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HUMAN RIGHTS LAW

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Introduction

Any analysis of the role of human rights in domestic constitutional law must grapple with a central tension lying at the core of the relationship between the two. Whereas constitutional law is inevitably grounded in a particular place covering defined sets of people, human rights aspire, as the term makes clear, to transcend the political in the name of entitlements that inhere in people wherever they are from and regardless of the governmental arrangements under which they live. National constitutional law can almost always point to a specific moment when the foundational document from which all else follows is agreed and brought into effect, and even in those very few places where this is not the case (the United Kingdom for example) the 'constitution' is made up of a bundle of documents (statutes; judicial decisions; shared practices) which are similarly rooted in time as well as in place and people. In this way too human rights appear different: the vast ambition of the phrase involves a claim to stand outside a history made up not only of people and places but of foundational turning points as well.

The bridge between these antithetical perspectives in the national constitutional environment is human rights law. Here the universalist instincts of human rights are given voice but in a way that harnesses their impulsive ethical force. The term is tamed by being forced to take a legal shape recognisable to (local) constitutional law while the latter is compelled through its reception of human rights to make some concessions to the universal. As we shall see the tension between the two is played out in different ways around the world but in our contemporary democratic polities there can be little doubting that the two need each other. Human rights without law are (merely) a bunch of activists' claims or philosophers' dreams. But constitutional law without human rights (or whatever the relevant document chooses to call them: more on this shortly) looks altogether too morally neutral to be entirely trustworthy. There was a time when in at least some places it was thought that democratic society could get along just fine with no moral basis to government other than agreement on how laws were made, enforced and interpreted (with even these structures themselves being up for grabs). That is rarely now believed to be the case even in those places where it had once held sway, and 'human rights law' is what has rushed to fill what has increasingly come to be believed was an ethical gap at the core of democratic government.

In this chapter our task is to unravel the practical implications of the tension just identified and assess how effective human rights law has proved to be at managing the constitutional conflicts that it produces, across various jurisdictions. There are three large-scale paradoxes generated by this sterling effort of human rights law at bridge-building, and before we turn to the substance we shall elaborate on these now: understanding them will help guide us through the constitutional thickets to follow.

First – in a subset of the central tension with which we started - there is this dependence of human rights law for their very existence on the sort of grounded constitutional moments that they appear

by their very nature to demand to transcend. How does human rights law escape the claim to ahistorical universalism that is so much the rationale of the field of which it is the legal offshoot? Does the bridge to the grounded from the ethereal not inevitably drag the latter down with it? Now it is true that there are rare moments when even in democratic societies adjudicators of disputes find in 'natural law' a source of right and wrong that trumps not only ordinary law but (even) the constitution to which that ordinary law is itself uncontroversially subject. A famous dissenting judgment from Ireland in the 1930s did exactly this, with no less a figure than the Irish Free State's inaugural chief justice Hugh Kennedy reaching into a quasi-religious space to find constraints on a government that were rooted not in the apparently authorising words of the constitution he was interpreting but rather in a timeless sense of right and wrong.[1] Such attempts are rarely made and when they come along they invariably fail. For all his stature Kennedy's reflections were unpersuasive; no democracy can allow judicial interventions like these to gain the upper hand if it wishes to avoid a drift to theocracy at worst, juristocracy[2] at best. But this being the case, how then does the universal stay afloat in the sea of localism in which it finds itself? As we shall see the answer to this varies from place to place and across time. The extent to which human rights law is able to reach beyond its moment of national birth depends (ironically, it might be thought) on the sort of birth they have, how many they are, how robust, how ambitious.

Our second paradox leaps out at us the moment we acknowledge how indelibly our subject is rooted in democratic governance: human rights appear to thrive best of all in the political cultures whose commitment to the popular will appears to leave no room for them. This is another way of saying that the protection of human rights via an independent rule of law is now regarded as a key component in a properly functioning, modern democratic state.[3] We must distinguish here between such places and the sort of polities in which in this chapter we have no interest: states with declarations of commitments to human rights which are either creatures of the executive will[4] or those in which sentiments such as these are designed merely to function as camouflage for the exercise of despotic power.[5] Totalitarian states can have 'human rights' – Stalin's constitution of 1936 is full of them.[6] Fascist regimes likewise – Hitler deployed his human rights conscience in the pre-war 1930s when he expanded his territorial reach under cover of interventions to protect maligned German minorities in neighbouring states.[7] In this chapter we are not concerned with the 'bad-faith' use of human rights in this way. Our assumption is that the phrase is being deployed in

[1] *The State (Ryan) v Kennedy* [1935] 1 IR 170, at p 204: 'every act, whether legislative, executive or judicial, in order to be lawful under the Constitution, must be capable of being justified under the authority thereby declared to be derived from God'. (Note the 'thereby' – even here the invoker of natural law is hedging his bets about their source.)

[2] K D Ewing, 'The Bill of Rights Debate: Democracy or Juristocracy in Britain' in K D Ewing, C A Gearty and B A Hepple (eds), *Human Rights and Labour Law. Essays for Paul O'Higgins* (London: Mansell Publishing, 1994), ch 7.

[3] H Brunkhorst, 'Constitutionalism and Democracy in the World Society' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010) ch 9.

[4] P Brooker, *Non-Democratic Regimes* 3rd edn (Basingstoke: Palgrave Macmillan, 2014).

[5] C Gearty, *Liberty and Security* (Cambridge: Polity Press, 2013).

[6] See in particular ch 10 of that constitution: http://www.departments.bucknell.edu/russian/const/36cons04.html#chap10 (accessed 26 September 2017).

[7] As with Danzig and Poland: see Hitler's speech to the Reichstag on 1 September 1939: http://avalon.law.yale.edu/wwii/gp2.asp (accessed 26 September 2017).

tandem with those other bench-marks of civilised democratic living, popular elections and an uncompromised judiciary.

But if this is the case, then how can we be describing democratic government? The whole point of the democratic revolution was surely to sweep away constraints on the 'people's will' whatever shape they happened to take in their subtle or not-so-subtle defence of vested interests? How can a 'proper' democratic regime submit to human rights law when this inevitably entails genuflection before the judicial branch, a cohort of personnel who may well (depending on where we are looking) have been in the van of anti-democratic reaction in the years of struggle? The only way out of this paradox – and the point is hinted at in our reference a moment ago to human rights backed by the rule of law as a 'key component' in any such system – is to dissolve it by redefining democracy, as Ronald Dworkin and other key rights-thinkers have done: the will of the people ruling as they will becomes just a type (and the wrong type) of democracy, 'majoritarianism', whereas true, authentic democracy involves expression of the will of the people of course, but now hemmed in by a set of moral boundaries that guard against populist transgression.[8] Representative democracy does not get to play free-style on the whole playing surface but only on a pitch with boundaries set by the referee to prevent any straying out-of-bounds. Constitutional human rights are the lines on the pitch that ensure the democratic game is played within those proper limits. And inevitably, given the way we construct representative government with its high emphasis on separation of powers, it is the judges who play the role of referees.

Our final paradox concerns claim and delivery. There is an immense mismatch between the loud ethical claims of human rights law on the one hand and their singular impotence when viewed in isolation from other branches of the state on the other. Here are claims that talk big but carry no stick at all. The bark is not only 'worse' than their bite; without the help of others there is no bite at all. The dependence of human rights on the various organs of the state to give them any kind of effect is total. Human rights are, after all, not an organ of the state, jostling to achieve a position where they can get things done, an executive branch at odds with the legislature or vice versa. At bottom they are merely claims on (constitutional) bits of paper whose potential wholly depends on a group of interpreters, the judges, who are themselves (as 'the least dangerous branch'[9]) dependent on the good-will of their colleagues across the polity if their constitutional commands are to have any effect. In this regard the probably apocryphal remark attributed to US President Andrew Jackson about a particularly controversial ruling by the then US chief justice and his colleagues on the Supreme Court, 'John Marshall has made his decision; now let him enforce it!',[10] stands as a warning against excess of which all judges tempted by the first phrase rather than the last word in the term 'human rights law' need to be mindful. (And the case about which the remarks were supposedly made, *Worcester v Georgia*,[11] was what we would today regard as an important ruling on the rights of indigenous people.) Practice (in terms of what actually happens) does not necessarily follow from

[8] R Dworkin, *Taking Rights Seriously* (London: Gerald Duckworth and Co, 1977); R Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986).
[9] A Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of American Politics* 2nd edn (New Haven: Yale University Press, 1986).
[10] 'The decision of the Supreme Court has fell still born, and they find that it cannot coerce Georgia to yield to its mandate' is less glamorous but more accurate: New Georgia Encyclopaedia http://www.georgiaencyclopedia.org/articles/government-politics/worcester-v-georgia-1832 (accessed 26 September 2017).
[11] 31 US (6 Pet) 515 (1832).

what the constitutional text declares to be the case by way of enforcement mechanisms and duties. How do constitutions avoid human rights merely adding to the beauty of the instrument, ethical adornments on the outside of the civic building but offering precious little shelter for anyone with in?

In this chapter the aim is to grow a deeper understanding of our subject by seeking to resolve as much as we can each of these paradoxes in turn, thereby doing the best we can to understand the central tension between the universal and the particular that lies at the heart of our subject (and with which we began). First, though, there are unavoidable issues of definition, not about what democracy means this time but rather concerning the sorts of rights with which we are about to concern ourselves.

What are (constitutional) human rights?

The parenthetic qualifier in this question does a lot of work. 'Constitutional' dramatically narrows the range of potential answers, driving (as we have seen) the response mainly into the field of national frameworks of government: 'mainly' because while we are still in the (Westphalian) mind-set of assuming that all sovereign power is inevitably exercised by independent states, new arrangements for the pooling of sovereignty have recently been creating supra-national constitutional law: more on this shortly. For now though, restricting ourselves to the national raises a predictable problem of nomenclature: does a state have to refer to certain items in its constitutional in-tray as 'human rights' for them to be treated as such here? The answer can hardly be yes as this would drive us down a nominalist route that would put the scholastic ancients to shame; ignoring this place or that not because they have not raised questions of great importance of the sort we have just been discussing but because their basic constitutional document happens not to describe them as 'human rights' is, surely, an obvious wrong turning. But if the subject is not to be limited to 'human rights' what control can we place upon it?

The discussion of the second paradox in the last section contains the key clue. We are not concerned only to find the 'human rights' term; it is what the term signifies in a constitution that matters. We are after the constitutional arrangement that it connotes, howsoever these are described. So we can deploy other phrases and words just as well where we find on close examination that they are doing exactly the same kind of constitutional labour as 'human rights'. Put shortly as we described a moment ago that work involves the demarcation of the democratic pitch, the name we give to the boundary lines. In more 'constitutional' terms what we are looking for are those arrangements under which individual entitlements are to be found sitting above the democratic bustle to which the legal outputs of the political sphere need (or are expected or are asked) to conform. What exactly these are called – human rights; civil rights; constitutional rights; or whatever – ought to be neither here nor there: it is its essence as an intrusive supra-legislative engagement that captures our interest. And this invasive vigilance can itself take many shapes, across a spectrum from confident command to diffident dialogue: it is not the consequences of such interventions that define our subject so much as it is the existence of this court-policed layer of morality above the political.

Approached in this way it becomes clear that 'human rights law' is an altogether more nuanced and contextually-driven subject than the term might seem to suggest. We can confidently assert that human rights law predates (even if it anticipates) the rise of democracy and has long co-existed

successfully with it. Less confidently we can also say that there are, broadly speaking, five historical situations out of which, if we have to generalise, we can say that human rights law has emerged. [12] First up are those situations where such laws flow out of internal revolution. The most famous epitome of this is of course the France whose revolution in 1789 produced that dramatic claim to universal freedom in the shape of the Declaration of the Rights of Man and of the Citizen.[13] Following from this was the Constitution of 1793 setting out a range of rights that were proclaimed to sit above the polity as guarantors of the promises made during the years of struggle.[14] At the same time as these French initiatives, the civil rights set out in a series of amendments to the constitution of the newly formed United States of America reveal a second kind of 'human rights' construction, one driven this time not by internal revolution but by a vibrant anti-colonial impetus.[15] A couple of years after these American guarantees had been given credible legal force, in *Marbury v Madison*,[16] came the Haitian constitution of 1805, another consequence of fundamental change wrought by resistance to a foreign status quo.[17]

In these earliest of human rights instruments, the authority of the judicial branch was available even in such pre-democratic times to protect citizens from abuse by the government across the board. And both kinds of situation have arisen regularly ever since, well into the democratic era, generating bills of rights which stand out as celebratory features of a new system of government achieved by a people liberated from within (post-Soviet states for example) or from without, as with so many post-colonial states in the years after the Second World War.[18] Sometimes the two merge, combining features of both, as with post-Soviet satellite states for example and arguably also South Africa and Zimbabwe, whose pre-constitutional domestic overlords were leftovers from previous periods of colonial domination that had turned themselves into domestic minority overlords. What is common to both of these constitutional situations is the existence of a dramatic moment of change, a point on which history turns. The deployment of supra-legislative guarantees of better governmental behaviour is in each case driven from within by the domestic agents of change – 'we will not repeat the oppression of those whom we supplant' is the rallying cry.

The third situation has a different kind of turning point. In this category, the emergence of human rights (broadly defined) has arisen where a state has needed to be rebuilt after violent armed conflict, against an external enemy (as in the case of Germany, Japan and Italy for example) or within its own borders (the United States after its civil war of 1860-65). In each case there is a victor-party for whom the imposition/agreement of a human rights oversight mechanism in the defeated jurisdictions is seen not only as a moral intervention similar to the first two of our categories ('never

[12] See for an acute study of constitutionalism in one region, with a strong emphasis on social rights, R Gargarella, *Latin-American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (New York: Oxford University Press, 2013).
[13] See http://avalon.law.yale.edu/18th_century/rightsof.asp (accessed 26 September 2017).
[14] Para 122: http://oll.libertyfund.org/pages/1793-french-republic-constitution-of-1793 (accessed 26 September 2017).
[15] Amendments 1 – 10 of the US Constitution: https://www.archives.gov/founding-docs/bill-of-rights-transcript (accessed 26 September 2017).
[16] 5 US (1 Cranch) 137 (1803).
[17] See http://faculty.webster.edu/corbetre/haiti/history/earlyhaiti/1805-const.htm (accessed 26 September 2017).
[18] D Grimm, *Constitutionalism. Past Present and Future* (Oxford: Oxford Constitutional Theory, Oxford University Press, 2016).

again') but also as a shrewd move in post-conflict regeneration. Reconstruction in the post-civil war United States was an exercise in assimilation heavily dependent on law and on the renewal of 'civil rights' in particular. For their part, the embracing of written guarantees to which the new democratic systems of Germany and Italy were required to be subject may have most obviously guarded against the revival of fascism but they also served as a deterrent against the emergence of a majority-sanctioned move towards socialist government, as embodied in the then powerful Soviet Union, its armies located intimidatingly close by.[19]

The fourth instance of human rights resurgence, that of Neo-Enlightenment as it may perhaps be most sensibly called, is different in every way. It arises at a moment of relative political stability, one that is experiencing none of the productive trauma common to our first three categories. In this kind of case, the domestic system largely works, but gets human rights law nonetheless. If nothing is broken, why the need to embark on a large-scale programme of repair? The answer lies in how these states imagine themselves, as places where things can be even better, and also where such improvement is needed to tackle problems which though not so severe as colonial or domestic oppression or defeat in war are, to the minds of those exposed to them, bad enough to warrant tackling in this radical way. The Canadians enacted a bill of rights in 1958 before a grand scheme of national improvement produced its well-known Charter of 1982, designed to bring all the Provinces and peoples more closely into the Canadian family while also establishing a new framework of basic individual rights. Often, as with Canadian Premier Pierre Trudeau and the desire to tame the rebellious province of Quebec, there will be political calculation behind the embracing of rights-talk. In the first term of Tony Blair's New Labour administration of 1997-2001 in the United Kingdom, a human rights law was enacted as part of a package of constitutional measures designed to display radical intent on the part of a government that was in fact adopting highly conservative fiscal measures at the time. Similar rights-interventions have occurred in New Zealand and a number of Australian states, a 'new Commonwealth model of constitutionalism' as one scholar has perceptively called it.[20]

The final way in which constitutional human rights are likely to emerge is as part of a coherent framework of state-building. This might be in a situation where a fresh constitutional settlement has been devised as a means of transitioning out of a long-term state of disorder into one of greater stability and with more widely accepted governing institutions.[21] Unlike our third category just referred to, here there is no victor-party imposing human rights as part of its triumph; rather the guarantees set out in a new human rights law of this sort become themselves an important element in an emerging pathway to peace.[22] Northern Ireland is an outstanding example of this sort of situation, with both of the relevantly engaged states (the United Kingdom and the Republic of Ireland) enacting a regional human rights instrument (the European Convention on Human Rights) into their domestic law as one of a number of a menu of options deliberately chosen to signal to all

[19] S Gill and C A Cutler (eds), *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014).

[20] S Gardbaum, *The New Commonwealth Model of Constitutionalism. Theory and Practice* (Cambridge: Cambridge University Press, 2013).

[21] And in such situations the breadth of the rights embraced can be very wide: S Liebenberg, *Socio-Economic Rights. Adjudication under a Transformative Constitution* (Claremont: Juta, 2010).

[22] Reflecting on how South Africa might well fit this category as well as into the second just discussed reminds us of the inevitability of some degree of fluidity as between these various models of constitutional origins.

the communities in the Province that there was to be no turning away from the agreements reached in the Good Friday Agreement of 1998. The field of transitional justice contains many similar examples.[23]

In this category, there is also the case of the aspirant state realising its potential through the embracing of rights. We occasionally see human right law as an element in state-building playing out on a larger scale, as a key ingredient in the creation of a new framework of government covering multiple, previously sovereign entities. Something like this happened in the United States in the early to middle 20th century when the widening application of constitutional rights to state as well as federal authorities played an important part in the holding of all the states in that Union to account for the conduct of their agents towards the individuals under their control. The federal Supreme Court had already done early judicial work in hewing a central federal authority out of a constitutional framework that had been at best uncertain about this demarcation, at worst positively better-disposed towards state power. [24] Much the same process has repeated itself in what we now think of and call the European Union but which began as a loose affiliation of sovereign states combining to improve their overall trading effectiveness. The European Court of Justice has done pioneering federalising work in a way that echoes that of the 19th century US court, but (unlike in that jurisdiction) from the start it has deployed the language of fundamental rights as a means of securing its desired outcome, a more unified Europe of shared values and agreed basic laws to which all domestic constitutions must adhere.[25] As the Common Market has taken on this more state-like demeanour, first as a set of Communities and then as a Union, its emphasis on rights has become clearer and more pronounced. The embracing of a social aspect to Union activities in the 1980s led to a sharp increase in human rights oriented initiatives on such topics as workers' rights, equality and non-discrimination. As the Union's ambition has grown and its remit deepened, so the articulation of its rights agenda has become clearer, culminating in the Charter of Fundamental Rights agreed in 2000 and of binding legal character since the coming into force of the Treaty of Lisbon in 2009.[26] It is not surprising to see the rights of EU citizens and the status of the EU Charter at the forefront of discussions about the United Kingdom's scheduled exit from the European Union in March 2019: those who see the EU as merely a tool of the markets have not been paying attention to developments over the last two decades. And human rights and the rule of law are key – perhaps the key – principles underpinning this new emerging, state-like power.[27]

If these then are the various ways in which constitutional 'human rights' (however they happen to be described) can come about - and our five cannot be definitive because by definition our enquiry has been empirical and can change with the emergence of new forms of constitution-making - , what

[23] R Buchanan and P Zumbansen (eds), *Law in Transition. Human Rights, Development and Transitional Justice* (Oxford; Hart Publishing, 2014).
[24] A Cox, *The Courts and the Constitution* (Boston: Houghton Mifflin, 1987) is a compelling, highly readable account.
[25] R Schütze, 'Constitutionalism and the European Union' in C Barnard and S Peers (eds), *European Union Law* (Oxford: Oxford University Press, 2014).
[26] See http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (accessed 26 September 2017).
[27] See S Weatherill, *Law and Values in the European Union* (Oxford: Clarendon Law Series, Oxford University Press, 2016). I have recently argued that these values are at the core of an emerging European culture: 'Unpicking Europe's Cult of Culture' *The New European* 21-27 September 2017, 30-31: http://www.theneweuropean.co.uk/culture/conor-gearty-europe-culture-1-5211899 (accessed 18 October 2017).

then is to be found in these various rights' instruments? It is time now to return to the three paradoxes with which we began and through which we hope to make deeper sense of our subject, beginning with our first and the one that most demands our attention, the conceit that with human rights we have a set of transcendent truths that the necessities of history mean can only be realised in highly particular sets of circumstances.

The Range of Human Rights

The German constitution of 1949 took effect as a basic law and contained in its opening set of articles what are called 'basic rights'.[28] Pride of place is given to the bald statement with which the document opens: 'Human dignity shall be inviolable'[29] and then, almost immediately, '[t]he German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world'.[30] The rights that follow (personal freedoms; equality before the law; freedom of faith and conscience; freedom of expression, arts and sciences are the first five, with assembly, association, religious, privacy property and asylum rights following) are specifically stated to 'bind the legislature, the executive and the judiciary as directly applicable law'[31] and while restrictions are permitted the 'essence of a basic right' may never be affected.[32] Now consider in contrast the rights to be found in the South African constitution: extensive, wide-ranging and ambitious, running to some 27 substantive articles.[33] The reach is much wider: the German equivalents for sure, but also such matters as access to information, environmental protection, cultural rights, health and social security. The difference between the two can hardly be explained away by some claimed distinction between 'basic' and other rights. Nor does some supposed historical movement (the unfolding of the three 'generations of rights' say) make any immediate sense. As has already been intimated in our more general discussion, each is a creature of its specific moment, the German a victors' anti-Communist constitution for sure but also a reaction to the Nazi hegemony which had first twisted the country's moral compass out of recognition and then destroyed it physically in war; and in South Africa a concerted effort to contrive a rights document so comprehensive as to be a vital act of nation-building and of national reconciliation in itself. The exercise could be multiplied writ-large across the canvass of global constitutional law. Constitutions, and constitutional rights within them, are like siblings in a large family – sharing broad resemblances, each nevertheless remains individually distinct.

While this makes comparative work difficult it does not make it impossible.[34] We have already seen that credible generalisations are possible so far as the origins of constitutional rights' instruments are concerned, and the same can be said for their content. Broadly speaking three family resemblances are detectible, at least within the democratic culture which as we have already explained must be our starting assumption so far as the constitutional rights of interest to us here

[28] The constitution can be read at https://www.btg-bestellservice.de/pdf/80201000.pdf (accessed 26 September 2017).
[29] Art 1(1).
[30] Art 1(2).
[31] Art 1(3).
[32] Art 19(2).
[33] See https://www.gov.za/documents/constitution/chapter-2-bill-rights (accessed 19 October 2017).
[34] See generally M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012).

are concerned. For reasons that will become obvious shortly these can usefully be called 'thin', 'thick' and 'innovative' democratic rights. Let us deal now with each in turn.

First, there are 'thin' democratic rights, those that grow out of the 'majoritarian' approach to our subject that we earlier discussed. If there is any role for rights in a system which allows the democratic legislature to produce whatever laws it wishes, [35] then it can only be as means of keeping that democracy in shape, stopping it from straying into other, more authoritarian forms of government. On this analysis if the building blocks for a properly functioning democratic system are in place then what the representative assembly speaking through law chooses to do with that power is neither here nor there – but constitutional rights are the guardians of the strength of those blocks. To change the metaphor from construction to locomotion, they are the oil that enables the democratic machine to be driven by its electoral victors. This points us in the direction of what were in British law known as civil liberties[36] and what in more contemporary constitutional human rights terms we think of as civil and political rights. The freedoms of thought and conscience, and of expression, association and assembly are pre-eminent among these: you cannot have a functioning democracy in which thoughts cannot be hatched and/or preventing from being made the focus of active debate. The right to non-discrimination ensures that these freedoms are not protected unevenly, favouring one 'acceptable' political community over others. What we now call 'due process' ensures that dissent is given its day in court, judged by independent persons (judge and, in the common law tradition, jury) rather than partisans. On its outer margins, rights such as those to life, liberty and not to be tortured ensure that the political environment is not polluted by fear. At the apex of any such system is the right to vote.

Here we have a major preoccupation of very many constitutional rights instruments.[37] Civil and political rights have become the most predictable content to be found in such documents; they may contain more (as we shall see shortly) but it is a rare framework that does not contain such rights. Building on the US, French and Haitian early models at the turn of the 18th/19th centuries, as enlightenment culture grew into the modern, the idea took hold that the civil and political freedoms that had been denied the drafters in their revolutionary struggles should from their moment of victory onwards take pride of place in the new regime that they were creating, pious guarantees of good behaviour on the part of future rulers, capable of binding even impeccably elected leaders. This supra-political setting of the boundaries of the polity is to be found in constitutions in all the five categories we have discussed. It is strongly reinforced by international and regional human rights law: an example of the first being the International Covenant on Civil and Political Rights of 1966 and of the second the European Convention on Human Rights and Fundamental Freedoms (1950).

Two further points about the nature of these rights when they take this constitutional (rather than philosophical) shape can be usefully noted. First while such rights may begin life as political, their generalised character as constitutional rights inevitably gives them reach beyond the democratic necessities they have been designed to protect. Here the conjunction between the civil and political

[35] Such systems are often conceived of as Republican in nature: see R Bellamy, *Political Constitutionalism. A Republican's Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).
[36] C A Gearty, *Civil Liberties* (Oxford: Clarendon Law Series, Oxford University Press, 2007).
[37] See the data-base constructed by the University of Texas *Constitute* project: https://www.constituteproject.org/ (accessed 17 October 2017).

is a useful reminder that what works for politics plays for civil society as well: the freedom to express oneself reaches literature and art as well as its more direct targets; the right to a fair trial covers the petty criminal as well as the political trouble-maker; and so on. Second, it is always immediately obvious once rights are being translated into real life situations that there have to be exceptions to many of them or the democratic society that is their beneficiary will soon descend into anarchy. If the original document does not acknowledge this fact (as the US constitutional amendments, on the whole, did not) then the judges will have to fill these drafting gaps. Even if the caveats are there, it is in the determination of the range of the exceptional that the judges as arbiters of constitutional meaning find most of their work. How could this not be, to pick one salient example, when a rights framework like that of the Canadian begins with a declaration that 'the rights and freedoms set out in it [are] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'[38] The word 'only' here cannot hide the extent of qualification contained in the move from the philosophical to the politico-legal.

The need for qualifications to rights, expressed perhaps as an acceptance of their progressive realisation, is generally thought to be especially marked with regard to our second set of rights in the human rights family, those that are concerned with the protection of 'thick' democratic rights. Here the version of democracy that rights are required to protect is richer and more wide-ranging than that which we have just been discussing, driven by the strategic redefinition of what democracy entails that we have earlier observed.[39] The machine of government is not only given the oil with which to function but it is required also to drive in a particular direction, one that heads towards a society which cherishes the equal dignity of all, and in which life opportunities are guaranteed while protections against calamitous misfortune are also built into the design of the vehicle. The constitutional route towards realisation of this ambitious democratic plus model is via the entrenchment of social and economic rights. A well-known example of these is to be found in the South African Constitution, whose rights provisions extend well beyond the civil and political to embrace rights of access to, for example, adequate housing, health care, food and social security.[40] To the same effect are the constitutions of scores of constitutions worldwide.[41] Constitutions without explicit protection along these lines have on occasion been tempted to develop them by a process of interpretation, as in India where the 'right to life' has been given a very much broader texture than its drafters may have anticipated,[42] and even the United States which toyed with innovation along these lines at the height of its Warren/Burger court activism.[43] Of course how far these rights are allowed to dictate democratic decision-making with regard to policy and budget-making has been a difficult issue in most jurisdictions from time to time, and not only because of the perceived need for qualifications just referred to but also because, and we have seen this recently with the rise of neoliberalism, the mood of politics might well turn hostile to the very assumptions

[38] Canadian Charter of Rights and Freedoms 1982, section 1: see http://laws-lois.justice.gc.ca/eng/Const/page-15.html (accessed 17 October 2017).
[39] See text at n 8 above.
[40] The Bill of Rights is set out at http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng-02.pdf (accessed 26 September 2017). The housing guarantees are in art 26, those to health care, food and social security in art 27. See generally Liebenberg, n 21 above.
[41] See https://www.constituteproject.org/search?lang=en (accessed 17 October 2017).
[42] Art 21 of the Indian Constitution; *Unni Krishnan JP v State of Andhra Pradesh* 1993 AIR 217, 1993 SCR (1) 594. See generally M Langford (ed), *Social Rights Jurisprudence. Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2009).
[43] *Shapiro v Thompson* 394 US 618 (1969); *Goldberg v Kelly* 397 US 254 (1970).

about equality and socially just allocation of resources upon which social and economic rights depend.[44]

And finally less commonly but always interestingly there are those constitutions which develop a range of innovative rights as a way of meeting the particular concerns of their political communities. Canada provides another good example: its Charter of Rights and Freedoms contains many provisions aimed at supporting the cultural rights of French-speaking communities within this largely Anglophone polity.[45] New Zealand's bill of rights has a general clause guaranteeing the rights of minorities[46] and chapter 2 of South Africa's constitution, devoted to rights, includes guarantees related to the environment, language and culture, and cultural, religious and linguistic communities.[47] The innovative website developed at the University of Texas, *Constitute*, ambitiously seeks to provide a user-friendly data-base of the world's constitutions.[48] It finds no fewer than 146 constitutions with a right to culture, 40 with provisions on disability and ten guaranteeing indigenous rights of representation. And at the outer reaches of the possible there is Bolivia's (non-constitutional) Law of Mother Earth,[49] showing how far this language of rights can be pushed, even beyond the human (and therefore the remit of this chapter).

As we have moved through the family of rights from thin to thick to innovative, we cannot help but observe how the range of rights has been expanding. More and more issues that might have been thought to belong to the cut and thrust of the democratic process are being recategorised as rights, thereby (to recall our earlier analogy) shrinking the playing field of politics in favour of ever-narrowing and more intrusive boundaries. Where does this leave the referee, the adjudicator of when such politics ends and these (human) rights begin? We have already observed his or her importance in the policing of the exception. Our second paradox, about such an elevation of the judicial being possible only in a democratic polity that would seem to leave no room for it, combines now with our third, about the contrast between what courts are empowered to do and what actually happens, to put the judges at the centre of this final part of our comparative human rights journey. How do democratic constitutions manage the great power that appears to flow from entrusting human rights to the courts? How do the judges approach the exercise of the powers with which they have been entrusted in the name of human rights?

The Least Dangerous Branch?

A dramatic recent development in constitutional law has been the willingness of courts to deliberate on, and sometimes reject, the validity of elections that have been held in democratic states. *Bush v Gore*[50] will live on in the memories of not just constitutional specialists, and more recently we have seen declarations of invalidity affecting elections in Thailand,[51] Austria[52] and Kenya.[53] Arguably these

[44] P' O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 (4) *Modern Law Review* 532-554; C A Gearty, 'Neo-Democracy: "Useful Idiot" of Neo-Liberalism' (2016) 56 (6) *British Journal of Criminology* 1087-1106.
[45] See in particular general language rights (ss 16-19), minority language educational rights (s 23).
[46] s 20.
[47] See ss 24, 30 and 31 respectively.
[48] https://www.constituteproject.org/ (accessed 17 October 2017).
[49] http://www.worldfuturefund.org/Projects/Indicators/motherearthbolivia.html (accessed 17 October 2017).
[50] 531 US 98 (2000).
[51] 'Court Annuls Thai Election Adding to Political Crisis' *Financial Times* 21 March 2014: https://www.ft.com/content/b73523cc-b0c9-11e3-bbd4-00144feab7de (accessed 17 October 2017: pay wall)

remarkable interventions, which go well beyond the application to a specific issue of this or that right to assert control over the very way in which the political field arranges its players, both vindicate the status of the affected states as democratic and in doing so display the courts in their role as guardians of the fundamental right of citizens to live in a truly (rather than bogus or corrupt) democratic system. That is as may be but the feeling is unavoidable that something bigger is going on here than the enforcement of human rights of the sort we have been discussing, even those civil and political rights with which we began the last section.

So far as these political guarantees are concerned, there are it is true (and against the generality of an assumption we earlier made) sometimes occasions when rights are stated in absolute terms and furthermore presented in ways that allow no scope for democratic retaliation. The most famous examples are the US first amendment's stipulation that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances', and the German basic law's succinct declaration at its outset, already noted earlier, that 'human dignity shall be inviolable'[54] and that the 'essence' of any right can never be overridden.[55] Where context demands it however the courts find themselves compelled to manage the risk of absurd absolutism by reading caveats into words regardless of how bald they appear in the text.[56] The moral force of human rights cannot help but be diluted by contact with practical necessity. It is the same for those few pure human rights prohibitions that are to be found scattered across the globe's constitutions, those which, unusually, permit of no exception (on torture for example or slavery/forced servitude), though here the leeway is to be found in tightening definitions rather than in the contriving of exceptions.[57]

More frequent than unequivocal language of the sort we have just been discussing are the purpose-built limitations on rights that one finds in most rights instruments, across all the family members that we have earlier been discussing. The examples here could be multiplied to numbing effect but one or two may be permitted to make general points on behalf of all the rest. Thus we can recall our earlier observation about that generally impeccable rights' instrument the Canadian charter, that it starts with a general get-out clause, permitting 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. The South African equivalent allows limitations 'only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' and even then only after taking into account all relevant factors' (only some of which are enumerated). Both are typical in interpreting (and perhaps striking down) democratic laws by

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[52] 'Austria Presidential Poll Result Overturned' BBC News 1 July 2016: http://www.bbc.co.uk/news/world-europe-36681475 (accessed 17 October 2017).

[53] 'Kenyan Presidential Election Cancelled by Supreme Court' BBC News 1 September 2017: http://www.bbc.co.uk/news/world-africa-41123329 (accessed 17 October 2017).

[54] Art 1.

[55] Art 19(2).

[56] As with the first amendment to the US Constitution: A Lewis, *Freedom for the Thought We Hate. A Biography of the First Amendment* (Philadelphia: Basic Books, 2007).

[57] D Luban, *Torture, Power and Law* (Cambridge: Cambridge University Press, 2014) deals well with direct acts of torture and covers the Bush presidency's definitional efforts to debilitate the reach of the term: see esp Part IV.

reference to the needs of democratic society: the irony of this being done by unelected referees[58] is neither noticed nor appreciated given how such vigilant oversight is assumed in both places (and in others of which these are typical) to be of the essence of rather than in violation of democracy. A separate exculpatory avenue for rights-violation is the emergency route. No liberal democratic state wants to be so open-minded that its brains fall out;[59] as a result prohibitions on assaults on the 'free democratic basic order'[60] can often be found, as can permissions to act in controlled violation of constitutional norms in situations of crisis.[61] Once again we see resolution of the paradox of judicial power being resolved in favour of a reworking of what democracy requires, and in particular of the obligation required of all such polities, and supported by the courts, not to facilitate their own destruction.

A different tack is taken in those rights' frameworks where the courts are intentionally disabled from conclusive legislative override. The new commonwealth model already alluded to when we were discussing the origins of constitutional rights instruments is of particular interest in this regard.[62] The New Zealand bill of rights does not allow any kind of ruling against primary legislation,[63] while the Canadian equivalent does but then permits democratic retaliation in the shape of rights-proofed re-enactment of the offending measure (with pre-emptive parliamentary strikes also possible).[64] Somewhere in the middle is the United Kingdom's approach, followed in Ireland[65] and the Australian Capital Territory,[66] under which primary legislation may be declared to be in breach of human rights but without this involving any loss in the impugned law's validity.[67] Lawyers may condemn this as useless but there remain in the sorts of places that enact such laws strong commitments to human rights and the rule of law which have led to these declarations being implemented, albeit by executive and legislative choice rather than duress,[68] and the same is true of the override allowed the Canadian parliament which has never been deployed in (now) over thirty-five years.

This last observation is a reminder to us that the law is not always what it seems, that the theoretically weak (in terms of enforcement) can be stronger (in reality) than it appears. The reverse also holds true: courts often hang back from deploying to full effect the powers with which they have been entrusted, deploying the language of justiciability, remedy-deferral, deference and respect for separation of powers in order to do so.[69] If they do go so far as to rule in a way that

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[58] On which see R Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge, Mass: Harvard University Press, 2004).
[59] A variation on a well-known observation: see https://quoteinvestigator.com/2014/04/13/open-mind/ (accessed 17 October 2017).
[60] German basic law art 18.
[61] J Ferejohn and P Pasquino, 'The Law of the Exception: A Typology of Emergency Powers' (2004) 2 (2) *International Journal of Constitutional Law* 210-239. See generally A Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (Cambridge: Cambridge University Press, 2014).
[62] Gardbaum, n 20 above.
[63] New Zealand Bill of Rights 1990 s 4.
[64] s 33.
[65] European Convention on Human Rights Act 2003, s 5
[66] Human Rights Act 2004 s 32.
[67] Human Rights Act 1998, s 4.
[68] Joint Committee on Human Rights, *Human Rights Judgments.* Seventh Report of Session 2014-15. HL 130. HC 1088 11 March 2015.
[69] M Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Perspective* (Princeton: Princeton University Press, 2008)

provokes a legislative reaction then even higher levels of reticence kick in when it comes to assessing the validity of that response.[70] Judicial pugilism often seems to exhaust itself after one battle.[71] Courts exploit the paradox of their strength lying in their weakness so as to ensure that sometimes, in the wider public interest as they see it, the latter must be allowed to triumph over the former.

Conclusion

Human rights law is so often about proportionality. The courts use this tool of rational engagement to assess whether any given incursion into a 'human right' is warranted by a legitimate aim identified by the state, and also whether the state action affecting the right is causally linked to that aim. If it passes muster on both of these, the next step is to ask whether other less human-rights-intrusive means could have been deployed instead, and then finally if this is not the case whether the balance between the public need and the private interest has been properly drawn.[72] Looking at this technical legal term with a consciously broader set of eyes than usual, what is proportionality if not a means of managing the paradoxes with which we have been concerned here, between individual entitlement and public necessity, between the need for occasional defiance of the democratic will in the name of democracy, and between the availability of intrusive judicial power and the necessity not to exercise it? Human rights law is surely the same exercise in proportionality albeit written on a larger canvass: the courts must engage with the ethical while not losing sight of the real-world situation they are adjudicating; they must be brave when they can be but reticent when the wider public interest demands; litigants with just claims must occasionally be disappointed in the interests of keeping the whole show on the road. Democracy thrives on grey areas, on uncertainty, on nuance and nudge. Human rights law is no exception.

FURTHER READING

K Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012);

R Buchanan and P Zumbansen (eds), *Law in Transition. Human Rights, Development and Transitional Justice* (Oxford; Hart Publishing, 2014).

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S Gill and C A Cutler (eds), *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014).

[70] R Dixon, 'The Core Case for Weak-Form Judicial Review' (2017) 38 *Cardozo Law Review* 2193-2232.
[71] Ibid.
[72] K Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012); P Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge: Cambridge University Press, 2012), ch 5; A D P Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012).