles raise more practical and also critical perspectives on the operation of rights. After this general discussion we need to focus on the seven articles that form the substance of my thesis.

Articles 1 and 2 discuss the potentials and limitations of human rights language in a multicultural society, (“Culture and Human Rights” (1) and “Ihmisoikeudet ja eksoottinen Toinen” (2) or, in English, “Universal human rights and the Exotic Other”).

Article 3 compares the strengths and weaknesses of human rights standards in selected human rights conventions, and is entitled “Palauttamiskiello. Non-refoulement periaatteesta kolmessa ihmisoikeussopimuksessa” or, in English, “Prohibition of Return. Non-refoulement in three human rights conventions”.

Article 4 (“Shadows in Paradise”) discusses the potential, the limitations and the paradoxes of one human rights principle in the field of refugee law.

Article 5 (“European Asylum Policy”) analyses the use of human rights language by the EU in an important commitment under which decisions to include or exclude people, and appropriate policy arrangements, are carried out.

Article 6 (“Freedom of Religion”) discusses the abstract commitment and practical application of freedom of religion as a human right.

Article 7 (“OPCAT”) looks at the strengths and weaknesses of one human rights institution in the light of a new human rights protocol.

The articles can be divided into two different groups, even though they have many common themes. The first two papers, “Culture and Human Rights” and “Human Rights and the Exotic Other”, analyse, on a rather theoretical level, the operation

of human rights in a multicultural world. Drawing on legal and anthropological discussion, Article 1 focuses on the meaning of “culture” and the claimed “Western origin” of the human rights concept, which is sometimes said to limit the usefulness of the concept of human rights in non-Western cultures. Article 2 is a continuation of the themes of Article 1, and analyses the paradoxes and tensions that emerge when human rights, which are claimed to be “Western” and universal, encounter a representative of a particular culture, the so-called “exotic Other”.

The second group of articles (Articles 3, 4, 5, 6, and 7) discuss the operation of human rights in different practical contexts. Articles 3, 4 and 5 look at the dark and bright sides of human rights law in providing protection against persecution and inhuman treatment. Article 6 analyses the practical operation of freedom of religion in a multicultural society. Article 7 also deals with protection against prohibited treatment, but takes a more formal and institutional approach to human rights commitments, and analyses the strengths and weaknesses of one human rights institution, the Parliamentary Ombudsman of Finland, in the light of a new human rights instrument, the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

My study has two levels. On one level each individual article addresses particular research questions and provides conclusions on them (the “article level”). In this introduction (“introduction/synthesis level”), I examine and discuss my articles from the theory-practice perspective I have tried to set out in previous sections. I also try to provide answers to the tension (or what I call problem with rights) between abstract human rights and their practical realisation, as discussed in detail in “The Problem with Rights” in section 2.

The seven articles included in my thesis, however, reflect very different strategies, perspectives and understandings for human rights, and also show the development and changing nature of my thinking vis-à-vis human rights. In the early stages of my career as a lawyer, international human rights law seemed to provide a rather neutral, objective and unproblematic basis for justice. Human rights were very much an unproblematic theory. Later, the practical limits and contingencies of human rights – human rights as practice – have become more apparent. Through human rights practice it became clear to me that, instead of providing clear standards, human rights offers more choices and alternatives than practitioners usually realize. As I see it today, human rights are simultaneously a theory and a practice. In a particular professional context or historical or cultural situation, a good human rights lawyer might want to highlight the claimed universal nature or standard-setting ability of human rights. Without doubt, there are situations when human rights can be a useful language for those who are on the margins and outside the clubs of the powerful. But in another context, one can promote justice or institutional priorities

by referring to the open, political and changing nature of rights. Understanding that human rights have this nature, and many other abstract and practical qualities is the key to understanding their power and appeal, and to avoiding any clichéd concept of rights.

It is also necessary to say what I am not planning to do. In this synthesis I am not trying to develop a general theory or model of the operation of human rights in general. In the light of the wide and almost unlimited scope and undefined meaning of human rights and human rights talk, this would probably be an impossible task. I am mainly interested in the operation of human rights in the cases and perspectives that I raise in my seven articles.

So I am not interested here, for example, in what (if anything) it means in practice for the states who are parties to the UN Covenant on Economic, Social and Cultural Rights to recognize the right of everyone to work (Art. 6), their right to enjoyment in just and favourable conditions of work (Art. 7), or their right to be free from hunger (Art. 11). I am sure, however, that analysing these articles and many other articles in different UN and Council of Europe human rights conventions from a pragmatic perspective would be useful and interesting.

In general, I think that well-meaning practitioners of human rights should engage in this type of critical evaluation (considering in what way treating the “right to work” or “right to be free from hunger” as human rights helps the unemployed or hungry to get work or food, for example) more often. It would be useful to know what kind of practical costs and benefits would emerge from these analyses. What does it mean in practice when states who are parties to the Covenant on Economic, Social and Cultural Rights “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, or how precisely can the human rights of minorities assist us in helping Roma people in Europe? This type of approach is nothing new, but more pragmatic calculations of this type could assist us in seeing the real achievements of human rights and the amount of resources that are spent on often rather ineffective human rights bureaucracy and human rights talk.

8 THE ARTICLES

As a lawyer and a cultural anthropologist (my Masters of Art involved the study of comparative religion, cultural anthropology and theoretical philosophy), my education has affected the themes of my articles. In October 1998 I was asked to deliver a speech on human rights in a multicultural society to a seminar organized by the Advisory Council on International Human Rights of the Ministry for Foreign Affairs of Finland. When preparing my paper, I became interested in the debate regarding the universalism and relativism of human rights. I wanted to find out in what way the idea of different “cultures” challenges the concept of human rights.

The starting point for my article was that multiculturalism cannot challenge the meaning of human rights. In my visits to South-East Asia – including visits to human rights institutions in Thailand, the Philippines and Malaysia – I had never come across the opinion that human rights could be in any way negative or problematic. Usually my contacts, in both professional and non-professional contexts, had been very much in favour of human rights. In spite of having different cultural or religious backgrounds, it seemed to me that people generally wanted their human rights to be respected. Was this view of human rights as something self-evidently good an arrogant, or a Western, approach to rights? I wanted to explore my impressions in more detail, and gather further insights into the link between human rights and “culture” and the links between human rights and the Western origin it is claimed to have.

These experiences and ideas affected me when I began to write the first article of my thesis, “Culture and Human Rights”.¹¹⁴ In this article I started from the standpoint of basic human rights literature that the goal of human rights is to create common rules for all people in the world. I noted that this is a challenging goal in view of the diversity of cultures, religions, lifestyles and values in the world and the conflicts engendered by them. In the human rights debate, the universality of rights has often been contested on the grounds that they are a product of Western culture and cannot therefore be applied universally.¹¹⁵ The concept of human rights was already being questioned by some anthropologists when the Universal Declaration of Human Rights was drafted. In 1947 the American Anthropological Association (AAA) issued a statement to the drafting committee in which it criticised

114 This article has been published as Jari Pirjola, “Culture, Western Origin and the Universality of Human Rights”, *Nordic Tidsskrift for Menneskerettigheter* (Nordic Journal of Human Rights), Vol 23, 2005, No. 1.

115 See Adamantia Pollis and Peter Schwab, “Human Rights: Western Construct with Limited Applicability”, in Adamantia Pollis and Peter Schwab (eds.), *Human Rights: Cultural and Ideological Perspectives*, 1 (New York, 1980), p. 12.

the concept of human rights in the Universal Declaration of Human Rights. The AAA statement famously argued that “The Rights of Man in the twentieth century cannot be circumscribed by the standard of any single culture, or be dictated by the aspirations of any single people”.¹¹⁶

In “Culture and Human Rights”, I argued that the culture concept and the Western origin of human rights are, however, in many ways problematic notions when challenging the universality of human rights. In spite of their culture or origin, human rights can serve as a key instrument and a yardstick. As to the culture concept, I considered the anthropological discussion according to which cultures are not normative, coherent, timeless or discrete systems that could justify human rights violations. “Cultures” are not free from power struggles, politics or growing global interaction. It is true, I noted, that the roots of human rights thinking lie in the European political and philosophical tradition, but human rights thinking has developed over a long period of time, and is the result of a process having various different underlying ideas and tensions which all are part of the “Western tradition”.

I concluded the article by suggesting that the culture concept, or the so-called Western origin of human rights, cannot challenge the strengths and potentials inherent in human rights. I also argued that the “Western origin” criticism of human rights fails to take sufficient account of the fact that modern human rights did not arise harmoniously from its Western and Christian roots but arose as a result of continuing conflicts and tensions. Human rights are reactions to experiences of injustice, pain and fear arising from the human condition. These negative experiences could be turned into political goals and eventually into a binding human rights convention. I did not pay much attention to the other understandings of rights discussed in section 5: the indeterminacy, conflicts or paradoxes that affect the practical operation of human rights. I noted, however, that in practice many people are excluded from the universal protection of human rights. The practice of human rights is about power and politics, and whenever these elements are involved, there is a risk that some people are excluded.

The second article of my thesis (“Human Rights and the Exotic Other”) discussed human rights and culture from different perspectives and tried to develop the theme of “Culture and Western Origin”.¹¹⁷ The article discusses the tension between the claimed universal of human rights and any particular culture. I wanted to explore, how the human rights practitioner should deal with the paradox that the concept of human rights is linked to the idea of universality, while the concept of culture is linked to something non-universal, particular and traditional.

116 “Statement on Human Rights”, reprinted in *American Anthropologist* Vol. 4 (1947).

117 *Universaalit Ihmisoikeudet ja “eksoottinen Toinen”*. (In English: *Universal human rights and the exotic Other.*) *Oikeus* 2007 (36); 1, pp. 107-114.

At the outset of my article, I stated that human rights are important theoretical instruments for providing protection to all, irrespective of “culture”, religion, ethnicity or the political situation of the state. I started by noting that we need human rights standards because judging the conduct of states towards minorities, for example, cannot be based only on the state’s own contingent political criteria for just treatment. But on the other hand it has been stated that this type of reference to human rights standards is a Western, European and even imperialistic approach which is not sensitive to the voices of particular cultures or religions, or what I called “exotic Others”. Why should we trust in universal human rights when there are also other universal vocabularies that might be more sensitive to particular ways of life?

In this tension between something that is said to be universal and something that is said to be particular, a lawyer or an anthropologist can feel uncomfortable. If you promote so-called universal human rights you may feel like a colonial master transplanting Western standards and ideas to foreign and exotic places. Why should we emphasise the universality of rights, if we are only talking about one possible normative language of the modern world? Maybe this type of thinking sustains unjust structures in the world instead of changing them.

But too much sensitivity to the voices of “Others” can also be confusing. Ideas of tolerant diversity or cultural sensitivity can ignore the rights of marginalised individuals, groups and communities. Those exotic Others that escape abuse, can wonder why promoters of diversity are sometimes so eager to respect legal pluralism or different normative standards operating in a social field. Shouldn’t everyone be entitled to the freedom and equality that human rights conventions can sometimes promote?

I first explored the factors which can in some situations maintain the tension between universal human rights and particular cultures which is described above. I argued, for example, that in human rights discussions people’s identities are often wrongly thought to be based on their culture, religion or tradition. There would be serious problems with the moral and social claims of multiculturalism, if multiculturalism were taken to insist that a person’s identity must be defined by his or her community or religion, overlooking all his or her other affiliations (such as language, social relations, education, political views or civil roles) and giving automatic priority to inherited religion or tradition over reflection and choice.

Other factors that can maintain the tension between human rights and culture include the usefulness of this tension from the point of view of power. Giving priority to culture or religion (instead of arguments emerging from rights language), can benefit those who are in powerful positions. Yet another factor is the emphasis on the “Western” nature of human rights. If human rights represent Western values, for example, why should other cultures be interested in them? Also, the traditional idea of culture as a coherent, non-political, traditional and exotic entity worthy

of protection, can create tension between human rights and the standards of the particular culture or religion.

I concluded in the article that, in order to manage or deal with this tension between culture and human rights in a productive way, new approaches both to culture and to human rights are needed. First, it is necessary to view cultures as complex, changing and political units, and I had also discussed this in “Culture and Western Origin”. It is crucial to ask who, in a practical context, defines the “real” content of a religion, culture or tradition. It is important to notice that “culture” is two things at once, that is, a dual discursive construction. It is at one instant, the conservative re-construction of a reified essence, and at the next the path towards a new construction of an agency.

Secondly, new approaches to human rights are needed. In order to overcome the perceived tension or antagonism, one must also try to clarify the concept of human rights in multicultural discussion. I suggested that we can simultaneously be sensitive to human rights language and be open to a variety of different cultural interpretations. Human rights must be seen to constitute both legal and political standards. But it is crucial to note that their scope is limited. Human rights do not aim to shape the life of their promoters, and do not represent all-encompassing worldviews or ways of life; neither do they provide a yardstick by which to evaluate cultures or religions in general. Human rights are not intended to replace Christian morals, the Buddhist way of life, or the possible vocabularies of duty or responsibility of the exotic Other. Rather they concentrate on political justice by setting up some basic normative structures and demands.

The article suggested that in a multicultural context human rights must be approached as political claims to equal freedom in a universal perspective. In this view, the universality of human rights does not mean the imposition of Western values on other cultures, but instead aims for the universal recognition of pluralism and difference. But human rights recognise different religions, political convictions and ways of life only insofar as these differences are not against the very idea of human rights to equal freedom. From this perspective the concept of human rights must also remain open to different and conflicting interpretations in our pluralistic world – an idea I developed further in “Freedom of Religion”.

The third article presented in my thesis, “Prohibition of Return: Non-refoulement in three human rights conventions”, is also closely linked to my experiences in professional life as a lawyer dealing with human rights and especially migration and refugee-related matters.¹¹⁸ As a legal adviser to the Finnish Red Cross, I noticed how useful the language of human rights can sometimes be. For advocacy and protection

118 Jari Pirjola, “Palauttamiskielto. Non-refoulement periaatteesta kolmessa ihmisoikeussopimuksessa” (In English: Prohibition of Return: The Principle of Non-refoulement in three human rights conventions), *Lakimies*, no. 5, 2002, pp. 741-756.

work, the formal language of, say, the 1951 Refugee Convention, or the prohibition of inhuman treatment in the European Convention on Human Rights, provides civil society with an effective, formal and non-political vocabulary for speaking of asylum seekers or other vulnerable groups. However, after attending meetings of bodies such as the UNHCR in Geneva, or the ECRE (European Council on Refugees and Exiles) in different parts of Europe, I gradually started to become suspicious of the power of human rights law to limit the policy choices of governments. I started to pay attention to the fact that the regular reference to international human rights standards by NGOs, governments, or the EU did not seem to make any major difference to the concrete asylum practices of governments, whether at European or at national level. This was surprising, as Article 3 of the European Convention on Human Rights is said to have “absolute” character and, according to James Hathaway, one of the leading experts on international refugee law, the definition of refugee was just a matter of putting five criteria together while applying the international standards established in international human rights conventions.¹¹⁹

These experiences and confusions are the general background to my third article, “Prohibition of Return”, where I compare the principle of non-refoulement in three human rights conventions, namely the 1951 UN Convention relating to the status of refugees (the Refugee Convention), the 1950 European Convention on Human Rights (the ECHR) and the 1984 UN Convention Against Torture (the Torture Convention). The aim of the article was to challenge and thus to clarify the meaning of non-refoulement in international law.

All the conventions explored in the article include the principle of prohibition of return (adopting the French term, *refoulement*). The Refugee Convention describes refoulement as the act of returning a person to a country where “she or he fears for her or his life or freedom on account of her or his race, religion, nationality, membership of a particular social group, or political opinion”. The ECHR addresses the principle of non-refoulement by stipulating that no-one shall be subjected to torture or to inhuman or degrading treatment or punishment. The Torture Convention prohibits returning a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. In the article I raised the following questions: Who is covered by the provision relating to the prohibition of return? What kind of ill-treatment may provide grounds for non-refoulement? And how probable must the risk of ill-treatment be in order to invoke the prohibition of return? I examined human rights conventions in a rather abstract, formal and technical manner, as norms whose substance can be interpreted and systematised from the text of the articles and commentaries, as well as from the decisions of the relevant monitoring or supervisory bodies.

119 See James Hathaway, *The Law of Refugee Status* (Butterworths, 1991).

While working as a legal adviser at the headquarters of the Finnish Red Cross, I was a member of the Finnish Asylum Appeals Board for five years. Working in a judicial capacity at the Board, gradually made me aware of the indeterminate nature of human rights law for delivering decisions in concrete legal cases. It soon became clear to me that it was not difficult to reach opposing conclusions regarding the need for international protection by referring to the same human rights standard. When deciding cases at the Board with my colleagues, who had very different backgrounds and came from different institutions (e.g. police, border control, refugee aid organizations, or government ministries), I noticed that, because persecution or inhuman treatment are not and cannot be clearly defined in international law, the decisive factor for a decision on asylum seemed to be who had power to decide the case. Often the decision on a case could be predicted from the composition of the bench that was deliberating the appeal. How was that possible, when we were implementing international human rights standards, such as freedom from persecution or inhuman treatment, that are thought to set concrete and non-political standards for the treatment of people?

In my fourth article, “Shadows in Paradise. Exploring Non-refoulement as an Open Concept”, I wanted to explore my impressions of the indeterminate nature of international protection further, and to look at the open nature of international legal norms.¹²⁰ In the first draft of the article, I focused on analysing the openness and indeterminacy of certain protection-related human rights concepts (e.g. persecution and cruel and inhuman treatment). During the drafting process, I sent this article to Professor Martti Koskeniemi for comments. He kindly replied to me that it is certainly interesting to analyse the open and indeterminate nature of human rights concepts, but that this is not enough. What is more interesting, he wrote, is to show how open concepts receive their meaning in practice and what kind of factors might be involved in this process. Human rights concepts – leaving a lot of room for different kinds of interpretations – do not remain open in practice, but are always filled with meaning and substance. In order to look at the operation of rights we must not only speak of their abstract promise of protection, but also of their operation in practice, their bright and dark sides.

In “Shadows in Paradise” I stated that the principle of non-refoulement contains a paradox. While states are committed, by signing the 1951 Refugee Convention and other key human rights conventions, to respecting the principle, its content is not established in international law. In other words, states have committed to a principle the content of which is indeterminate. Since no common definition exists, national

120 Jari Pirjola, “Shadows in Paradise – Exploring Non-Refoulement as an Open Concept”, *International Journal of Refugee Law*, 19:4, 2007, pp. 639-660.

and international bodies have, in practice, extensive powers of discretion to give content to the terms “persecution”, “torture” and “degrading” or “cruel” treatment.

I explored non-refoulement as an open and ambiguous concept. I noted that acknowledgement of the indeterminacy is important, as open concepts never remain so in practice but are always issued with content or interpreted. This approach called for a further question: How do interpretations come about, and what kind of factors influence them? I concluded that different national and international actors promote their own “correct” interpretations of this keystone of refugee protection. Thus this keystone of refugee protection also contains problems, biases and dark sides.

The fifth article, “European Asylum Policy. Inclusions and Exclusion under the Surface of Human Rights Language”, has to do with my general interest in the operation and policy-making of the European Union, as well as my short training period in the European Commission.¹²¹ In 2008 I had an opportunity to participate in a four-month training programme for civil servants in the Commission’s unit on “Freedom, Justice and Liberty” in Brussels, dealing with activities regarding the creation of common asylum and migration policies for Europe.

I noted that even though human rights were regularly mentioned in the official documents of the European Union concerning involuntary migration, they did not seem to have any major restrictive influence on the policy choices of the Commission in the area of asylum and migration in practice. Perhaps my impressions during my very short stay were wrong, but in any case I became interested in the tension between the European Union’s commitment to refugee protection, on the one hand, and the willingness to initiate control policies and strategies that seemed to be in opposition to this commitment, on the other hand – themes that I had worked with already in the Finnish Red Cross. There seemed to be a commitment to protect but also the political will to exclude protection seekers by referring to human rights; this could be seen as a practical bad consequence (dark side) for asylum seekers in this context. From these experiences, I wrote my article, “European Asylum Policy”.

In the article I suggested that the tension between universal human rights commitments and the particular interests of the EU or its Member States is at the heart of the creation of a common asylum system. The article explores some of the inherent and structural contradictions as well as the sometimes hidden paradoxes that affect the creation of common asylum policies. In the article I wanted to examine human rights as a form of power, by linking the operation of human rights to the regimes of power it serves. I examined the development of the European asylum system as a process of including and excluding. I argued that open and abstract human rights commitments (human rights as theory) can provide only limited

121 Jari Pirjola, *European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language*, *European Journal of Migration and Law*, 11, 2009, pp. 347-366.

guidance on how to develop migration and asylum policies in Europe (human rights as practice). I concluded that we should not try to hide the development of the European asylum system behind the obscurity of legal reasoning or institutionalized rights language, but see the emerging common asylum system as the result of different and often conflicting priorities, power struggles and ideological influences.

The sixth article, “Freedom of religion in multi-faith Europe – protecting universal or Western sensibilities”¹²² (“Freedom of Religion”), explores, from theoretical and practical perspectives, some of the dilemmas regarding the freedom of religion in Europe. The paper is based on the speech that I delivered at the European Conference of the International Ombudsman Institute in October 2010. I suggested in the article that in the modern world there is a growing appeal for human rights, which are often thought to provide us with humanitarian and non-political guidance in an unpredictable world. One of the important and fundamental rights is the freedom of religion. Even though we have great trust in human rights at an abstract level, that should not prevent us from looking critically at their operation.

At the outset of the article I looked at the nature and scope of freedom of religion as a so-called universal human right. I concluded that, at an abstract level, freedom of religion provides wide and comprehensive protection to practise and manifest one’s religion. I then moved on to discuss why this claimed universality often turns out in professional practice to be a politics of the particular, a kind of European universalism.

I tried to show that freedom of religion as a human right does not set us clear standards, but in practice receives its meaning through balancing different political, strategic, Christian and Western interests. This argument was made visible by the claims of four Muslim applicants asserting their rights in the European Court of Human Rights. Even though religious clothing, for example, is included in the definition and scope of human rights, the European Court of Human Rights has been of the opinion that states do not breach applicants’ freedom of religion when they prohibit the wearing of the headscarf. In the light of the cases discussed in the article, I wanted to ask if human rights (freedom of religion) can provide us with a neutral, objective and non-political basis for deciding contesting demands, or whether human rights in these cases mainly protect Christian ways of interpreting freedom of religion.

Based on my analysis, I argued that we should not rush to celebrate the decisions of the human rights bodies, but look at them as policy decisions that include dark and bright sides depending on one’s perspective on the matter. Instead of asking

122 Jari Pirjola: “Freedom of Religion in Multi-Faith Europe: Protecting Universal or Western Sensibilities?” *Nordic Journal of Human Rights*, 29:1 (2011), pp. 38–55

whether the decisions of the human rights courts were “right” or “wrong”, I wanted to uncover the contextual specificity of the making of these judgements.

The central issue was to discuss why certain interpretations of freedom of religion might be privileged in the practice of the European Court of Human Rights, and how the contingent product of the “truth” (the judgement) could be contested. I concluded that, even though human rights and human rights bodies are valuable institutions, their practical consequences should not be viewed as beyond critical reflection. It is necessary to allow critical views to be heard, in order to avoid clichéd concepts of human rights and to advance the many potentials included in human rights language. I argued that the main task of the critical approach to the practice of human rights, is to try to keep visible the circular relationship between rights and politics that is always involved in the application of human rights.

The seventh article of my thesis, “The Parliamentary Ombudsman of Finland as a National Preventive Mechanism (NPM) under the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, focuses more on the institutional side of human rights protection.¹²³ The article analyses and assesses the current role, and the strengths and weaknesses of the Parliamentary Ombudsman of Finland (POF) as a national preventive mechanism (NPM) under the OPCAT. In this article, I asked if the POF is an appropriate body to be designated as the NPM. I discussed in rather formal way whether the POF meets the minimum standards required under the OPCAT for an NPM in terms of mandate, powers and working methods. What are the strengths and weaknesses of the POF? Finally, what, if any, legislative changes are needed for the institution of the POF so that it is possible for the Ombudsman to carry out his or her activities as an NPM in an independent and effective manner? I looked at the requirements of the OPCAT, and compared these with the mandate and working methods of the POF.

I concluded in the article that, as the requirements of the OPCAT regarding the NPM are not described in detail, the current mandate of the Ombudsman is in conformity with at least the minimum requirements of the OPCAT. I concluded by indicating some strengths and some weaknesses of the institution of the Ombudsman in regard to the requirements of the OPCAT.

123 Jari Pirjola: “The Parliamentary Ombudsman of Finland as a National Preventive Mechanism under the Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”, *Nordic Journal of International Law* 77, 2008, pp. 163-174.

9 METHODS

The articles use different legal strategies and writing techniques in discussing human rights. There are many ways to approach and understand human rights, since different professional or academic contexts and situations require different strategies and languages. One could say that my collection of articles is methodologically eclectic. I use concepts, techniques and approaches that draw on traditional legal writing and legal analysis (in “Prohibition of Return” and “OPCAT article”), approaches that use more critical legal writing (in “Shadows in Paradise”, “European Asylum Policy” and “Freedom of Religion”), and concepts and approaches that are affected by discussions and methodologies of cultural anthropology (in “Culture and Human Rights” and “Human Rights and the Exotic Other”).

In different phases of the writing process I have, at a general level, found useful the five strategies that Martti Koskenniemi has outlined for the management of the tension between human rights and sovereignty.¹²⁴ The strategies are: (1) *human rights formalism*, which examines rights as they are laid down in the international instruments. In this approach questions of historical context or moral legitimacy are deferred. Formal validity of human rights is enough, buttressed by commentaries on how rights should be implemented; (2) *human rights fundamentalism*, which mystifies the essence of human rights. It uses language of essentialist notions such as “liberty” or “human dignity”. In this way it loses its critical character; (3) *human rights scepticism*, which claims that human rights have no role for politics. Human rights are an irrational strand in liberal theory, “nonsense upon stilts” to use Bentham’s expression. Rights become another strategic device in what is seen as an irreducible struggle for power; (4) *cosmopolitan democracy*, which accepts that human rights depend on political decision-making and therefore insists on democratic international procedures and fair play. Three elements form its basis: constitutionalism, democracy and rights. Even though an important strategy, it may underestimate the role of institutional power and bad faith. Institutions and procedures can freeze the justification of privileges; and (5) *radical democracy*, which emphasises the role of power in the democratic process. In radical democracy, to assert a right will remain an attempt to fill the space of the universal by what is particular. Radical democracy attacks the fixed or harmonious aspect of rights, and highlights their role in the struggle for hegemony and in the articulation of antagonisms and exclusions.

¹²⁴ For detailed analysis of the strategies, see Martti Koskenniemi, “Human Rights, Politics and Love”, *Nordic Tidsskrift for Menneskerettigheter* (Nordic Journal of Human Rights), Vol 4, 2001, pp. 41-44.

The articles “Culture and Human Rights” and “Human Rights and the Exotic Other” draw on discussions in the field of cultural anthropology and human rights of the concept of culture. Since the 1980s, the entire concept of culture has been subject to reassessment and international approaches, as I discussed in more detail in the articles. For example, James Clifford and George E. Marcus’s *Writing Culture* (1986), and Richard G. Fox and Barbara J. King’s *Anthropology Beyond Culture* (2002) provided useful theoretical and methodological insights that affected me when I drafted the article.¹²⁵ In the field of human rights, I was much influenced by my dialogue with Dr Heiner Bielefeld, who introduced me to his article, “Western versus Islamic Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion of Human Rights” (2000). “Culture and Human Rights” also received some inspiration from my short visits to human rights institutions in Kuala Lumpur, Malaysia (2000) and Manila, the Philippines (2002). In the Philippines I had, with the assistance of the University of the Philippines (UPI), an opportunity to carry out a short field trip to discuss the relationship between culture and human rights with several local non-governmental human rights organisations.

The method I used in “Prohibition of Return” was more formalistic, technical and comparative. I collected and analysed legal materials, including articles and case law, in order to compare the scope of protection provided by three human rights conventions. The article also reflects the fact that I participated in a course on refugee law given by Professor James Hathaway in Helsinki. Hathaway made international human rights law appear very systematic and formal.

The articles “Shadows in Paradise” and “European Asylum Policy” reflect a more critical approach to article writing. During my work with international human rights law, for example for the Asylum Appeals Board or in the office for the Parliamentary Ombudsman of Finland, I had noted that in most cases related to human rights, it is not difficult to come to opposing results by balancing human rights norms in different ways. But is it not true that appropriate and context sensitive “balancing” of different perspectives, priorities and workable solutions is a good example of what policy work is all about? And should human rights standards not set limits to these types of policy considerations? Human rights law in daily practice started to appear more and more as something useful, but also problematic: indeterminate, political, conflictive, manipulable and abstract. What do we promote when we “promote human rights”, and how do we know that our balancing of conflicting priorities is the right one? From my practical perspective as a legal adviser, this was an interesting puzzle, as human rights are said to be something that should limit authorities and be outside politics. The more I referred to human rights as external standards, the

125 James Clifford and George E. Marcus (eds.), *Writing Culture. The Poetics and Politics of Ethnography* (University of California Press, 1986), and Richard G. Fox and Barbara J. King (eds.), *Anthropology Beyond Culture* (Berg, Oxford, 2002).

more human rights started to resemble theology. The more appropriate “balancing” was needed, the more human rights started to resemble policy work instead of legal work. During the drafting process of “Shadows in Paradise” and “European Asylum Policy”, I became more interested in the critical approaches to human rights. I found the traditional way of looking at human rights useful but very limited. As I saw it from a professional point of view, only a critical approach to human rights can contribute to an understanding of the emancipatory possibilities as well as the limitations of human rights.

In “Freedom of Religion” I wanted to focus on the operation of one human right (freedom of religion as a human right) and ask how it operates in a professional context. I analysed selected decisions of the European Court of Human Rights, and asked how freedom of religion operates in these cases. I tried to connect some aspects of critical human rights theory to the practice of the European Court of Human Rights. I was also inspired by the “Foucauldian” framework, which is interested in the production of truths and in how to give “voice to those produced as other by the binary truths of modernity, and thereby contesting the Eurocentric and masculinist standards which have been legitimated as universal”.¹²⁶

The methodology in the OPCAT article was a little bit different. In 2006-2007 I participated in a distance-learning course on the prevention of torture which was organised by the United Nations High Commissioner for Human Rights and the Association for the Prevention of Torture. I was assigned a tutor in Geneva, and I drafted seven short papers (assignments) in the field of torture prevention. In order to pass the course and receive an Oxford University Diploma I had to write a final document (the so-called final assignment) dealing with the prevention of torture. The OPCAT article was this final assignment.

In different phases of writing I received comments, advice and relevant legal materials from my tutor in Geneva, with whom I was in electronic correspondence throughout the course. The aim of the final assignment was to examine the articles of the OPCAT Treaty as they are laid down in the international instrument. I was not interested in the historical context or the powers or political questions regarding the practical operation of the National Preventive Mechanism. In this case formal validity and an analysis of human rights was enough, buttressed by commentaries on how rights should be implemented.

It is clear that the methodologies I have used in my articles reveal only partial perspectives on human rights. Many other strategies could also have been used. My seven articles reveal some aspects, understandings and contexts regarding the operation of human rights, while simultaneously hiding some other aspects that

¹²⁶ Dianne Otto, “Everything is Dangerous: Some Post-structural Tools For Rethinking the Universal Knowledge Claims of Human Rights Law”, *Australian Journal of Human Rights* 1, Vol 17, 1999, p. 1-30.

would require a different kind of methodology. Being (also) an anthropologist I see my articles as if they were “villages” or “case studies” that I investigated during an anthropological fieldtrip. Like a good anthropologist I have made a lot of observations and filled my notebook with interesting information, but I have also failed to ask the right questions and have ignored many voices. I have tried to tell the truth but not the whole truth. In the world of “rights” that would not be possible. My anthropological journey has also changed me, and this is reflected in my articles as well as in the more self-critical parts of this synthesis.

10 THEORETICAL AND PRACTICAL PERSPECTIVES ON HUMAN RIGHTS IN MY ARTICLES

Before I conclude this synthesis, I must briefly discuss my articles in the frame of reference I have tried to set up in the previous pages. In other words, what kind of theoretical and practical perspectives to rights emerge from my seven articles in the light of the frame of reference I have set out in this synthesis?

In “Culture and Human Rights” and “Human Rights and the Exotic Other” I explored, at a rather abstract and formal level, whether rights are culturally dependent, and the meaning of the claim that the roots of human rights lie in the Western tradition. In general, I was interested in the question of whether people from different cultures and religions could find an overlapping consensus on basic common principles.¹²⁷ The understanding of human rights in these two articles draws, for example, on the research of Dr Heiner Bielefeldt who, drawing especially on Rawls’ political philosophy, had argued that human rights have always been a contested political issue. For this reason, human rights language can also play an important role in a multicultural context. The strength of human rights language lies in the fact that the human rights concept is not the result of any natural or organic development based on the genes of a particular culture. Thus any cultural essentialist occupation, such as the “Occidentalisation” or “Islamisation” of human rights should be rejected. This would not mean that cultural aspects of human rights would become meaningless for the concept of rights. On the contrary, human rights should be cherished politically, as their cultural and religious aspects can provide motives and practical commitments for human rights.

Hence the key question of the articles was how to maintain the connection between human rights as rules and religious or cultural traditions without being trapped in a cultural essentialism. In “Culture and Human Rights” I argued that even abstract human rights commitments can have an important role in finding a

¹²⁷ As is well known, Rawls shifted from a moral to a political conception of the person in his *Political Liberalism* (Columbia University Press, 1993) because he regarded the kind of moral autonomy he had advocated in ‘*A Theory of Justice*’ as too controversial a premise to serve as the basis of an “overlapping consensus” in a liberal, plural and multicultural society. According to Rawls, the main aim of ‘*Political Liberalism*’ is to show that the “idea of the well ordered society in the *Theory* [of Justice, JP] may be reformulated so as to take account of the fact of reasonable pluralism. To do this it transforms the doctrine of justice as fairness as presented in the *Theory* into a political conception of justice that applies to the basic structure of society. Transforming justice as fairness into a political conception of justice requires reformulating as political conceptions the component ideas that make up the comprehensive doctrine of justice as fairness.” See John Rawls, *Political Liberalism* (Columbia University Press, 2005) p. xli. Compare Benhabib, *The Claims of Culture*, (Princeton University Press 2002) pp. 108-109.

consensus on basic normative standards in our increasingly multicultural societies. In the multicultural context, human rights can operate as legal and political claims to equal freedom in a universal perspective. Human rights language can be seen as a political means to promote equality and freedom in practice.¹²⁸ This is without doubt a bright side of human rights.

Heiner Bielefeldt has pointed out that:

*Unlike Islam and other religions, which claim to shape the whole lives of their adherents, human rights do not represent an all-encompassing “weltanschauung” or the way of life, nor do they provide a yardstick by which to evaluate cultures and religions in general. Human rights are not necessarily the highest manifestation of the ethical spirit in human history either, because they are not entitled to replace, for instance, Christian demands of love, Islamic solidarity, or the Buddhist ethic of compassion. Rather they concentrate on political justice by setting up some basic normative standards.*¹²⁹

The purpose of human rights norms is not to provide anyone with a comprehensive world view but to assist in creating standards and institutions for the finding of an overlapping consensus in practice.¹³⁰ My article suggested that the liberating and positive role of rights in a multicultural context cannot be denied by referring to “cultures” or the “Western” origin of human rights. Human rights, as abstract and indeterminate language, can serve as useful political and legal instruments when we try to solve the conflicting demands of plural societies. The promise of human rights to end domination and oppression explains their legitimacy. So even though we might find human rights problematic in practice, as discussed in section 5, people continually find human rights indispensable.¹³¹

In “Human Rights and the Exotic Other” I also discussed human rights from a rather theoretical and abstract perspective. I argued that to manage the tension between the concepts of culture and abstract human rights, new approaches not only to culture but also to the human rights concept are needed. In a multicultural

128 This is done, for example, by emphasizing a fair balance between conflicting interests or by containing and managing conflicting demands in a democratic and peaceful manner. However, the fact that the publication of cartoons in Denmark was protected by the freedom of speech did not prevent the spread of a violent response around the world.

129 Heiner Bielefeldt, “Muslim Voices in the Human Rights Debate”, *Human Rights Quarterly*, Vol 17, 1995, pp. 588-617 at p. 588.

130 *Ibid.*

131 Michael Goodhart, “Neither Relative nor Universal: A Response to Donnelly”, *Human Rights Quarterly*, Vol 30, 2008, pp.183-193, at p.192. “To advocates and people struggling for democracy, human dignity, and social justice, it really doesn’t matter very much whether human rights are universal, metaphysically well-grounded or whatever. It just matters that they are useful and available to anyone, that they get the job done”, (p. 193).

context, human rights must be approached as claims to equal freedom. With this view, the universality of human rights does not mean an imposition of Western values on other cultures, but instead aims for the universal recognition of pluralism and difference. But in practice human rights recognise different religions, political convictions and ways of life only insofar as these differences are not contrary to the very idea of human rights to equal freedom. From this abstract and formal perspective, the concept of human rights must also remain open to different and conflicting interpretations in our pluralistic world – an idea I discussed in “Freedom of Religion” from a more practical perspective.

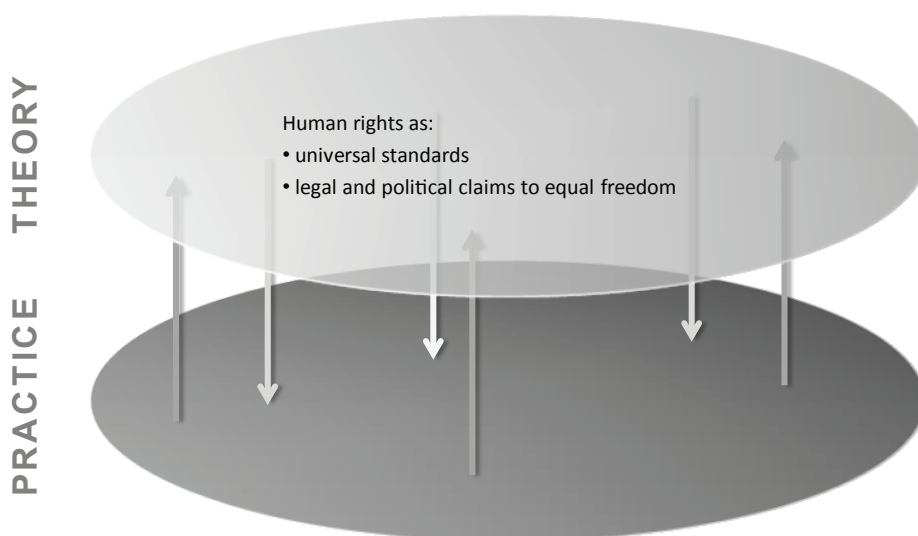


Figure 3 In “Culture and Human Rights” and in “Human Rights and the Exotic Other” I was mainly focusing on human rights from a theoretical perspective.

Comment

Viewing these two articles afterwards from the perspective of this synthesis, one notes that in “Culture and Human Rights” and “Human Rights and the Exotic Other” I treated human rights in a rather formal manner, mainly highlighting the potential of rights language. Human rights were discussed from a theoretical perspective. I did not give much time to the indeterminacy critique or to the conflicting and political nature of human rights. Maybe the argument that human rights can create common rules for all people in the world is an arrogant and imperialistic idea?

I suggested that one strength of rights language is that the human rights system could provide a foundation for an ongoing dialogue between different cultures and religions, which is probably the case.

Looking from a practical perspective, it is clear that in concrete situations the solution for religious or cultural conflicts or tensions does not come from human rights themselves or from rights language. In practice human rights norms can only provide temporary and contestable solutions to controversial issues like the conflicts between freedom of religion and freedom of speech, and can only provide limited guidance to solving concrete questions, such as whether Muslim students should be allowed to wear the headscarf at university.¹³² Human rights are not meaningless either. They can provide a universal language and a promise of justice, and serve as principles that can guide thinking and structure the balancing process for deciding on conflicting demands. Human rights can also assist in challenging existing practices. Expressions of rights can “mediate” between individual and universal interests. Human rights can create a political language for universal demands from an individual perspective. Thus, one practical potential benefit of rights lies in their acting as important “mediating” principles around which communal values and individual interests can be organized.¹³³

As discussed in section 4, human rights can sometimes operate as formal legal rules or standards. For example, the principle of “non-refoulement” makes it possible for everyone in his or her particular situation to make reference to this keystone principle of refugee protection. Human rights as rules and principles formed the research question in my article “Prohibition of Return”, where I analysed three

¹³² This is because different rights pull in different directions and a “fair balance” between different rights is very context dependent. Dominic McGoldrick has written that human rights thinking can, however, provide a useful language, discourse and, in some cases, institutional structure for mediating and resolving headscarf disputes. He also notes that “there are also dangers in adopting human rights analysis. It has its own weaknesses and blind spots. It is evident the human approach embodies a certain set of concepts, boundaries and discourse. We have also illustrated that within each human rights categorization there can be found a complex balancing of claims and interest. The balance is very context dependent and may reveal tensions that pull in different directions. The human rights outcome for a headscarf-hijab issue may thus vary from one state to another. Within the ECHR system the European Court explains this by reference to the ‘margin of appreciation’”. See McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, (Hart, 2006) pp. 31, 308. As an example of balancing, see *Leyla Sahin v. Turkey*, Application No. 44774/98, Grand Chamber Judgement of 10 November 2005.

¹³³ Duncan Kennedy suggests that rights mediate between law and policy. Rights arguments involve something more than the logic of the valid, because they explain and justify rules, rather than merely apply them, but they are less subjective than pure policy arguments, because of their “factoid” character. See Duncan Kennedy, *The Critique of Adjudication* (Harvard University Press paperback edition 1997) pp. 319-320.

selected human rights conventions as sets of legal rules and principles that can create standards for the protection of asylum seekers against involuntary return. In the article I discussed the principle of non-refoulement as a legal rule and a principle that sets limits against expelling asylum seekers or refugees and returning them to their home countries. I noted that Article 3 of the European Convention on Human Rights “prohibits” returning anyone to an area where he or she would be subjected to torture or to inhuman or degrading treatment or punishment.

In “Prohibition of Return” I compared and analysed selected human rights norms as universal and legally enforceable legal rules. My strategy was, again, rather abstract and formal, since I looked at human rights law as laid down in the three human rights conventions I explored. In my article I was interested in the formal application and validity of the relevant articles. Based on my legal analysis of the relevant articles, I claimed that the power of the principle of non-refoulement lies in its ability to set clear limits to the expulsion or return of asylum seekers. I claimed that the “non-political decisions” of the supervisory bodies (the ECHR and the Torture Committee) can also in practice create standards for the scope of non-refoulement.

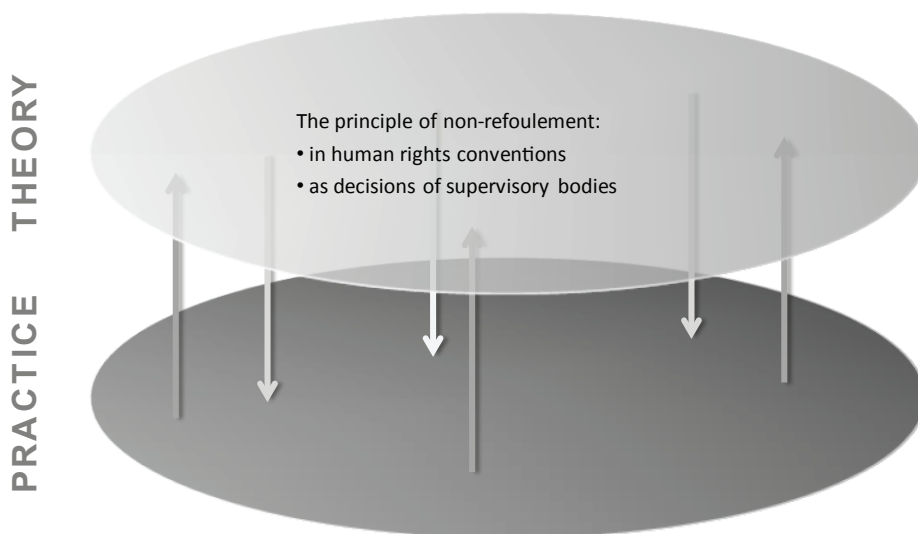


Figure 4 The article “Prohibition of Return” discussed human rights mainly as standards and principles.

Comment

*Looking at the operation of rights from the perspective of this introduction, and in the context of a more critical discussion of human rights, one notes that in “Prohibition of Return” I did not pay much attention to the indeterminacy or open nature of human rights norms, which in practice might compromise the claimed standard-setting ability of human rights norms. I did, however, refer to the decision of the European Court of Human Rights in *Ireland v. United Kingdom*, for example, which acknowledges the open nature of Article 3. The Court held that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The Court stated, as is well known, that in practice the assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age, and state of health of the victim.¹³⁴ In this article I did not explore how open rights receive their meaning in practice, or what factors could be involved in this process. This was something I wanted to do in “Shadows in Paradise”.*

The purpose and the strategy of “Prohibition of Return” was, however, not to examine the operation of rights in a critical manner (to look, for example, at what it means in practice when rights are open and conflicting), but to produce a technical and comparative analysis of the relevant articles of the three selected human rights conventions (for the benefit of colleagues). I explored rights as something rather non-political and absolute. I also underlined the non-political role of the supervisory bodies to set standards for the scope of non-refoulement. In my article I did not consider the fact that in practice it is not difficult to include and exclude by referring to open legal rules or legal definitions.

*It is clear that the interpretation of Article 3 of the European Convention on Human Rights is constantly developing in the light of decisions of the European Court of Human Rights. The same applies to the UN Torture Convention and the decisions of the UN Committee Against Torture. Another article would be needed to reflect on recent developments in a proper manner. In the light of my article, a few points need to be raised regarding recent important decisions of the ECHR: in the case of *Sufi and Elmi v. United Kingdom* (application nos. 8319/07 and 11449/07,) the ECHR stated that Article 3 does not as such preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual’s claim that there would be a real risk that a return to his country of origin would be proscribed under Article 3. In *Salah Sheek v. the Netherlands* (1948/04), the Court noted that reliance to on an internal flight alternative does*

134 *Ireland v. United Kingdom*, ECHR Judgement of 18 January 1978, A 25, at p.65.

not, however, affect the responsibility of the expelling Contracting State to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3. Therefore, before relying on an internal flight alternative, certain guarantees must be in place (an ability to travel to and settle in the area, for example).

In the case of Sufi and Elmi v. United Kingdom, the ECHR further noted that a situation of “general violence” is not the only risk that a returnee may face when he or she returns to his or her country of origin (Somalia in this case). The returnee might also need protection against the “real risk of ill-treatment on account of the human rights situation”. In Salah Sheek v. the Netherlands, the Court held that the socio-economic and humanitarian conditions in the country of return did not necessarily have a bearing, and certainly not a decisive bearing, on the question of whether the person concerned would face a real risk of ill-treatment within the meaning of Article 3. However, the fundamental importance of Article 3 means that the Court retains “a degree of flexibility” to prevent expulsion in very exceptional cases. The Court is of the opinion that even humanitarian reasons can prevent expulsion in a situation where the humanitarian grounds against expulsion are “compelling”.

In the recent case of M.S.S. v Belgium and Greece (30696/09) the Court stated that it had not excluded the possibility that the responsibility of the State under Article 3 might be engaged in respect of treatment where an applicant, who was wholly dependent on state support, found himself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity. It easy to see that in the above cases the Court is very much relying on open legal language. The need for protection is dependent on “human dignity”, “compelling humanitarian grounds”, “general violence” or “a human rights situation”. As discussed in sections 4 and 5, Article 3 can thus in practice have good or bad consequences for the person seeking international protection.

In “Shadows in Paradise” I discussed human rights from a different perspective, and wanted to look at them not only as a theory but also in practice. I wanted to be more critical of the ability of human rights to set clear and objective legal rules or standards in professional practice. At the time of writing, I felt that human rights formalism – discussed in my “Prohibition of Return” – gives an incomplete picture of the operation of human rights. Thus, I felt it necessary to merge the theory with the practice and explore the practical operation of rights: the problems, limitations, paradoxes, and ambiguities that in some practical situations can compromise the abstract promise of the non-refoulement principle.

In particular, I explored the following paradox: while states have committed themselves to respect the principle of non-refoulement by signing the 1951 Refugee Convention and other key human rights conventions, the scope of the principle (the definition of persecution or inhuman treatment, for example) is not clearly established in international law. In other words, states have committed themselves to uphold human rights, the practical scope of which is indeterminate. Since no common definition exists in practice, national and international bodies have quite extensive powers of discretion to give content to terms like “persecution”, “torture”, and “degrading” or “cruel” treatment.

Thus, in practice, the implementation of open and developing human rights concepts requires interpretation, prioritising and an analysis of costs and benefits. The practical operation of human rights – its bright and dark sides – is linked to that process. Different national and international actors – NGOs, immigration authorities, intergovernmental organisations, human rights institutions, ombudsmen – seldom share the same practical interpretation of human rights; instead, different human rights experts promote their own interpretations of human rights. As I argued in “Shadows in Paradise”, an interpretation depends on the values and priorities of the people and institutions involved in the particular case. For this reason it is not impossible that one interpretation of human rights becomes institutionalized, and thus legitimates existing circumstances.

I noted in my article that various interpretations of human rights law seem quite stable within institutions. For instance, the Court of Human Rights has ultimately been fairly constant in interpreting Article 3 of the European Convention on Human Rights in recent years. National authorities, courts or human rights organisations defending refugee rights, such as the UNHCR, often seem to promote their own, “correct” interpretations of human rights. As a result, the inalienable and absolute right guaranteed in a human rights convention becomes an issue of the politics of these institutions.¹³⁵ This can be good or bad depending on one’s perspective on the matter. The article also discusses the question of whether technical human rights language can be used to describe economic injustice, loss of human dignity or loss of a clean environment.

Even though the operation of non-refoulement can, as discussed above, have dark and bright sides in practice, it is a valuable principle, the objective of which is to protect people from serious human rights violations in practice. The principle has also opened up a debate between political and legal actors on a state’s responsibility to protect people against expulsion, and this can also have useful practical consequences for those who are seeking international protection.

¹³⁵ Mary Douglas claims that all thinking is dependent upon institutions. See Mary Douglas, *How Institutions Think* (Syracuse University Press, 1986), pp.45-53.

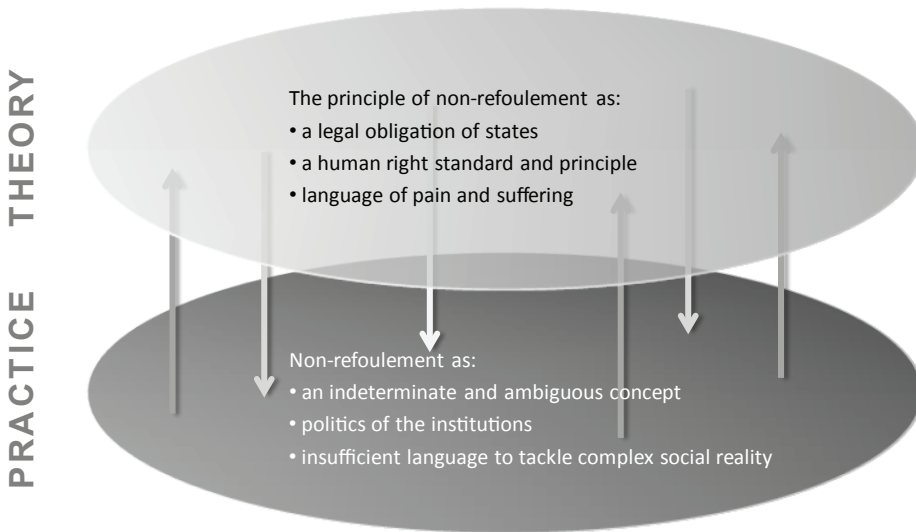


Figure 5 The theoretical and practical understandings of human rights as analysed in “Shadows in Paradise” are summarised in figure 5.

The article “European Asylum Policy” was also about the abstract promise of rights and their practical implementation. In other words, what is the meaning of human rights in the creation of a common European Asylum Policy? The article explored the tension between the human rights commitments of the EU and the practical interests of the EU Member States in the development of the European Asylum Policy. Again, the interplay between the theory and the practice of human rights emerged. On the one hand, the EU has importantly committed itself to respect the absolute right of asylum and human rights standards. On the other hand, in practice human rights law clearly seems to be unable to harness the expedient policy goals of the EU or Member States.

I stated in the article that open and abstract human rights commitments or rights language could only provide limited guidance on how to develop migration and asylum policies for the EU. Depending on one’s priorities between universal and particular interests, it was easy, by referring to the same human right commitments, to include or exclude asylum seekers. In the context of the European Union, the claimed absoluteness of human rights standards is easily lost and disagreement can occur as to where, when, and how human rights protection should be arranged.

Thus, it seemed that human rights language did not restrict governments from managing asylum and migration flows (e.g. non-entry policies) in an “expedient” manner. As open and abstract rights cannot guide policies, we must raise the

question of whether the EU invokes universal human rights mainly in order to promote its own particular interests and objectives, thus giving its human rights commitments the flavour of hypocrisy.

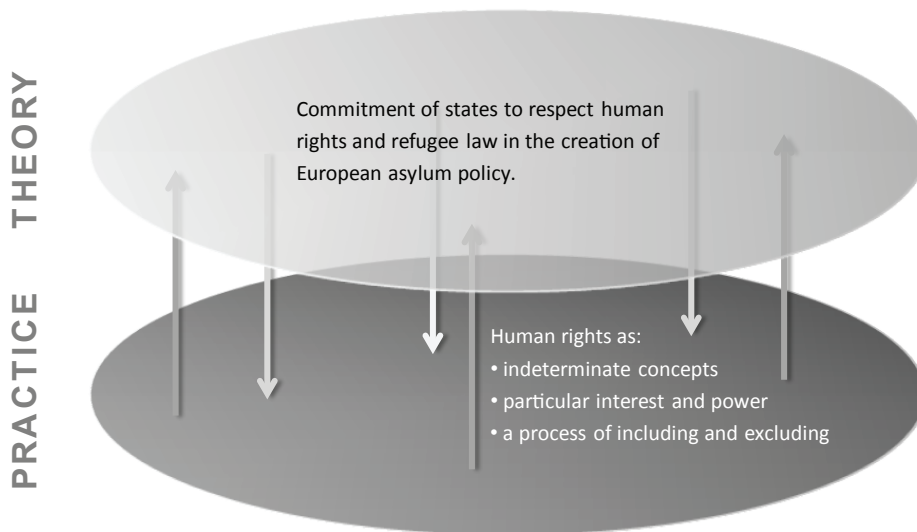


Figure 6 The theoretical and practical understanding of human rights as analysed in “European Asylum Policy” is summarised in figure 6.

Comment

Since the drafting of my article on European Asylum Policy, many political and legal developments have taken place in the gradual process of establishing the Common European Asylum System. The Treaty of Lisbon entered into force on 1 December 2009. It provides the EU with new institutions and working methods to better tackle migration related challenges in Europe. Whereas the Amsterdam Treaty aimed at creating common minimum standards for asylum, the Treaty of Lisbon focus on creating common asylum system. This includes the common interpretation and application of key protection related concepts that was rather critically analyzed in my article. According to the article 78 of the Treaty, “the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of

28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

In addition, following the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights received the same legal value as the European Union treaties. The Charter includes many provisions that deal with international protection. For example, according to article 19 of the Charter “no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.

One important practical tool for bringing more harmonization to European Asylum standards in EU level, includes the possibility of the European Court of Justice to give preliminary rulings (without preliminary restrictions) in the area of freedom, security and justice, including asylum and immigration matters (see for example Judgment of the European Court of Justice in Case C-277/11 on 22 November 2012 dealing Council Directive 2004/83/EC on minimum standards for qualification for refugee status or subsidiary protection status or Case C-69/10 dealing Directive 2005/85/EC).

Another important policy development since the publication of my article, is the establishment of the European Asylum Support Office (Regulation No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office). The task of the support office is to play a practical role in the concrete development of the Common European Asylum System. The agency was established with the aim of enhancing practical cooperation on asylum matters, and helping Member States fulfill their European and international obligations to give protection to people in need of protection. The idea is that the Asylum Support Office acts as a center for expertise on asylum.

In this context, it is also necessary to mention the Stockholm program which set out the European Union’s priorities for the area of justice, freedom, and security for the period of 2010-2014. According to Stockholm program, the EU must, for example, develop its integrated border management and visa policies to make legal access to Europe efficient for non-EU nationals. It is stated that on the one hand strong border controls are necessary to counter illegal immigration and cross border crime, but at the same time access must be guaranteed to those in need of international protection. According to Stockholm Program, the EU must develop comprehensive and flexible migration policy that centre on solidarity and responsibility, and address both the needs of EU countries and migrants.

It remains to be seen what will be the practical results of the above mentioned and pending policy and legal developments for the asylum seekers seeking protection at the southern borders of Europe, for example. The tension between universal commitments and particular interest of States discussed in my article,

has not disappeared. In my view, many concerns and tensions that I discussed in my rather theoretical analysis deserves attention also in post-Lisbon era.

As to the current state of common European Asylum System, I want to end this comment to the very practical observations provided in April 2013 by the Statewatch after their visit to asylum reception center in one EU country Greece:

“We visited the Pikpa Centre in early April 2013, an open facility run by volunteers in a building provided by the municipality. The Centre is outside the capital town of Mytilene, near the airport. It consists of a concrete building containing a kitchen and a collection of small wooden buildings in which people sleep, some 6 or 8 to a room, on bare mattresses. They have all arrived following long journeys to Greece from Syria, Afghanistan and further beyond. The people from Afghanistan left there over four months ago. Each day 20-30 people arrive in Mytilene by boat. Some were told en route that they could get a taxi to Athens from the island; clearly impossibility even had they enough money for the fare.

Some receive papers (not asylum) to go to Athens or move on elsewhere. Others stay on the island, in limbo and entirely dependent on the goodwill, financial support and voluntary work of the people of the island. When we visited there were 30 people in the Centre. They included single young men in their late teens and early twenties, some older people including mothers and fathers with children, and unaccompanied children. They have had no opportunity to ask for asylum in Greece because the Port Police send them to the Coastguards, who then send them back to the Port Police (who will not accept an asylum claim). They have not seen a lawyer and are told by the authorities that it is only possible to do so if they get arrested, but the police won't arrest them. If anyone does manage to be arrested, police say it will mean five months in prison or a police cell before they can submit an asylum claim. Two of the young men had arrived in Molyvos, a tourist village in the north of the island. They walked for two days across the mountains to get to Mtyilene town.

A significant number of the people in Pikpa today have been there for 17 or 18 days, not knowing if they will ever see a lawyer, be able to claim asylum, or move out of the Centre. It is clear that the EU's Common European Asylum System is nowhere near in place on this island and is unlikely ever to be, especially in the context of the economic crisis.”

In “Freedom of Religion” I explored freedom of religion in theory and practice. I again examined, from both theoretical and practical perspectives, some of the dilemmas regarding the application of freedom of religion in Europe. First of all I looked briefly at the nature and scope of freedom of religion as a so-called universal human rights norm in international human rights law. My starting point was the idea that human rights can provide us with neutral, objective and non-political guidance in multi-faith societies.

I then discussed why this claimed universality and neutral non-political aspect often turns out in professional practice to be a politics of the particular – a kind of European universalism. I tried to show that in professional practice, the freedom of religion as a human right does not set us clear standards, but receives its meaning through balancing different kinds of political, strategic, Christian and Western interests. I argued that even though freedom of religion is in theory said to be a universal right, in practice it can also protect particular and European ways of understanding freedom of religion. In the article, this was made visible by the claims of four Muslim applicants asserting their rights in the ECHR.¹³⁶

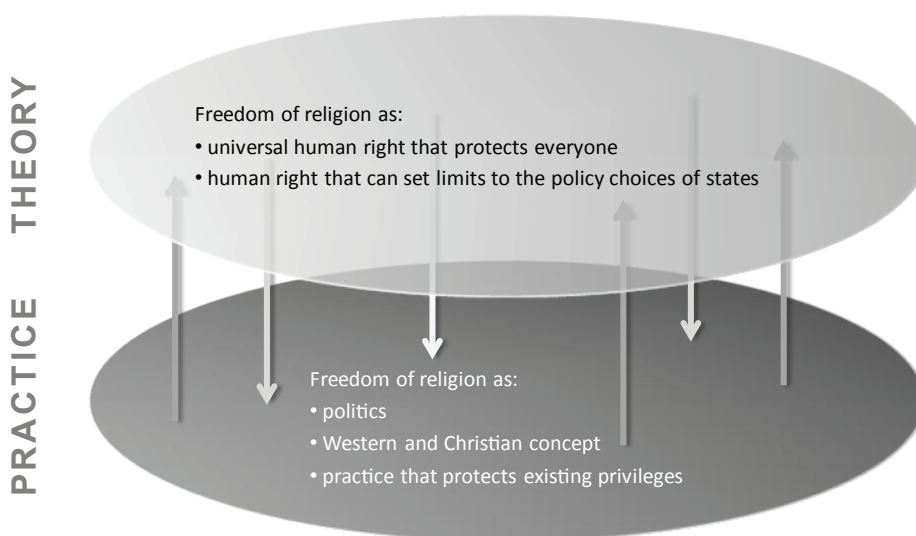


Figure 7 The theoretical and practical understandings of human rights in “Freedom of Religion” can be summarised in figure 7.

¹³⁶ See also the Case of Eweida and Others v. United Kingdom (15.1.2013) regarding the rights of Christians to manifest their religion.

The OPCAT article also focuses on the interplay and tension between human rights commitments, and the practical implementation of those rather indeterminate commitments. The article discusses the strengths and weaknesses of the Parliamentary Ombudsman of Finland (POF) as a National Preventive Mechanism (NPM) under the OPCAT. The mandate of the POF did not reveal inconsistencies that would prevent the Ombudsman from being designated as the NPM for Finland. In the Protocol, the requirements of the NPM are described in rather indeterminate manner, so the current mandate of the Ombudsman is in conformity with at least the minimum requirements of the OPCAT. As I noted, among other things, the strengths of the Ombudsman included a strong and independent mandate and extensive powers to investigate and take action with regard to people deprived of their liberty.

I noted that the new Protocol and the new visiting mechanism are without doubt an important new human rights mechanism that can also in practice improve the protection of inmates in closed institutions. However, the imprecise and indeterminate provisions in the OPCAT (for example: “regularly examine”, “treatment” or “required professional capacity”) cannot guide the policies of the NPM. For this reason, I underlined the operational aspects of a credible and professional NPM. For the Ombudsman to function effectively as an NPM, it requires that some of the traditional methodologies of the Ombudsman undergo development and re-evaluation.

This is why the POF as NPM should concentrate on developing its general mode of operation or, in other words, the policy aspects of its work. To be effective, the Ombudsman should focus less on human rights and more on the policy questions of preventing prohibited treatment and developing internal professional capacity and a visiting methodology. Developing good policies is difficult, however, as the POF is a human rights body (and human rights cannot guide policies), and not an expert on the development of closed institutions for the prevention of prohibited treatment (which is the main task of the NPM). How does the Ombudsman as NPM then know (better than experienced professionals in prisons, migration centres or mental hospitals, for example) that his or her recommendations are the right ones?¹³⁷

For this reason the NPM, like any other human rights institution, must be alert to the development of its practical policies and methodologies. I wrote in the OPCAT article that human rights expertise is not enough. Including doctors, social workers, and anthropologists on visiting teams would increase the teams’ professional capacity and credibility.

137 See Martti Koskeniemi, “Human Rights Mainstreaming as a Strategy for Institutional Power”, *Humanity: An International Journal of Human Rights, Humanitarianism, and Development*, No 1, 2010, pp.11-12.

But if outside experts will be used, it is also necessary to reflect the relation between this expertise and human rights expertise. In other words: “In the end the question emerges, whether there is (or can be) any distinct commitment to human rights that would not be a commitment to a particular theory of development, security, or administrative appropriateness. If the answer to the question is ‘no’, then what reason is there to think that the preferences or biases of the experts would not, in time, turn to resemble or to be indistinguishable from the biases and preferences of economic experts, security experts, or the typical leanings of administrative routine? The paradox appears to be that a human rights preference may stay stable only as long as it does not take seriously the other kinds of preferences represented in the context of professional interaction.”¹³⁸

Comment

Looking at the OPCAT article from the perspective of this introduction, one can see that my article was rather descriptive, uncritical and formal analysis of Parliamentary Ombudsman as a potential National Preventive Mechanism under the OPCAT. On the other hand, when I drafted the article it was rather difficult for me to anticipate in what way the “theory” described in the article would be turned into practice.

As regards possible practical changes in the work of the Ombudsman, I noted already at the time of writing the article that to function effectively as a National Preventive Mechanism, the Ombudsman has to develop and re-evaluate its visiting methodologies. To be effective NPM the Ombudsman should increase the number of inspections it undertakes, as well as develop different inspection methodologies. Inspections could be divided into thorough and brief inspections, follow-up inspections and inspections that concentrate on specific themes, for example. The regularity of the inspections can be advanced by increasing independent inspections by the legal staff of the Ombudsman’s office. The objectives and follow-up methodologies need to be clarified. Unannounced inspection visits should also be carried out with greater frequency. Some of those changes have already taken place. For example, in 2012, great number of visits was carried out by the staff of the Ombudsman (to increase the number of the visits) and a large number of visits were so called unannounced visits.

138 Ibid., p. 12.

As I see it, the biggest challenge to the Ombudsman's operational concept is probably the fact that the National Preventive Mechanism should endeavor to actively prevent inappropriate treatment and not just react to detected legal shortcomings or complaints, like a traditional guardian of the law. Another relevant question from the practical point of view relates to the possible organizational changes. In this connection, reference can be made to the paragraph 32 of the Guidelines on national preventive mechanisms adopted by the UN Subcommittee on the Prevention on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) in November 2010, according to which: "Where the body designated as the NPM performs other functions in addition to those under the Optional Protocol, its NPM functions should be located within separate unit or department, with its own staff and budget".

In addition to this, the Ombudsman should enter into a constructive dialogue with the object of inspection to develop the operation of the institution. This requires different kind of (policy) skills, expertise and ways to work. In December 2012, the OPCAT governmental bill (182/2012) was finally given to the Parliament. For this reason, it is still too early to discuss in detail how the theory and practice will meet in the office of the Parliamentary Ombudsman. It is stated in the governmental bill, for example, that as NPM the Ombudsman can nominate experts to assist him or her during inspections. Non-legal expertise in closed institutions is foreseen to increase the preventive function of the inspections.

11 CONCLUDING OBSERVATIONS

At the outset of this synthesis of my seven articles I outlined my view of the problem with rights. I stated that human rights are an interplay between theory and practice: on the one hand, human rights are conventions, rules and principles; on the other hand, these same standards receive their meaning in professional practice. In practice these perspectives often merge with each other. I also noted that while there is a growing appeal for abstract human rights, there is also disappointment and criticism with regard to their practical operation.

On the one hand rights, as conventions and norms, are thought to provide us with humanitarian, value-neutral, objective and non-political guidance in a complicated and multicultural world. Otherwise human rights would probably not be so popular. But human rights are also a practice. Human rights do not speak for themselves; they are made to speak in the service of particular people and particular purpose.¹³⁹ And when open and conflicting rights are put in the service of the practice, they can start to produce both good and bad (liberating or non-liberating) consequences, as discussed in section 5. Some critical observers have claimed that human rights can also be a bureaucratic state language that does not make much difference at all in practice. These two perspectives to rights are reflected in sections 4 and 5 of this synthesis.

My articles, I noted, could also easily be placed somewhere within the tension between theory and practice, which is discussed above. Some of my papers discussed human rights as rather non-political, unproblematic, and objective standards (the theoretical perspective) that could guide societies toward justice, while other articles were more concerned with the practical problems, paradoxes and limitations of human rights (human rights in practice).

In this synthesis I have tried to discuss human rights as a tension or interplay between theoretical and practical perspectives. Both aspects of rights are always present when we discuss or implement human rights. Human rights are a liberating theory because it can sometimes provide us with ideals, objectives, standards, institutions, and language for injustice and fear. In some contexts, demanding the enforcement of abstract human rights can also in practice challenge existing benefits or power structures and provide useful resources (financial, institutional and legal) to those who are in marginal positions or outside the clubs of the powerful. Further, human rights language can focus our attention on individual suffering and on the

¹³⁹ As is noted by Susan Marks in "Human rights in disastrous times" in *Cambridge Companion to International Law* (eds. James Crawford and Martti Koskeniemi) (Cambridge University Press, 2012), pp. 309-326 at p. 320.

demands from individuals to stop prohibited treatment. The global appeal and legitimacy of human rights lie in their promise of ending domination and oppression. This might also explain why it is that, even though some scholars often find human rights indefensible, people continually find them indispensable. To advocates and people struggling for democracy, human dignity, and justice, it really doesn't matter whether human rights are universal, inalienable, or Western. What matters is that they are – even if only sometimes – useful and available in practice.

But if the international human rights system can serve the powerless, it can also serve the powerful. When abstract human rights ideals are turned into practice, human rights become part of the power, administrative routines, expertise and bureaucracy, a tool or a weapon for political, moral or legal argument, as discussed in this introduction (especially in section 5) and in my articles.

In the real world human rights can sometimes provide protection and reveal inequality and oppression, but they can also conceal and affirm the dominant structure and ideology of a society. Human rights can be instruments of emancipation and protection but they can also turn out to be a hypocritical practice and an institutionalized expert language that sometimes serves and protects existing powers and privileges rather than challenges them. For this reason, whether we find critical approaches to human rights practice appealing or not, they deserve careful consideration.¹⁴⁰

From the point of view of international refugee law, for example, it is not a big problem for a human rights government lawyer in professional practice to conclude either that those who are escaping war or famine are refugees or that they are not. Rights language leaves a lot of room for meaning construction. It is easy on an abstract level to agree that no-one should be treated in an inhuman manner, but referring to this prohibition cannot avoid the open and manipulable nature of the prohibition. In other words, abstract human rights claims and struggles are essential as they can bring to the surface exclusion, inclusion and domination, but at the same time rights language can authorise whatever does not constitute a violation of human rights and frame the struggle of rights as questions of the correct legal interpretation of human rights norms.

For this reason, human rights should not only be viewed as something good or bad, but as a tension and dispute between abstract norms and ideals on the one hand, and their practical implementation on the other. Both perspectives on human rights are needed. If we only view human rights as something good and romantic (without thinking practical consequences) we may end up in naïve humanism or “human rights theology”. Even from the liberal standpoint, the worst thing that could

140 On the dual operation of rights, see Costas Douzinas, *Human Rights and Empire. The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish, 2007), pp. 108-109.

happen would be that we start taking human rights as a kind of given human rights theology, a community of believers, or something taken for granted in moral and political debate. Few of us working with human rights want human rights language to degenerate into a sort of lingua franca in which moral and political values of all or any kinds may be expressed.¹⁴¹ For this reason the modern democratic state or human rights bodies whose operation is very much based on the abstract principles of “respect for human rights” or “promotion of human rights” should not be blind to the long and critical discussion regarding human rights, some of which has been considered in this introduction as well as in my articles.

I have likewise tried to argue that what is needed is a stronger pragmatic weighing of human rights in practical context. The pragmatic approach is concerned with the operation and results of human rights in practical situations, not with what human rights are claimed to be in the abstract. The pragmatist’s approach tries to explain, question and critically test human rights practices. What kind of difference do they make nationally and globally? Who are the winners and who are the losers? Which people and purposes human rights language serve and what kind of arguments are used? The costs and benefits of human rights cannot be discussed in the abstract, but only in practical contexts. The “correct” interpretations of human rights law do not always necessarily promote justice or represent a progressive world view leading us towards a more enlightened world. Human rights can also promote “wrong” preferences and justify abuses. For this reason human rights “experts”, advocates, and institutions need both sensitivity to human rights phenomena and the ability to see the concrete and practical consequences of their commitments. Human rights should not be viewed as what it is claimed to be but as what it actually is – namely a plural and indeterminate discourse that can lead almost anywhere.

We will not avoid challenges or even clichés regarding human rights by avoiding their critical articulation and assessment, “by treating the human rights movement as a frail child in need of protection from critical assessment or pragmatic calculations”.¹⁴²

As Michael Goodhart puts it:

If we locate the foundation of human rights’ legitimacy in their global appeal, as history suggests that we should, these flaws [that modern critics identify, JP] need not to shake their foundation. Instead, they can become the basis of a self-reflexive critique, one in which the gap between the promise of human rights and their practice creates the

141 Waldron, “Nonsense Upon Stilts”, Bentham, Burke and Marx on the Rights of Man (Methuen 1987) p. 2.

142 Kennedy, “The International Human Rights Movement: Part of the Problem?”, European Human Rights Law Review, Issue 3, 2001, p. 267.

*normative and conceptual space to reconsider and redefine them again and again.*¹⁴³

But on the other hand, if we only underline and emphasise the critical aspects of rights, we may lose their liberating promise of ending fear, oppression and discrimination. There are also times, professional contexts and strategic as well as pragmatic reasons to promote the promise of human rights. In other words, while we analyse the many doubts, problems, restrictions, paradoxes and ambiguities that surround the practical operation of rights, we also have to acknowledge the many possibilities of rights: setting abstract standards and principles, guiding policies, providing the vocabulary for discussions in multicultural contexts, the potential role of human rights institutions for achieving good results, or the role of human rights language as a personal inspiration or commitment towards a better world.

In the same way, new human rights instruments, like the OPCAT, create important new mechanisms for protection against torture and other cruel, inhuman and degrading treatment. Human rights can thus assist in creating credible and transparent protection for individuals in closed institutions, for example. However, in practice human rights mechanisms and institutions carry with them strengths and weaknesses that must be put under scrutiny.¹⁴⁴ In practical work human rights bodies can have unintended consequences and blind spots that require critical analysis instead of more reference to human rights.

As I see it, the human rights community should be more sensitive to the expanding human rights bureaucracy because the politics of human rights might turn out to protect particular (political, economic or institutional) interests instead of universal interests. Human rights experts may use the same language, operate in the same institutions, implement the same rules and share the same experiences, thus sometimes reinforcing partial perspectives of a fair balancing of rights. These experts are often committed to a particular routine and understanding of what is appropriate in a particular administration. Institutionalized human rights jargon can lose its capacity to make any difference at all, and can collapse into institutionalized and cynical human rights bureaucracy.

143 Michael Goodhart, "Neither Relative nor Universal: A Response to Donnelly", *Human Rights Quarterly*, Vol 30, 2008, pp. 183-193.

144 Anne Smith has observed that human rights institutions can play a key role in promoting and protecting human rights. However, this unique position also gives rise to problems for such institutions. National human rights institutions have to define and defend their role and space in relation to where they fit in with government and civil society. One paradox that she explores is how to manage independence while simultaneously forging links and creating partnerships with governmental and non-governmental bodies. Human rights institutions cannot be the servants of the government but they cannot be independent either. How this is all balanced and managed is a central component of the credibility and effectiveness of national human rights institutions. See Anne Smith, "The Unique Position of National Human Rights Institutions: A Mixed Blessing?", *Human Rights Quarterly*, Vol 28, Number 4, 2006, p. 944.

Furthermore, the language of human rights might have difficulty in identifying protection-related issues that arise from a complex social reality, say, claims of structural injustice, poverty or environmental degradation. Universal freedom of religion may turn out to be freedom of religion as understood in the Christian context. There is also the danger of hypocrisy, the use of human rights language as camouflage for a hidden agenda. Jacques Derrida has likewise identified a list of problems and challenges of globalisation vis-à-vis the practical operation of abstract human rights. Derrida talks of the “plagues of the new world order”, giving as examples unemployment, the exclusion of immigrants, economic globalisation, aggravation of foreign debt, the arms industry, inter-ethnic wars, and phantom states. According to Derrida, these challenges show the limits of the human rights discourse. In the light of these “plagues of the new world order”, human rights will remain “inadequate, sometimes hypocritical, and in any case formalistic and inconsistent with itself as long as the law of the market, the foreign debt, the inequality of techno-scientific, military, and economic development maintain an effective inequality as monstrous as that which prevails today, to a greater extent than ever in the history of humanity”.¹⁴⁵

One possible dark side posed by human rights is linked to the question of professionalism: how do we make sure that human rights experts can provide the “right” recommendations to the administration (prison, police, medical, migration etc.) or to the religious or minority communities they are advising or monitoring? Expert knowledge of “empty” human rights might be a problematic platform for promoting justice in areas that mainly operate outside rights. How, in professional practice, when open human rights are interpreted can we know whose understanding and expertise should be preferred, whose goals supported and whose experience or goals are less relevant?

In the light of my analysis in the articles and this synthesis, the idea of “promoting human rights”, or the demand to “respect human rights”, or even “monitoring the implementation of human rights” – which are all slogans of rule of law societies – can emerge as overly simplistic. It remains unclear what the promotion of human rights entails and whose interpretations are included and whose excluded. Instead, human rights should be seen as complicated, political and conflictive demands. Promoting human rights turns out to be something that is very much dependent on the perspective, context, goals and values in the given situation or polity.

From a non-clichéd and pragmatic perspective of human rights, different kinds of understandings and interpretations of human rights constantly challenge and

¹⁴⁵ Jacques Derrida, “Wears and Tears (Tableau of an Ageless World)”, in Patrick Hayden (ed.), *The Philosophy of Human Rights*, Paragon Issues in Philosophy (Paragon House, 2001), p. 265.

threaten each other. The promise of rights and their practice are a contested space that must be considered and defined again and again.

A reference to human rights should not obscure the political choices and decisions, and inclusions and exclusions, that are always involved in the application of human rights. It is not always clear whose interpretations (of refugee law, of freedom of religion, or of the meaning of rights in multicultural societies) are privileged and promoted, and whose interpretations are excluded. The task of the pragmatic approach to human rights is precisely to keep visible the circular relationship between rights and politics that is always involved in the application of human rights. The practice of rights should also affect the theoretical perspective on rights: practice should affect and provide information to human rights theory.

We can continue referring to human rights even if we have lost faith in their non-political operation. Do we have a better political language to promote justice? Maybe their power lies in their enabling of transgressions: no hegemonic imposition, no rationality, no law, no judgment, no argument is ever safe from being challenged by the many uses of human rights.¹⁴⁶

¹⁴⁶ Hoffmann, "Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights", in Anne Orford (ed.), *International Law and its Others* (Cambridge University Press, 2006) p. 244.