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Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Resolution

Mattias Kumm*

I THREE PUZZLES

The dominant form of global human and constitutional rights adjudication is characterized by three striking yet puzzling features. First, the scope of legally recognized human rights is not narrowly focused on things fundamental or basic to human existence, but extremely broad (call this the problem of rights inflation). Second, most rights may be limited by measures that meet the proportionality requirement, thereby appearing to undermine prominently made claims that rights are trumps or fire walls that have priority over competing policy concerns (call this the problem of casual override). And third, notwithstanding the claim that human rights are universal, the kind of things that can be found on lists in international, regional or national human rights documents vary considerably between jurisdictions and instruments. And even when provisions are worded similarly, they are often interpreted differently in different states (call this the problem of variance).

In the following I will show how each of these structural features of human rights practice is connected to a distinctive moral point. Gaining a clearer understanding of each of these moral points and elucidating how they relate to one another is an important step towards the development of a more comprehensive theory of human rights. These three structural features work together to establish a practice that reflects not only a particular conception of human rights, but more generally a particular conception of law and politics: Politics is the practice of rights-based justice seeking among free and equals under conditions of reasonable disagreement. Law is the authoritative resolution of questions of justice by norms, which in terms of the procedures used to generate them and the outcomes produced are demonstrably justifiable to those

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addressed in terms that free and equals might reasonably accept. The structure of human rights adjudication is geared towards establishing whether or not a particular legal norm burdening an individual can be demonstrably justified to that individual under this standard. In this way human rights operationalize what Rainer Forst has called the right to justification,[1] and is at the heart of a non-domination-oriented conception of law and justice. If an account along these lines provides the best justification for the practice we have, we have not only gained a deeper moral appreciation of human rights practice such as it happens to be. We are also in a better position to interpret, and progressively develop, that practice in a way to better help it realize its moral point.

II THE SCOPE OF RIGHTS: "TOTAL RIGHTS" AND THE CONSTITUTIVE FUNCTION OF RIGHTS

1. It is a widespread view among philosophers that human rights, if they are to be defensible, occupy a limited domain, protecting only against a special class of injustices (call this the "limited domain conception of human rights"). That class uncontroversially includes such things as torture, arbitrary killings or detention, religious coercion and many other fundamental things, even though a great deal remains disputed. There may be considerable difficulties in determining either the nature[2] or the content of the delimiting principle[3] to be used to distinguish between human rights claims and other claims of justice. These may be hard questions, but whatever difficulties there might be need to be confronted. They must be confronted, because human rights could not plausibly be understood as the normative foundation of the whole of law and politics and the grounds for a comprehensive political program for the realization of freedom, equality and justice for all (call this "the constitutive or 'total' human rights conception").

There appear to be a closely related set of reasons why, if the idea of human rights is to be made sense of, some version of the limited domain conception of human rights must be correct and any version of the total rights conception

[1] Rainer Forst, The Right to Justification (2012).

[2] Is the delimiting principle moral, as, for example, James Griffin, On Human Rights (2008) or James W. Nickel, Making Sense of Human Rights (2d ed. 2007) propose, or is it political functional, as for example John Rawls, The Law of Peoples (1999) or Joseph Raz, From Normativity to Responsibility (2011) suggest? For a critique of both moral foundationalism and functionalism in favor of justificatory pluralism see John Tasoulias, "Towards a Philosophy of Human Rights", 65 Curr. Leg. Probl. 1 (2012) and Allen Buchanan, The Heart of Human Rights (2013).

[3] Griffin, *supra* note 2, for example, proposes that the delimiting principle is to secure personal agency, whereas for Nickel, *supra* note 2, it is to ensure the prerequisites for a minimally good life.

must be wrong. First, if human rights are binding for public authorities across time and space and all issues of law and politics turn on the best understanding of competing rights claims, there would seem to be very little space for either legitimate difference among states or political disagreement within states. Human rights would define the highly constricting parameters of a Procrustean bed in which humanity would have to lie. On the one hand, it is not clear what space for sovereignty and national self-determination would be left, if human rights were the foundation of, and provided a determinative standard for, all of law and politics. On the other hand, from the perspective of domestic constitutionalism, the consequences would also appear to be unattractive and implausible. If constitutional rights are conceived as national concretizations of human rights, as they tend to be in most jurisdictions,[4] and if human rights cover the whole domain of law and politics, what space is there for the give and take of democratic politics and of disagreement between parties, social groups, and citizens? Would the judicial enforcement of human rights not inevitably lead to juristocracy?

2. The problem is that actual human rights practice generally does not fit very well any limited domain conception of rights. Human rights claims do not, in legal practice, occupy a narrow domain limited to things fundamental, however that threshold might be understood. In legal and political practice rights claims occupy a domain that includes what might appear to be mundane and even trivial things.

This is perhaps most evident with regard to the scope of *liberty* rights. It might just seem like conceptually misguided political posturing, when political actors and local newspapers in affected cities in Bolivia, Ecuador, and Columbia decried FIFA's 2007 decision to ban all international football matches above 2500 meters as a violation of the right of fans to watch their team play in their capital city.[5] But the position of many internationally renowned courts seems to be not so different. The Court of Justice of the European Union (CJEU) has recognized a general human right to liberty – the right to do or abstain from doing whatever you please – as an integral part of the common European constitutional tradition. The well-known major early cases decided

[4] US contemporary constitutional practice possibly qualifies as an exception in this regard. The age of the US constitution and its Bill of Rights, long preceding any international human rights law, as well as the historicist originalist preoccupations that characterize contemporary constitutional reasoning, tends to foster an inward looking and self-sufficient constitutional culture in which engagement with the "outside," to the extent it takes place at all, is discussed as a problem, rather than an in-built feature of constitutional rights practice. See also Lorraine Weinrib, The Postwar Paradigm and American Exceptionality, in Soujit Choudhry (ed.), The Migration of Constitutional Ideas (2006), 84.

[5] See http://en.wikipedia.org/wiki/High-altitude_football_controversy.

by the Court like *Nold*[6] and *International Handelsgesellschaft*[7] concerned questions that are unlikely to be high on the list of priorities for human rights activists. *Internationale Handelsgesellschaft* was a case concerning the forfeiture of a deposit lodged in connection with the issue of export licences for maize meal. The plaintiff had failed to export the quantities of maize he had obtained a licence for, by all indications because it turned out to be more profitable to sell to a domestic buyer. Under EC rules failure to export after obtaining the licence meant forfeiture of the deposit, unless the failure to export was the result of *force majeure*. That regime, the plaintiff claimed, violated his human right to freedom of action and economic liberty. In *Nold* the issue was whether EC rules relating to the distribution of fuels could require companies to meet a certain volume of sales requirements in order for them to qualify as a direct wholesaler with a right to direct purchase from a selling agency. The plaintiff believed that his denial of that status based on its reduced sales volume was a violation of its right to freely practice their trade and profession. The position of the German Federal Constitutional Court (GFCC) is similar. It has interpreted a provision guaranteeing "the free development of one´s personality"[8] as effectively guaranteeing a general right to liberty.[9] In practice, it has recognized such activities as riding horses through public woods,[10] feeding pigeons in public squares,[11] or importing a particular breed of dog[12] as falling under the scope of a right.[13] Even when an international legal instrument does not have a provision easily construable as a general right to liberty, courts tend to interpret expansively the scope of whatever more specific clauses they are provided with. The European Court of Human Rights (ECtHR), for example, has the tendency to read the scope of the right to privacy guaranteed under Art. 8 of the European Convention of Human Rights as something close to a catch-all right, also covering, for example, increased noise production for residents living near Heathrow Airport, brought about by a policy scheme permitting night flights.[14] Effectively a critic has suggested,[15] the ECtHR recognized a human right to sleep well.

Furthermore, both the CJEU and the GFCC are also examples of courts that have taken a similarly expansive approach to *equality*. On the one hand, equality as a human right is interpreted in a formal sense as requiring that the law,

[6] Case 4/73, [1974] ECR 491. [7] Case 11/70, [1970] ECR 1161.
[8] Art. 2 Sect. 1 German Basic Law. [9] BVerfGE 6, 32 (Elfes). [10] BVerfGE 80, 137.
[11] BVerfGE 54, 143. [12] BVerfG 1 BvR 1778/01 (Mar. 16, 2004).
[13] Strikingly, whenever a German government official publically starts considering a general speed limit on German Autobahns, the claim to a right to freely go as fast as your car can safely go will be invoked.
[14] *Hatton* v. *United Kingdom* (2003) 37 EHRR 28.
[15] George Letsas, A Theory of Interpretation of the European Convention on Human Rights (2007), at 126.

whatever distinctions it may contain, be enforced on its own terms, irrespective of who the parties to the dispute happen to be. On the other hand, there is substantive dimension to equality. The commitment to equality also means that the law may not make distinctions between different groups of persons that are not defensible. Here is the relevant point: This does not only mean that a human rights text or courts try to interpretatively define a limited list of suspect categories like race, gender, ethnicity, sexual orientation, etc. Debates about what categories to include as suspect – e.g., Should age discrimination be included? What about disability? – are mainly of symbolic and expressive significance in these jurisdictions and play a role in focusing attention. The reason why in many contexts little depends on these lists is that the principle of equality is understood by many courts, including the CJEU and the GFCC, as a general principle of non-discrimination, potentially subjecting all distinctions made by the legislator to rights-based judicial review. Any distinction made by the legislator between different persons requires justification and can be challenged by invoking a right to equality. On these grounds, the GFCC has held unconstitutional non-smoking laws that allow restaurants to establish separate smoking rooms, but exclude that possibility for discothèques.[16] The ECJ has struck down an EU Regulation on the ground that it provides subsidies for one kind of product, but not another, when both products were substitutable and used the same materials and production processes.[17] In this way, the language of human rights becomes a tool to potentially subject all acts of public authorities that affect individuals detrimentally to rights review.

Besides an expansive approach to defining the scope of a human right, with some courts recognizing a general right to liberty and a general right to equality along the lines described above, rights practice also has other structural features that further extend the range of questions that can be reached by invoking rights. These can only be briefly gestured towards here.

Human rights are not generally understood only as negative claims that individuals have against the state, restricting what the state can do to them, requiring the state to abstain from doing something. States are not just under a duty to *respect* rights. They are also under a positive duty to *protect and fulfil* human rights. Many human rights instruments, from the Universal Declaration of Human Rights (UDHR) to the International Covenant on Social, Economic and Cultural Rights and many national constitutional codifications of human rights, include social and economic rights, like the right to housing, to food, water, healthcare or basic social security. These rights require positive state action to be fulfilled. Furthermore even outside the domain of textually

[16] BVErfG, 1 BvR 3198/07 (Aug. 6, 2008).

[17] Case C-117/76 *Ruckdeschel & Co.* v. *Hauptzollamt Hamburg-St Annen*, ECR 1753.

codified social and economic rights, courts often recognize duties of the state to protect interests falling under the scope of a right against third parties or other threatening circumstances. The classical rights provisions relating to liberties are interpreted by many courts as grounding protective duties. The right to life is infringed not only when a police officer uses lethal force unjustifiably, but also when the police do not undertake reasonable measures to protect someone from concrete threats by third parties.

A particular subset of positive duties rarely concerns the state´s duties to provide for particular forms of organization and procedure: due process rights in the widest sense. In this way *the basic institutional structure of the state is itself a central focus of human rights law*. Perhaps least surprisingly human rights instruments tend to address questions relating to *the judiciary*. Ignoring variations, qualifications or additional requirements and focusing on the core point: An impartial and independent court or tribunal must be available to hear claims relating to individuals' legally guaranteed rights and must be able to provide effective remedies. More surprising is perhaps the fact that for all intents and purposes international human rights law is plausibly interpreted as requiring the institutionalization of some form of liberal democracy.[18] The UDHR[19] requires "genuine and periodic elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure" and the ICCPR[20] states that "Every citizen shall have the right and opportunity . . . without any unreasonable restrictions to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." Various constitutions have "due process" guarantees, which ground participatory rights in the context of administrative proceedings. Furthermore, and perhaps most audaciously, Art. 28 of the UDHR even provides that "everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."[21]

[18] For a more elaborate argument see Thomas Franck, "The Emerging Right to Democratic Governance", 86 AJIL 46 (1992); see more recently, and, more sceptically, Susan Marks, "What Has Become of the Emerging Right to Democratic Governance", 22 Eur. J. Int'l L. 507 (2011).

[19] Art. 21 Sect. 3 UDHR. [20] Art. 25 b ICCPR.

[21] Here the issue is not only the level of abstraction (what exactly is this a right to?), but also the question of the addressee of the right claim: Is it a right against the state to engage in a particular foreign policy geared towards the establishment of some such order? Is it a claim against certain international institutions? For a discussion of problems relating to the allocation of duties among different potential addressees of anti-poverty human rights, see Samantha Besson, The Allocation of Anti-poverty Rights and Duties: Our Rights, but Whose Duties?, in K. Nadakavukarn Schefer eds., Poverty and the International Economic Legal System – Duties to the World's Poor (2013).

Given the scope of rights, just about any claim of injustice – whether injustice is brought about by state action or inaction or by institutional structures cementing forms of domination – can plausibly be brought within the framework of human rights. Even though contingent features and limitations of any particular human rights instrument may present obstacles in specific instances, we should generally expect to be able to reframe any claim that injustice has been done to someone as a claim that human rights have been violated.

3. But that does not imply that there is anything wrong with a human rights practice that has this structure. How to assess a rights practice that has such a structure depends on what you imagine its normative point to be. If you believe that the point of human rights, we might say, is to constrain law and politics in the name of some fundamental human interests, however conceived, a practice that understands the scope of rights this expansively appears pathological. But such an understanding of the point of human rights might itself be misguided. If instead we think of *human rights as constituting a particular conception of law and politics: a conception of law and politics as justice-seeking among free and equals*, we might assess the situation quite differently. If this is their moral point, we should expect not only that liberty and equality played a central role in that rights practice, but that the domain of human rights be coextensive with the domain of political justice. That is indeed the tendency that the phenomenon of "rights inflation" points to.

Furthermore such an understanding of rights should not be misconstrued as a self-serving judicial power-grab, effectively expanding the jurisdiction of courts charged with interpreting and enforcing rights. The idea of the constitutive function of rights and its expansive understanding of the domain of rights is older than the practice of judicial review. There is nothing new about the idea that all law and politics ought to be conceived as the concretization and specification of highly abstract rights of free and equals.[22] To the extent that contemporary rights practice reflects structural features of a total rights conception, this is not a historical novelty, but connects contemporary practice to its enlightenment political roots in the eighteenth-century American and French revolutionary traditions. We see it when the French Declaration of Rights of Man and Citizens declares in the Preamble that "ignorance, neglect, or contempt of the rights of man *are the sole cause* of public calamities and of the corruption of governments" and "determine[s] to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order . . . that the acts of the legislative power, as well as those of the executive power, may be compared at any moment *with the objects and purposes of all political*

[22] For Kant there was only one fundamental right: The right to equal liberty, see Immanuel Kant, The Metaphysics of Morals (Mary Gregor trans. 1996).

institutions and may thus be more respected."[23] The core task of democratic legislation in a true republic was to delimit the respective spheres of liberty between individuals in a way that takes them seriously as equals, and does so in a way that best furthers the general interest and allows for the meaningful exercise of those liberties. Democratic self-government was conceived not only as human rights-based, but as having as its appropriate subject matter the delimitation and specification of rights. Legislation, such as the enactment of the *Code Civile*, was rights specification and implementation.

III PROPORTIONALITY: REQUIRING JUSTIFICATION IN TERMS OF PUBLIC REASON

1. But saying that just about any issue of justice can be framed as a human rights issue does not yet say anything about what it means to have framed the issue that way. What exactly follows from the fact that just about any state behaviour affecting a person falls under the scope of a human right? What exactly do you have in virtue of having a human right? When the behaviour of a state falls within the scope of a right – a prima facie infringement of a right has occurred – that does not imply that such behaviour is an actual violation of the right and therefore unjust. The fact that you have a right to do as you please does not mean that a law that prohibits you from murdering another person is violating your rights. Rights can be limited. Infringements of rights are susceptible to justification.[24] But how exactly should those limits be drawn?

Even though there are interesting and significant differences between conceptions of human rights in the liberal tradition, they generally share the idea that something protected as a matter of right may not be overridden by ordinary considerations of policy. Rights have been described as "trumps"[25] over competing considerations of policy, as having priority over "the good"[26] in some strong sense, and as "firewalls"[27] providing strong protections against demands

[23] See Preamble, Declaration of the Rights of Man and of the Citizen (1789).

[24] It is no solution to avoid these issues by insisting that rights properly so called are only fully specified rights, that is whatever is left after the justificatory process has established the priority of a rights claim against all countervailing considerations. First, we would still need to know how exactly we should go about the task of properly specifying rights and assess competing claims. Second, giving up on calling an infringement of a right a prima facie violation of a right would be deeply at odds with the dominant structure of practice. Third, the justificatory process itself is such an integral point of rights practice, that a conception of rights which is only outcome focused (focused on what survives justification) would fails to capture one of its core moral points.

[25] Ronald Dworkin, Taking Rights Seriously (1977).

[26] John Rawls, Political Liberalism (1993).

[27] Jürgen Habermas, Between Facts and Norms (1993).

made by the political community. Circumstantial all-things-considered judgments on what is in the general welfare are generally insufficient grounds to justify infringements of rights. Reasons justifying an infringement of rights, if they exist at all, have to be of a special strength.

Yet this claim of a special priority of rights sits uneasily with a prominent feature of human rights adjudication. A general feature of rights analysis all over the world is some version of a proportionality test.[28] An act of a public authority that infringes the scope of a protected right can still be justified, if it can be shown to pursue legitimate purposes in a proportional way. Only acts by public authorities that are disproportionate will be struck down on the grounds that they violate an individual's right.

True, there are human rights provisions such as "no one shall be subjected to torture,"[29] "the death penalty shall be abolished,"[30] "no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation,"[31] etc. Such rights have a rule-like structure and can either be absolute rights or subject to certain rule-like exceptions. Specific rules of this kind are best understood as authoritative determinations made by the parties negotiating human rights treaties about how all the relevant first order considerations of morality and policy play out in the circumstances defined by the rule. Notwithstanding interpretative issues that may arise at the margins, clearly the judicial enforcement of such rules is not subject to proportionality analysis or any other meaningful engagement with moral considerations.

But at the heart of modern human rights practice are rights provisions that are not only more abstract, they exhibit a different structure. Take the right to freedom of speech, the right to freedom of assembly, the right to privacy, etc. Clearly these rights must have limitations. The right to freedom of speech does not mean you have a right to shout fire in a crowded cinema, the right to freedom of assembly does not mean you have a right to organize a spontaneous

[28] Grant Huscroft, Bradley Miller, Grégoire Webber, Proportionality and the Rule of Law (2014), Aharon Barak, Proportionality (2012), Matthias Klatt & M. Meister, The Constitutional Structure of Proportionality (2012), Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism", 47 *Columbia Journal of Transnational Law* (2008): 73–165, David Beatty, Ultimate Rule of Law (2004).

[29] Art. 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

[30] Art. 1 of Protocol 13 of the ECHR states: "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

[31] Art. 11 ICCPR states: "No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation."

mass demonstration in the middle of Fifth Avenue during rush hour, nor does the right to freely manifest your religion mean that you have a right to fulfil your perceived religious duty to engage in a violent crusade against those whom you deem to be infidels, even if your church professes those obligations to exist for true believers. Furthermore it is unlikely that the limits of these rights can be stated in the form a set of neatly circumscribed rule-like exceptions. The question is how exactly those limits should be determined.

The architecture of rights provisions in modern human rights treaties and constitutions provide a good first indication. Characteristic of human rights treaties and constitutions enacted after WWII is a bifurcated structure: The first part of a provision defines the scope of the right. The second describes the limits of the rights by defining the conditions under which an infringement of the right is justified.

Article 8 of the European Convention of Human Rights (ECHR), for example, reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

"2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The first part defines the scope of the interests to be protected – here: "respect for his private and family life, his home and correspondence." The second part establishes the conditions under which infringements of these interests can be justified: If the infringement is duly authorized by law and the infringement is substantively justifiable "as necessary in a democratic society in the interest of national security, public safety," etc.

The first step of human rights analysis typically consists in determining whether an act infringes the scope of a right. If it does a prima facie violation of a right has occurred. The second step consists in determining whether that infringement can be justified under the limitations clause. Only if it cannot is there a definitive violation of the right.

Even though the term proportionality is not generally used in limitation clauses immediately after WWII, over time courts have *practically uniformly interpreted these kinds of limitation clauses as requiring proportionality analysis*. Besides the requirement of legality – any limitations suffered by the individual must be prescribed by law – the proportionality requirement lies at the heart of determining whether an infringement of the scope of a right is justified. Any law or legal measure restricting a right must meet the

proportionality requirement. More recent rights codifications often recognize and embrace this development and have often substituted the rights-specific limitation clauses by a general default limitations clause. Chapter VII, Article 52 (1) of the European Charter of Fundamental Rights, for example, states: "Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others."

Even though there is some variance in how the proportionality test is understood in judicial practice, the most widely used and defended version[32] asks the following set of sequential questions. First, did the infringement further a legitimate aim?[33] Second, was the measure necessary? A measure is necessary if and only if there are no alternative, less restrictive means. Of all equally effective means the one that is least restrictive has to be chosen. This part of the test thus establishes a Pareto-optimality requirement. Third, there is the balancing test: Do the benefits of the measure outweigh the costs imposed on the rights-bearer?

The following example serves as an illustration how the justification of rights infringements under such a framework operates. It concerns a recent case decided by the ECtHR that concerns the question of whether a provision criminalizing sexual intercourse among blood relations is compatible with a right to private life. In *Stübing*[34] the German Constitutional Court had upheld the law and the complainant challenged that decision before the ECtHR. The point of the following is not to either report on the decision or analyze and discuss in any depth all of the relevant arguments. It merely serves as an illustration of how the proportionality test helps structure the human rights inquiry.

The case concerned biological siblings, who had grown up apart and only met each other on the occasion of their mother's funeral. They fell in love, lived together as a family and had four children before the man was convicted and incarcerated for violating the German criminal law prohibiting incest. Historically, the point of incest regulation in many of the states where it exists was to reinforce and validate a widespread and deeply held moral belief that incest is wrong. As the court notes, citing cross-country surveys, the prohibition of incest continues to enjoy wide support among populations on moral grounds. But the first core issue is whether the validation of moral beliefs about how one should or should not live one´s life is a legitimate purpose, when the public

[32] *Supra* note 29.

[33] Strictly speaking, there are two questions here, which is why the proportionality test is sometimes said to have four prongs: Was the aim legitimate (a normative question) and did the measure actually further that legitimate aim (an empirical question).

[34] See *Stübing* v. *Germany*, ECtHR Judgment of April 12, 2012.

is not relevantly affected. Even though this is by no means uncontested in all contexts, and may on occasion be subject of direct controversy, the reinforcement of widely held moral norms relating to how one should conduct one´s private life is typically not recognized as a legitimate purpose justifying the infringement of a right under the first prong of the proportionality test, and it wasn´t recognized as such in this case, neither by the ECtHR nor the German FCC. Such beliefs generally do not qualify as a legitimate public purpose, unless they are connected to other plausible concerns of public policy.[35] In this way the first prong of the proportionality test implicitly functions to ferret out perfectionist purposes. Beyond the exclusion of widely held beliefs about how one should live one´s life as a ground for limiting a right, the first prong of the proportionality test also excludes a number of other politically salient factors as irrelevant: It excludes as irrelevant the brute fact that a majority wants something, that something is conventionally done a particular way or that it has always been in a certain way. "We want this," "We don´t do this kind of thing around here," and "We have a tradition of not tolerating that kind of thing" is never a sufficient argument, as powerful a factor as it might be in the political process. There is obviously nothing intrinsically wrong with moral beliefs, preferences, conventions, or traditions. But to serve as a valid justification for the infringement of a right, moral beliefs, preferences, conventions, and traditions have to be connected to plausible public policy concerns to be relevant. The widespread implicit endorsement of this position in human rights practice is apparent in the fact that courts insist on focusing on other concerns of public policy when they discuss the first prong. Although practically no measure ever fails the first prong, because it is practically nearly always possible to find some more plausible public policy concern, the first prong implicitly serves to categorically exclude a wide range of considerations that

[35] Restricting rights on grounds of *public* morality is widely recognized, of course. But public morality is in play only when the public is affected by behavior in the relevant way: Copulation in public or even running around naked in public can be prohibited on the grounds that people are seriously put off by it. Here a balance has to be struck between the competing concerns of those who seek to behave in a certain way in public and those who wish not to be confronted with such a behavior when they are in public. The admonition to be tolerant is countered by the admonition to be respectful and some kind of balance will have to be struck. But these cases are to be distinguished from morality legislation in the strict sense where the issue is simply one of moral conviction as the ground for prohibitions, without any consideration of how the proposedly immoral behavior affects others. The majority does not have the right to prevent you from doing what they think is morally wrong, simply because they think it morally wrong and would prefer a world in which such behavior did not exist. Even though this is not uncontested, a more comprehensive survey of human rights jurisprudence would prove the pattern that rights adjudicating courts – certainly across Europe – tend to implicitly side with H.L.A. Hart against Lord Devlin on this point.

may well have been highly relevant to the political process but raise serious concerns from the point of view of a liberal political morality.

So both the ECtHR and the German Constitutional Court focused their discussion on other possible legitimate public purposes: Is the prohibition of incest justifiable on the grounds of protecting the roles and structures of the traditional family? But if the idea is to protect minors against adult family members (parents or older siblings), then other provisions of the criminal code – in particular, statutory rape – have that covered. And to the extent that the statute applies also to adults, is it a legitimate purpose to criminalize the sexual practices of consenting adults to reinforce traditional family roles and structures? This, again, appears to be morality legislation.

But perhaps the legitimate purpose is the protection of the weaker, psychologically vulnerable member in such a potential relationship? Here there are two problems. First, it seems questionable to make the generalized paternalistic assumption that an adult´s consent to incest relationships must be the result of weakness and psychological vulnerability (is this an empirical assumption driven by the belief that a morally upstanding person surely would not give her consent?). And if the concern is the exploitation of weakness and psychological vulnerability of one party, then that should be a condition for its criminalization. Otherwise the criminalization even of those whose consent does not suffer from any deficiencies is overbroad: It does not serve the purported purpose. It thus fails the second prong of the proportionality test: The law is not necessary, because a more restricted law would be equally effective in achieving the legitimate purpose without burdening those who have given their free consent.

The final purpose discussed is eugenic. Given the heightened probability of genetic defects of potential children between family members, they should abstain from acts that might lead such children being born. But even if one were to accept this as a legitimate public health purpose (a disputed point among the judges), the general criminalization of sexual intercourse would probably fail the second and third prong of the proportionality test. To begin with the provision is overbroad and thus not necessary: It also covers situations, where the issue of giving birth to a child with genetic disabilities is moot. In the case before the court the husband had already undertaken a vasectomy after the fourth child was born, thereby excluding any further procreation. And even in cases where there is a possibility of childbirth: Would it not be more appropriate to ensure that the parties are sufficiently informed of the relevant dangers? In the case of mature mothers beyond forty, or couples with blood group incompatibility issues or other defects, there is a comparable probability that any offspring produced will suffer from disabilities. It would appear to

be obviously disproportionate in any of these contexts to criminalize a couple that, with full knowledge of the risks, decided to have a child anyway.[36] If that is so, it is not clear why it should be different in the context of incestuous relationships. The suspicion is that the moral opprobrium connected to incest, rather than any plausible policy concerns are doing the work.

A majority of judges on the German Court had nonetheless upheld the law, ostensibly because they were persuaded by some combination of the various policy rationales. And the ECtHR let the court´s decision stand invoking the state´s "margin of appreciation" (more on that below).[37] But whatever you believe the right resolution of the issue to be, the example illustrates two characteristic features of rights reasoning: First, the fact that a rights-holder has a prima facie right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. The second characteristic feature of rights reasoning is the flipside of the first. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on the reasons that justify the infringement. Furthermore, the three-prong structure of proportionality analysis provides little more than a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshalled to justify an infringement of a right are good reasons, all things considered. What should also have become clear is that the issues raised within such a structure can be complicated and may be subject to reasonable disagreement.

Note how there is a space within this structure to accommodate categorically structured commitments of political morality and liberal accounts of justice: Under the first prong of the proportionality test certain purposes – for example, perfectionist purposes – can be categorically excluded as illegitimate. Furthermore note that the idea of balancing does not imply the existence of a common matrix or some kind of technocratic calculus. Balancing is a metaphor that

[36] The above presents a stylized and simplified version of the argument put forward by the dissenting opinion of Judge Hassemer of the German Constitutional Court.

[37] Given the remarkably unpersuasive arguments of the majority, probably the best way to make sense of these decisions is to assume that neither German Constitutional Court nor the ECtHR was willing to invest a great deal of institutional legitimacy striking down a law that apparently reflected widespread moral views, when the harm done by upholding it appeared to be limited. Notwithstanding the tragic family involved in the case, there haven´t been many cases relating to incest for years, nor is that expected to change. What cases such as these indicate is that even if moral convictions of the majority do not count as a legitimate purpose to restrict rights, socially widespread convictions nevertheless serve as an empirical constraint on what courts are willing to do.

refers to the requirement that all relevant things need to be taken into account and that a balanced judgment has to be made, whether, under the circumstances, public authorities could reasonably give precedence to furthering a particular legitimate purpose.[38] When such a judgment is made, the public reasoning of judges tends to be constrained somewhat both by the gravitational pull of their own previous decision[39] as well as the settled legislative or judicial judgments underlying other related areas of the law. Balancing is thus practically guided not just by the court's previous decisions, but also ideas of reflective equilibrium or coherence as they apply to the relevant legal order.

Assessing the justification for rights infringements is to a large extent an exercise of an institutionally situated form of general practical reasoning. Given the modest role of authoritative texts and the centrality of assessing justifications within a framework of the proportionality test, it lacks the constraining features that otherwise characterise legal reasoning. Given the structure of human rights norms, there is something misleading in the idea that judges *interpret* rights. Judges do not interpret rights, they assess justifications. The apparent "casual override" that is reflected in the ubiquitous use of the proportionality test is connected to the distinctive contestatory and justificatory function of rights. The proportionality test, structured as it is, effectively establishes a test of public reason. Human rights norms empower rights-bearers to challenge existing power relationships by insisting that those relationships be susceptible to justification in terms of public reason.

But if everything that falls within the scope of a right must therefore be susceptible to proportionality-based justification, what is the proper domain of sovereignty, national self-determination and political democracy? The answer becomes clearer once we understand the sources of the third puzzling feature of human rights practice: Its variance.

IV VARIANCE: STYLES OF CODIFICATION AND LEGITIMATE DIFFERENCE

Human rights claim to be universal. Human beings are claimed to have them simply in virtue of being human, not in virtue of being a member of this or that

[38] For a fuller discussion see Mattias Kumm, Political Liberalism and the Structure of Rights: On the place and limits of the proportionality requirement, in: George Pavlakos (ed.), Law, Rights and Discourse: Themes from the Legal Philosophy of Robert Alexy (2007), 131–166.

[39] This is true even in non-common law continental jurisdictions, where there is no official doctrine of precedent and earlier decisions are not formally accorded any authoritative weight nor regarded as sources of law.

political community or region. Yet there are two complementary phenomena that appear to undermine the idea that human rights are truly universal. On the one hand there are differences between human rights treaties. International human rights treaties differ from regional human rights treaties, which in turn also differ from one another. And national constitutions rarely simply incorporate by reference global or regional human rights treaties. In the context of drafting their own Bill of Rights new lists are composed, differing again both with regard to the number of rights guarantees and, in part, in their content, from other instruments.[40] On the other hand, even when international, regional and national rights provisions appear to be textually similar, they may still be interpreted quite differently. Any general human rights instrument – globally, regional, or national – will include a right to freedom of religion or freedom of speech, for example. But the practices that are deemed justifiable under that provision differ considerably across jurisdictions. What accounts for that difference? In the following I will distinguish between two kinds of variances: Differences in the levels of specification, and substantive differences.

1 *Levels of Specification*

The length of human rights lists depends primarily on the level of abstraction at which human rights are specified.[41] It is futile to ask how many human rights there really are. To illustrate the point focusing only on classical negative liberty rights, we can imagine three kinds of approaches: Country A decides to list only one liberty right in its constitution: A general right to liberty. Country B, more conventionally, decides to add, say nine more specific liberty rights, such as a right to life and physical integrity, privacy, a right to freedom of speech, association, religion as well as the right not to be subjected to unreasonable punishment. Country C, finally, has a list of 100 liberty rights. It has all the rights that state B has codified, but each of those rights is further specified in nine more concrete provisions. Instead of merely guaranteeing a right not to be subjected to unreasonable punishment, for example, it also includes: a right not to be sentenced to a prison term merely for being unable to pay your debt; a provision that prohibits the death penalty for all but a limited class of specifically listed particularly egregious crimes; a prohibition

[40] The Israeli Supreme Court, for example, has developed a rich and expansive practice of rights protection grounded on a basic law mandating the protection of only "dignity and liberty." On the other side Brazil's constitution lists 77 negative rights in its Art. 5, followed by 34 social rights of urban and rural workers in Art. 7.

[41] See also Nickel's discussion of "the problem of lists," in Nickels, *supra* note 2, at 92.

to sentence anyone to death who was not 18 at the time they committed the crime; a prohibition to subject anyone under the age of 14 to criminal punishment. And so on.

Note how there is no necessary correlation between a high level of protection of human rights and the level of specificity with which they are codified. It is not inconceivable, for example, that a court charged with interpreting the abstract provision prohibiting unreasonable punishment in state B might conclude that the death penalty is not just unreasonable to impose on minors or less than egregious crimes, as is established in state C; It might hold that the death penalty is unreasonable altogether and that the correct interpretation of the right means that capital punishment should be abolished entirely. Indeed one of the reasons for greater specificity in a human rights instrument may well be the desire of the political drafters of the instrument to cabin in the power of other interpreters, in particular judiciaries. By spelling out in more concrete rule-like form legal guarantees of what a right amounts to, the drafters preclude more ambitious interpretations of the more abstract right.

So what accounts for the difference in the lengths of these lists and the chosen level of abstraction for human rights provisions? There are a number of factors in play. One of them is historical: Particular historical experiences of abuse tend to lead to specific provisions seeking to ensure and to expressively highlight the commitment that those specific forms of abuse do not happen again. In that sense Nietzsche's dictum that a people´s laws reflect what they have overcome applies also to the issue which human rights issues are more concretely highlighted by being explicitly expressed. Is it surprising that in the United States the first amendment covers freedom of religion and freedom of speech, given what so many immigrants were fleeing from? Is it surprising that the German Basic Law enacted after WWII established an unqualified right to asylum after so many had been persecuted and were struggling to leave Fascist Germany and to be granted asylum elsewhere? Is it surprising that privacy and data protection concerns appear to be highlighted in Europe to a greater extent than elsewhere, after so many states had been captured by authoritarian or totalitarian governments for a considerable part of the twentieth century? Other considerations are political. They might concern the scope of political agreement among relevant actors. Given that human rights instruments, whether international law treaties or constitutions, require a great deal of consensus, the question is also what exactly the parties are able to agree on. Sometimes that will favour abstractions: The parties agree on an abstract principle, even if they disagree about how it should be specified. Sometimes, although in human rights practice much more rarely, that will favour concrete rules: Parties may agree on specific rules, where agreement on the more

abstract principle justifying that rule is absent.[42] Furthermore, including a specific norm in a human rights instrument is an easy way to please constituents. The drafters take up their constituents' pet concern, include it in the list, thus symbolically acknowledging its importance, all the while not really giving anything away, if the provision does not take the form of a concrete rule, but remains a principle subject to proportionality analysis.[43] Finally, the level of specification also depends on perceptions of what should be left in political play as part of the ordinary political give and take, as democratic majorities shift. Conversely an understudied form of abuse of power is the overconstitutionalization of rights: when present (qualified) majorities preclude future majorities from specifying rights differently by entrenching them in the form of concrete rules in the constitution, rather than just enacting ordinary legislation that can later be changed when majorities change.[44]

A second form of human rights overkill can also take the form of the judiciary effectively strangling the political process by leaving an increasingly small margin for genuine political decision, as constitutional doctrines develop in an ever finer web of doctrinal specifications over time. Call this the problem of juristocracy.[45] The perennial issue here is that of the appropriate degree of

[42] In that sense C. Sunstein's account of undertheorized agreements is one-sided. Undertheorized agreements do not only lead to decisions one step at a time. They may sometimes push decision-makers, including judges, to announce bold principles, even when there is a great deal of disagreement on how that principle ought to be specified across a wide range of issues. In this way decision-makers can guide other actors, encouraging them to settle issues within the defined framework of principle, weighing in only as they see fit under the circumstances.

[43] Imagine, for example a constitution containing only a right to privacy. It is not unlikely that a court interpreting that provision will read a right to data protection as a more specific form of privacy protection into that right and develop its own data protection jurisprudence on that basis, as the ECtHR and the German FCC have done. Now imagine a politician seeking to establish his data-protection credentials to gain favor with a powerful data protection-focused group. He puts forward a proposal to include a right to data protection in the constitution. Perhaps the kind of high-profile political debates associated with constitutional amendments are well suited to focus attention on the issue of data protection. And perhaps it would serve a political community concerned about data protection well to have that concern articulated and symbolically validated in the form of a right in their constitution. But legally the specific inclusion in the constitution would change nothing: The courts already recognize such a right, deriving it from a more abstract right. Perhaps its explicit codification may embolden the judiciary to be less deferential to political actors when adjudicating questions concerning data protection. But we should not exclude the possibility that the symbolic validation of the right might function primarily as a distraction. Instead of discussing more concrete issues, such as the more effective control of the intelligence services or the demands to be made on companies relating to data management, progress takes place and political profiles are sharpened in the domain of the symbolic only.

[44] This appears to be a core strategy of Fidesz and Viktor Orban in Hungary. See Kim Lane Scheppele, Hungary's Constitutional Revolution, *NYTimes OpEd* Dec. 19, 2011.

[45] See Ran Hirschl, Towards Juristocracy (2004).

deference: What level of deference, "standard of review," what "margin of appreciation" should a human rights judiciary concede to national political institutions and the democratic process when it applies the proportionality test and assesses the reasons put forward by the parties?

Here it must suffice to propose a basic conceptual distinction to help illuminate the issue.[46] As I argued above, the proportionality test, structured as it is, effectively establishes a test of public reason. But this test of public reason, as it is applied by courts, is not applied to generally track the requirement that justice be done. The proportionality test itself may indeed track justice. But courts insist on applying that test in a deferential way, using doctrines such as "the margin of appreciation," "standards of scrutiny," or comparable doctrines. The point of these doctrines is to fix the difference between what justice requires (a question to be determined by other, more participatory processes) and what is reasonable. Reasonableness here refers to the idea of justifiability in terms of public reason, that is, justifiability in terms that free and equals might reasonably accept. Debates about the proper level of deference and the scope of the margin of appreciation in specific contexts ought to be understood as debates about the epistemic contours of the distinction between rights-based justice and reasonableness.

This means that human rights adjudicating courts are best understood as *policing the boundaries of the reasonable, not the boundaries of justice*. Participants in the democratic process should aspire to justice, but human rights courts do not review whether they succeed in that endeavour. The bar is set lower, by focusing merely on reasonableness understood as the justifiability in terms of public reason. The job of courts is not to govern and generally tell public authorities what justice and good policy requires. But it is their task to detect and strike down as instances of legislated injustice measures that, whether supported by majorities or not, impose burdens on some people, when no sufficiently plausible defence in terms of public reasons can be mounted for doing so. This is what it means for courts to apply the law in the context of human rights adjudication.

This understanding of the role of courts acknowledges what John Rawls has called "the circumstances of justice" and Jeremy Waldron has called "the circumstances of politics": there is often reasonable disagreement about what justice requires and that reasonable disagreement can only be legitimately settled by an appropriately participatory political process involving democratically accountable representatives. But it also insists that not all winners of political

[46] For an extended argument along those lines see M. Kumm, Socratic Contestation and the Right to Justification, 4 *Law & Ethics of Human Rights* (2010), 169.

battles and not all disagreements, even in mature democracies, are reasonable. Often they are not. Political battles might be won by playing to thoughtless perpetuation of traditions or endorsement of prejudicial other-regarding preferences, ideology, fear mongering or straightforward interest-group politics falling below the radar screen of high-profile politics. The point of the practice of rights based justification is to determine whether the settlement burdening the rights claimant is in fact reasonable.

The implicit claim is that acts by public authorities that are unreasonable in the sense of lacking justifiability in terms of public reason can make no plausible claim to legitimate authority in a world committed to human rights. For those acts the question is not what justifies the "countermajoritarian" imposition of outcomes by non-elected judges. The question is what justifies an act, when it can be ascertained with sufficient certainty in an impartial procedure involving independent judges that it imposes burdens on individuals for which there are no reasonable justifications.

2 *Differences on Application: Legitimate Difference as a Result of Difference of Relevant Local Context*

A great deal of variance can be accounted for by pointing to different levels of specification, along the lines analysed above. But other differences are substantive. A substantive position protected as a right in one human rights instrument or under one court's interpretation, is simply rejected in another. To mention some well-known examples, limited to the transatlantic context:[47] The death penalty is now categorically prohibited in Europe, but not in the United States. A great deal of hate speech that enjoys protection under the 1st Amendment of the US Constitution can be and is prohibited in Europe. Freedom of religion in Europe has been held to be compatible with a wide range of public practices that the US Constitution prohibits. Here I can only very briefly discuss two kinds of factors that account for such differences and what they imply for our understanding of universal human rights.

The first factor is the *differences in context* across jurisdictions. Some of the differences in what is recognized as a human right might be attributable to differences in context, which justify and account for that difference. Just to gesture at possible arguments, leaving open the question of whether any particular one can ultimately be sustained: Might it not matter for the purpose of justifying the exclusion of religious symbols from public schools in the US that

47 For an illuminating set of contributions examining these questions across issue areas see Georg Nolte (ed.), US and European Constitutonalism (2005).

the US is a deeply diverse and religiously vibrant country? And as a corollary, might it not be relevant to the claim that crosses in classrooms do not violate the rights of Non-Christian pupils in Italy,[48] that Italy is not only relatively homogenously Catholic, but also that religious symbols and art have acquired a secular, cultural meaning for many and appear to be devoid of any kind of missionary zeal? Might the establishment of a national Church in places like the UK or Scandinavian countries be tolerable exactly because of widespread religious disinterest and the cultural relativization of religion, thereby making it easier for those who really want to have nothing to do with a faith that is not theirs not to feel excluded or threatened? Might there be a difference between a Holocaust survivor being subjected to Nazi demonstrations on the streets of Berlin or in Skokie, Illinois? Might the experience of the Weimar Republic, which saw a liberal constitutional democracy fail because it lacked democratic support both among ordinary citizens and among its elites, justify prohibitions of parties seeking to abuse the democratic process to abolish democracy and establish a communist or fascist dictatorship? Different circumstances across communities may justify different specifications of human rights, thus justifying variance within a universalist framework of justification. The concrete and local norm has to be justifiable in terms of universal human rights norms, but the human rights norms are only properly specified locally, if they take account of the relevant local contexts. The tension between the universal and the local is thus internalized in the process of human rights concretization and specification.

3 *Interpretative Disagreement about Rights*

The third factor to explain variance is *genuine or "interpretative" disagreement* about human rights. Wherever human rights are codified, be it in global international treaties, regional treaties or national constitutions, human rights provisions are conceived as the foundation and framework for a particular conception of law and politics. That conception of law and politics never loses focus on the fact that what public authorities impose on others in the name of good policy, justice or legality has to be justifiable to them as a free and equal partner in the practice of collective self-government. But persons – even well-informed and motivationally appropriately disposed persons – will disagree about what justice and good policy will require in concrete circumstances. As I have argued above, from a normative point of view the practice of ordinary politics is best understood as the participatory struggle for the best specification

[48] See ECtHR *Lautsi* v. *Italy*, Judgment of March 18, 2011.

and concretization of our human rights as free and equals under conditions of reasonable disagreement. Once we specify a right in the context of an ordinary political process, we no longer call the concrete specification a human right, but a statutory or administrative right. We recognize the possibility that other political majorities or administrative decision-makers may legitimately conclude that the right is better specified differently. We use the language of human rights only to challenge a particular specification as falling outside the domain of reasonable specifications. Unreasonable specifications of a right are by definition specifications that can´t be demonstratively justified to those burdened by them as free and equals.

The problem is that there is not just reasonable disagreement about what justice and good policy requires. There is also – in part not unreasonable – disagreement about the boundaries of reasonable disagreement. Disagreements about whether something should be respected as a human or constitutional right are effectively disagreements about the boundaries of reasonable disagreement. Those boundaries, it turns out, are also subject to disagreement. Human rights concretization and specification is itself an activity that is subject to the general circumstances of politics: It is burdened by reasonable disagreement. In the context of norm concretization and specification that disagreement is addressed in what Seyla Benhabib has called iterative democratic processes.[49] These are participatory processes of contestation and deliberation leading to a more concrete constitutional settlement. It should not be surprising that different iterative democratic processes – whether the process of constitution-giving or gradual further norm-concretization by way of human rights litigation – can lead to slightly different settlements. The idea of human rights is connected to a universalist understanding of its core commitments to freedom, equality and democratic self-government. But it is a mistake to think of human rights concretization and specification as a task that does not involve a participatory process of contestation and deliberation at the end of which different settlements about rights might well be reached. The existence of interpretative disagreement does not mean that there is no one right answer. Like many of my East Coast law professor colleagues I am convinced, for example, that the Supreme Court was simply wrong to hold in *District of Columbia* v. *Heller*[50] that it is a violation of a persons right under the 2nd Amendment, if a municipality imposes general restrictions on residents for owning handguns and requiring all firearms to be kept unloaded and disassembled or bound by trigger lock, or that the Supreme Court was simply wrong to interpret freedom

[49] Seyla Benhabib, Another Cosmopolitanism (2006).
[50] *District of Columbia* v. *Heller*, 554 US 570 (2008).

of speech to preclude the kind of campaign of campaign finance regulation that was at issue in *Citizens United* v. *Federal Elections Commission*.[51] The legislatively imposed restrictions at issue in both of these cases, I believe, clearly do not fall outside of the boundaries of what a democratic legislator might reasonably determine is a good way to strike a balance between competing concerns. If the rest of the international community insists that freedom of speech should not be interpreted that way and that there is no right to bear arms that would be incompatible with reasonable firearm restrictions, they are simply right. These are examples where differences across jurisdictions are merely the result of some getting it right and others getting it wrong. There is no reason for us to presume that there is no right answer to these or other questions relating to the determination of rights. There is just no way of knowing what the right universal answer is, unless we enter into the debate and resolve that issue for ourselves, hoping to persuade others of our position eventually or, alternatively, to be convinced that we were mistaken in our views. The epistemic uncertainty that is evidenced by the fact of interpretative disagreement is something that human and constitutional rights law shares with all law. I see no reason why it should be a cause of special concern, unless one is misguided by expectations of certainty that is rarely to be found in human affairs.

V ONCE THE POINT OF RIGHTS IS CLARIFIED, THERE IS NO PUZZLE

It turns out that the three puzzles have relatively straightforward solutions, once we are not misled by a false preconception about what rights are and what their point is. First, the seemingly limitless scope of rights that gives rise to the challenge of "rights inflation" is connected to the constitutive function of rights. Very much true to their roots in the eighteenth-century American and French revolutionary traditions, the point of human rights is not only to constrain law and politics in the name of some fundamental human interests, however conceived. Instead human rights constitute a particular kind of law and politics: a conception of law and politics as justice-seeking among free and equals. If this is their moral point, we should expect the domain of human rights to be coextensive with the domain of political justice and that is indeed a tendency that the phenomenon of "rights inflation" points to.

Second, the apparent "casual override" that is reflected in the ubiquitous use of the proportionality test is connected to the distinctive contestatory and justificatory function of rights. The proportionality test, structured as it is,

[51] 558 US 310 (2010).

effectively establishes a test of public reason. Human rights norms empower rights-bearers to challenge existing power relationships by insisting that those relationships be susceptible to justification in terms of public reason. That test is met only, if behaviour of public authorities is demonstrably susceptible to a plausible justification in terms of reasons that the addressee(s) might reasonably accept.

Finally, variance between global, regional, and national human rights instruments and different interpretations of rights by courts and political actors across jurisdictions also has an important moral point: Variance is best understood to reflect the requirement internal to universalist human rights practice itself to respect the values of democratic self-government and sovereign self-determination. Variance can be the result of one of three things: Differences in the level of abstraction/specification, the existence of relevant differences across local contexts that justify different specifications, or run of the mill genuine interpretative disagreement about how a right is best specified under given circumstances. If the arguments provided above are correct, the three structural features of human and constitutional rights practice I have focused on do not undermine the idea of universal human rights. On the contrary, we would have reasons to be very surprised if these features were not present, given their connection to important moral concerns.