

Egoism or altruism?

The politics of the great balancing act

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A liberal democracy is a specific form of organizing politically human coexistence. It results from the joining together of two different traditions: on one side, the tradition of political liberalism with the rule of law, separation of powers and individual rights; on the other, the democratic tradition of popular sovereignty and the rule of the majority. Constitutive to this regime is the acceptance of pluralism. With pluralism comes the end of a substantive idea of the good life, the dissolution of the markers of certainty. The diversity of the conceptions of the good life has important consequences for the way in which relations within liberal democratic societies are constituted – and governed. Within such societies, there is a constant urge to constrain the scope of collective’s power so as to respect individual difference. In this, the liberal State is required to adopt a position of apolitical neutrality with regard to the various conceptions of the good life so as to ensure equal respect and concern for its citizens. At the same time, however, the State is also expected to protect and control the cultural and moral environment of the community.

In what follows I shall look into the liberal dilemma of how to manage the line between individual and societal rights, between egoism and altruism. I shall use as my main reference point the European Convention on Human Rights that sets forth a substantive catalogue of human rights that are, not unassumingly, seen to represent ‘the basic principles of democracy, the rule of law and respect for human rights’,¹ that is, the basic principles and general moral standards for liberal democracies.

1.

The fundamental principle of classical liberalism is that government must leave individuals free to choose what paths to follow in their lives, so long as their choices

¹ Council of Europe, Vienna Declaration of 8/9 October 1993, para. 2, reprinted in 14 *Human Rights Law Journal* (1991) 373.

do not harm others. The principle was stated by John Stuart Mill in the opening pages of his essay *On Liberty*:

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of the society with the individual in the way of compulsion and control [...] That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.²

In the 1950's, liberal theorists, most prominently H. L. A. Hart, returned to Mill's simple statement of the harm principle. The context was the debate over the legal enforcement of morality. The debate was reignited in Britain by the recommendation of the Committee on Homosexual Offences and Prostitution (the 'Wolfenden Report') that private homosexual acts between consenting adults no longer be criminalized. It stated: 'there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business'.³

The following year, in 1958, Lord Patrick Devlin, then a judge at the Queen's Bench, attacked the Wolfenden Report in the Maccabaen Lecture that he delivered to the British Academy. He argued that society does have right to pass judgment on all matters of morality, and that it does have the right to use law to enforce these judgments, and that purportedly immoral activity like homosexuality should remain criminal offence: 'The suppression of vice is as much the law's business as suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity'⁴ – that was to say, homosexuality was no different from terrorism, trying to demolish the very foundations of a society as it was. Indeed, Devlin's objections to the Report's findings, and accordingly to Mill's teachings, rested on his single assumption that a

² Mill 1978, 9. For background discussion of the harm principle, see generally Greenawalt 1995, 715 and 722–25.

³ Report of the Committee on Homosexual Offences and Prostitution, *Command Papers* (1957) No. 247 at para. 62.

⁴ Devlin 1965, 13. Cf. the writings by Sir James Fitzjames Stephen – one of the most vocal of Mill's critics – who preceded Devlin in his view that it was a proper objective of law to make people better human beings: '[T]here are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity.' Fitzjames Stephen 1967, 162.

society is kept together by the bonds of common morality. In his view, 'history shows that the loosening of moral bonds is often the first stage of disintegration' (Devlin 1965, 13). He equated a society with its morality to the extent that he regarded a change in the morality tantamount to the destruction of society. As to how the morality of and the danger to society were to be ascertained, Devlin left the matter to the man on the street, 'the man in the Clapham omnibus' (Devlin 1965, 15). In other words, Devlin argued that the community needed to be able to enforce the majority's moral views in order to preserve its own existence. His arguments were explicitly and self-consciously conservative. The way the society was, was the way the society was to be, for ever.

It was against such legal moralism, and its conservatism, that Hart reacted. At worst, he perceived grave danger in Devlin's thesis, for, if left uncriticized, it would appear to accommodate a popular morality based on ignorance, superstition, and misunderstanding – it would allow prejudice to be the foundation of society. This finding caused Hart to exclaim: 'Morality, what crimes may be committed in thy name!' (Hart 1971, 54). He inquired whether any good may be attached to preserving a society whose morality is based on retrograde principles such as racial and religious hatreds. For him, such a society's disintegration was preferable to its continued existence (Hart 1963, 19). As a progressive liberal, H. L. A. Hart resorted to Mill's harm principle to oppose the moral conservatism of Lord Patrick Devlin. He heartily endorsed the famous sentence: 'the only purpose for which power can be rightfully exercised over any member of a civilized community [...] is to prevent harm to others'. This, he said, was free of moral considerations. If your use of your freedom creates harm to me, such use is prohibited. And that is all there is to it.

Gradually, over the course of the 1960's and '70s, Mill's famous sentence began to dominate the legal philosophic debate over the enforcement of morality. Harm became the critical legal principle used to police the line between law and morality. It was deployed by progressive liberals who were favourably inclined toward the relaxation of sexual morality in the area of homosexuality, fornication and pornography. It was opposed by moral conservatives. Today, the debate is no longer structured in this way. The conservatives, too, have taken up the harm principle. In a wide range of debates over the regulation or prohibition of activities that have traditionally been associated with moral offence – from prostitution and pornography, to loitering and drug use, to homosexual and heterosexual conduct – the proponents of regulation and prohibition have turned away from arguments based on morality and turned instead to harm arguments. And so, we witness a

harm-free-for-all: a cacophony of competing harm arguments without any way to resolve them. (Harcourt 1999.)

There is no argument within the structure of the debate to resolve the competing claims of harm. The only real contender for a bright-line rule was supposed to be the harm principle itself. But that principle offers no guidance to compare harm arguments. Once a harm argument has been made and the necessary condition of harm has been satisfied, the harm principle has exhausted its purpose. It is silent on how to weigh the competing harms, balance the harms, or judge the harms. (Harcourt 1999, 119–120.)

The risk was always present. Already the critics of Mill had warned that most, if not all, human activity could be deemed to cause harm to others, and that ‘no person is an entirely isolated being’ (Mill 1978, 78). Indeed, even Devlin based his legal moralism on a harm argument, a harm done to society. Moreover, and more importantly (for our purposes), the harm arguments as put forward by Mill and Hart were not free of moral considerations. In both cases, there were competing values lurking behind their definition of harm, limiting the scope of the harm principle.⁵ For Mill, that value was human flourishing, the idea that human beings should become ‘a noble and beautiful object of contemplation’, and that human life should become ‘rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings’ (Mill 1978, 60). For Hart, that value was the prevention of human suffering. Central to his writings is a concern about human misery. He opposed the regulation of homosexuality because it ‘demand[s] the repression of powerful instincts with which personal happiness is intimately connected’ (Hart 1963, 43).

‘Harm’ cannot be defined in a morally neutral way. The harm principle – like a right or a freedom – is not a good in itself. Instead, harm arguments, rights and freedoms, serve to protect other social goods. And so, the boundaries of freedom and security, privacy and public order, cannot be drawn from any intrinsic or essential meaning of the relevant harm or right; such boundaries are not apolitically given. To the contrary, they reflect culturally conditioned ways of thinking about, say, sexuality. While the European Court of Human Rights has found it relatively easy to require the decriminalization of homosexual conduct between consenting adults in private because of the general consensus on this issue among the

⁵ See Harcourt 1999, 186–192; see also MacCormick 1982, 28–30.

contracting States,⁶ it has been less comfortable when dealing with extreme forms of sexual gratification.

2.

In *Laskey, Jaggard and Brown v. United Kingdom*,⁷ three men had been convicted for committing acts of violence, including infliction of wounds, while engaging in sadomasochistic practices. Although the practices had taken place wholly in private, between consenting adults, the men had been refused a defence of consent before the House of Lords.⁸ The existence of harm could not be determined by consent. This is how Devlin too would have regarded the matter. Eventually the case was brought before the European Court of Human Rights. The British government argued that the refusal of the defence of consent and the subsequent conviction had been justified for the protection of health and of morals: of health because the activities created a risk of physical injury; of morals because they undermined ‘the respect which human beings should confer upon each other’.⁹ In other words, Devlin was to win. The European Court of Human Rights agreed. In determining that there was adequate evidence of ‘pressing social need’ the Court accepted that one of the roles which the State is entitled to undertake is the regulation (by way of the criminal law) of activities which involve the infliction of physical harm, whether the activities in question occur in the course of sexual conduct or otherwise. Moreover, the Court considered that even in situations where the ‘victim’ consents, it was for the State – not the victim – to determine the level of harm that can be tolerated. Here, the Court interpreted the applicants’ actions as acts of extreme violence describing them in terms of genital ‘torture’ and drawing analogies between the applicant’s acts and acts of rape and sexual abuse.¹⁰

⁶ See, for example, *Dudgeon v. United Kingdom*, ECHR Series A (1981) No. 45, 4 EHRR (1982) 149; and *Norris v. Ireland*, ECHR Series A (1988) No. 142.

⁷ See *Laskey, Jaggard and Brown v. United Kingdom*, ECHR (1997-I) No. 120, 4, 24 EHRR 39.

⁸ See *R v. Brown and others*, 1 (House of Lords) *Appeal Cases* (1994) 212. Cf. Stanley 1993.

⁹ *Laskey, Jaggard and Brown*, para. 40.

¹⁰ See *ibid.*, paras 9, 40 and the concurring opinion of Judge Pettiti at 60–61.

In this way, as noted by critics, the Court's decision was based upon an 'undesirable misconception', mistaking a sexual practice for one of violence (Moran 1998, 82). The whole idea of controlled or 'responsible' sadomasochistic practices is that, by virtue of the consent involved and the pre-arranged script, there are, properly speaking, no 'victims'. Even those who sustain serious injuries might feasibly argue that, far from being degraded, they have achieved through the process some kind of spiritual uplift or emancipation (Nowlin 2002, 283). The Court seemed to be willing to accept that this could be so, in principle, but only in heterosexual relationships. In *Laskey, Jaggard and Brown*, it endorsed the finding of British courts in another case that it was not a violation for a husband to brand his initials with a hot knife in his wife's buttocks with her consent. What in a homosexual context was read as a sign of unruly violence and an evil form of uncivilized cruelty, in the context of a heterosexual relationship (and in this particular instance, marital relations) was considered a 'consensual activity between a husband and wife, in the privacy of their own home [and] not [...] a proper matter for criminal investigation, let alone criminal prosecution'.¹¹ Here, in effect, human rights are endorsing a moral order based upon a hierarchy of sex, sexuality and gender. Is the humanity of those that derive pleasure from the consensual giving and receiving of pain worthy of recognition? In this instance, the Court in effect denied the humanity of homosexuals that so act. While resort to 'public health' may sanitise the politics of exclusion and the normalising assumptions at work, it fails to erase them – human rights are not necessarily about inclusion and recognition of difference: human rights may also be about the violence of exclusion and the denial of human rights (Morgan 1998, 83).

The *Laskey* decision illustrates how the conflict between two values – the individual right to freedom versus the societal right to security – cannot be solved by merely talking about 'harms' and 'injuries' inflicted. The Court of Human Rights noted that when drawing an appropriate boundary around the limits of State interference in situations where the 'victim' consents, 'what is at stake is related, on the one hand, to public health considerations and the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual'.¹² Which to prefer, public health or personal autonomy? Right to privacy under Article 8 of the European Convention on Human Rights could not yield an answer

¹¹ *Laskey, Jaggard and Brown*, para. 30, quoting the Court of Appeal, Criminal Division, in *R v. Wilson*, 3 *Weekly Law Reports* (1996) 125.

¹² *Laskey, Jaggard and Brown*, para. 44.

to this problem. Privacy is a set of legal terms and conditions according to which human relations (and disputes about those relations) are given particular legal form. While the form itself gives those human relations particular meaning and shape it does not necessarily produce either a single or an inevitable outcome. Rather, a 'right to privacy' gives voice to a range of other factors, political and cultural, at the same time as it mediates them (Morgan 1998, 82). There was nothing automatic about the courts' decisions in *Laskey, Jaggard & Brown*. The decisions turned on cultural and political assumptions about the role and worthiness of homosexuals as members of a good society.

3.

Which to prefer, personal autonomy or public interest? In *Laskey, Jaggard & Brown*, privileging personal autonomy against public health would have given free reign to private domination and, possibly, eventually, to uncontrollable violence. On the other hand, privileging public health against personal autonomy meant ignoring the informed wishes, desires and aspirations of the applicants, and hence legitimizing the paternalistic policy decisions of the State. Which to prefer, private domination or State paternalism? It seems that neither individual nor general interest is an unmitigated good. This is an important aspect of the conflict of rights (Koskenniemi 2001).

In trying to solve the conflict of rights, we may intuitively feel that the less there is State interference, the better. Such attitude of *laissez-faire* would lead us to think that we can solve the conflict of rights by simply always choosing the right to freedom against the right to security. This would be a solution to the liking of liberal anarchists. The trouble is, however, that we cannot *always* choose the right to freedom: the more we try and keep the State out of our lives, the more defenceless we are against private domination. If, for example, we were to define the limits of State's authority to interfere in marital sexual relations in terms of 'right to privacy', then we would, in effect, privilege the husband's right to sexual freedom against his wife's right to security – we would ratify rape in marriage. In Finland, it was lawful for a husband to force himself upon his wife until 1994. In Britain, such forcible sexual intercourse was criminalized in 1991 by judicial interpretation. As an undoubted extension of the concept of rape as it had been previously understood, this criminalization was then challenged before the European Court of Human

Rights in 1995. In *SW and CR v. United Kingdom*,¹³ the Court considered complaints by two applicants who had in 1991 been found guilty of raping their wives. The applicants claimed that their respective convictions and sentences had been a violation of Article 7 of the European Convention on Human Rights, according to which:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Indeed, until the judgments of the Court of Appeal and House of Lords in these very cases, it had been the established rule of common law that, as written in 1736 by Sir Matthew Hale in his *History of the Pleas of the Crown*, a man could not rape his wife because in getting married she had given a general consent, once and for all, to intercourse with her husband. However, both the Court of Appeal and the House of Lords had in these two cases refused the appeal against conviction, holding that the old rule was anachronistic and offensive. As such it was deemed unacceptable in modern Britain: the rule should be held inapplicable.

There was fairly overwhelming evidence that the domestic courts' judgments represented a reversal, rather than a clarification of the law. And yet, the Court of Human Rights proceeded to reject the applicants' complaint under Article 7. The guarantee against arbitrary punishment entailed that only the law could define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*), that the criminal law should not be extensively construed to an accused's detriment, and that the offence should be clearly defined in law – common law regulations included. The Court held however that no matter how clearly drafted a legal provision might be, in any system of law, there was an inevitable element of judicial interpretation, elucidation of doubtful points and adaptation to changing circumstances. Article 7 could not be read as outlawing this process. And the Court held that 'judicial recognition of the absence of [marital] immunity [for rape] had become a reasonably foreseeable development of the law' (para. 34). It was clear that the Court was disgusted by the rule conferring free reign to private domination. It observed that 'the essentially debasing character of rape is so manifest' that the

¹³ See *CR v. United Kingdom* and *SW v. United Kingdom*, ECHR Series A (1995) No. 355-C, 21 EHHR 363.

result of the decisions of the domestic courts to convict the applicants of attempted rape, irrespective of their relationship with the victims, cannot be said to be against the object and purpose of Article 7 (para. 42). It continued:

What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom. (Para. 42.)

In order to avoid the reign of private domination, communal responsibility is required.

But this does not mean that we could solve the problem of conflicting rights by simply always choosing the general interest over the individual one, opting for altruism instead of egoism. Such communal ethic of responsibility may well lead to the totalitarianism of a welfare State.

4.

When the European Convention on Human Rights was being negotiated in 1949–1950, the delegates were willing to describe only certain aspects of the surrounding social reality in terms of ‘rights’. Indeed, the Convention was the product of classical international negotiation: only those human rights that were successfully formulated in political bargaining were included into the Convention catalogue. Governmental fears concerning issues such as government intervention in the economy, the challenge to colonial rule, concern about political extremism, scepticism of courts, a tradition of insular nationalism, and parliamentary sovereignty were addressed by restricting the documents (see Moravcsik 2000; Simpson 2001). In an intensely political process, rights were enumerated according to domestic interests, instrumental, self-regarding considerations. The final document offended no-one, because it was constrained to include only the least controversial basic political and civil rights. In this way, only certain aspects of reality came to be recognized as fundamental rights and afforded protection.

During the negotiations one of the most controversial and complicated questions concerned the right to education. In the end, no such right was recognized in the Convention. It was, however, included together with other controversial rights (such as the right to property and electoral guarantees) in the

First Protocol, on which the parties started negotiating immediately after the Convention had been signed. Article 2 of the First Protocol states:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

A large number of reservations were entered in respect of this Article. Then as now, governments have wished to assume wide functions in relation to regulation of education offered by the State as well as by the private sector. The Article does, however, recognize that parents have a separate right to respect for their own religious and philosophical convictions in the education of their children. The European Court of Human Rights has indicated that one of the purposes of this provision is to safeguard the possibility of pluralism in education and to operate as a check against possible State indoctrination. But the parental choice may be regulated by the State. And more often than not, the Court of Human Rights has opted for State paternalism rather than parental choice. For instance, when Denmark in 1970 enacted a law that made sex education compulsory in state schools, to be taught not as a separate subject but in integration with other subjects, parents of a number of children objected to this. They claimed that this law infringed their right to ensure education and teaching in conformity with their own religious and philosophical convictions. The Court held that there had been no violation of Article 2 of the First Protocol amounting to a failure to respect the wishes of parents: compulsory sex education was considered to be ‘within the bounds of what a democratic State may regard as the public interest’.¹⁴

Similarly, in the *Valsamis* case, the Court declined to strike down compulsory attendance at a school parade in the light of parental objections. In this case, the applicants were a family of Jehova’s witnesses, whose religious beliefs involved opposition to events with military overtones. The daughter was punished by the school for not attending a school parade on a Sunday to celebrate Greek National Day that marks the outbreak of hostilities between Greece and Fascist Italy in October 1940. The school punished the girl despite having been advised by her parents that attendance would be inconsistent with her religious beliefs. The parents complained to the European Court of Human Rights that their wishes in

¹⁴ See *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, ECHR Series A (1976) No. 23, 1 EHRR 711, para. 54.

respect of the family's religious convictions had not been respected. The Court disagreed. It could 'discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions' and it further noted that such 'commemorations of national events serve, in their way, both pacifist objectives and the public interest'.¹⁵

Paternalism has its limits, however. And so, for example, in the *Campbell and Cosans* case the Court of Human Rights did uphold the parental objections. At issue here was the practice of corporal punishment in State schools in Scotland. In assessing the duty to respect the philosophical beliefs of parents that objected such punishment, the Court stated that to earn such respect, a philosophical belief must relate to 'a weighty and substantial aspect of human life and behaviour'. In this case, it regarded that the parents' objections met the standard for they concerned 'the integrity of the person, the propriety or otherwise of the infliction of corporal punishment and the exclusion of the distress which risk of such punishment entails'.¹⁶ State regulation must have its limits, for general interest is not an unqualified good. Paternalism cannot mean despotism.

5.

Because of the underpinning notion of the European Convention on Human Rights standing as a bulwark against the slide back to totalitarianism, it is hardly surprising that when 'democracy' was evoked in the early jurisprudence of the Convention organs, it was evoked in stark contrast to 'totalitarianism'. Societies which strayed from the Convention were feared to 'slide imperceptibly towards totalitarianism'.¹⁷ The *pro forma* warning bell would continue to be sounded, for instance, in the 1981 case *Le Compte, Van Leuven and De Meyere*, which concerned the disciplinary procedures applicable to medical practitioners in Belgium.

¹⁵ *Valsamis v. Greece*, 24 EHRR (1997) 294, para. 31.

¹⁶ See *Campbell and Cosans v. United Kingdom*, ECHR Series A (1982) No. 48, 4 EHRR 293, para. 36.

¹⁷ *Klass and others v. Federal Republic of Germany*, ECHR Series A (1978) No. 28, para. 47. See also, for example, *Kommunistische Partei Deutschland v. Federal Republic of Germany* (Application No. 250/57), 1 *Yearbook of the European Convention on Human Rights* (1957) 222; *Glimmerveen and Hagenback v. Netherlands* (Application Nos 8348/78 and 8406/78) 18 *Decisions & Reports* (1979) 187; and *Glaserapp v. Germany*, ECHR Series A (1987) 104, 9 EHRR 25.

According to the applicants, the requirement that all doctors be members of the *Ordre des Médecins*, established by the State to regulate the medical profession, was a violation of Article 11.¹⁸ The Court did not agree. By virtue of the important public regulatory functions it performed, the *Ordre* was not to be considered an association within the meaning of Article 11. The Court emphasized however that the creation of such statutory bodies must not prevent doctors from forming together or joining professional associations:

Totalitarian régimes have resorted – and resort – to the compulsory regimentation of the professions by means of closed and exclusive organisations taking the place of the professional associations and the traditional trade unions. The authors of the Convention intended to prevent such abuses.¹⁹

For this reason, the Court was in later case law to interpret the freedom of association to necessarily contain some freedom *from* association.

In *Sigurður A. Sigurjónsson v. Iceland* the applicant, a taxi driver, complained that the obligation on him to become a member of an association ‘*Frami*’ in order to retain his licence to operate a taxicab violated his rights under Article 11. The Government contended that due to its public-law character *Frami* was not in fact an ‘association’ within the meaning of Article 11. While the Court accepted that *Frami* performed certain functions provided for in the applicable legislation and thus served the public at large, it pointed out that the supervision of the implementation of the relevant rules as well as the power to issue and suspend licences was primarily entrusted to other institutions. Therefore *Frami* was to be considered predominantly a private-law organisation and an ‘association’ for the purposes of Article 11; an obligation to join such an association was to be considered an interference with the applicant’s rights as covered by Article 11. As to what those rights were, the Court quite bluntly concluded that Article 11 must be viewed as including a negative right of association. It did so despite the fact that the *travaux préparatoires* suggested that the drafters of the Convention had formulated the right guaranteed by Article 11 differently from the right granted by the Universal Declaration of Human Rights precisely so as to exclude the negative right of

¹⁸ Article 11 para. 1 provides: ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.’

¹⁹ *Le Compte, Van Leuven and De Meyere v. Belgium*, ECHR Series A (1981) No. 43, para. 65.

association from the Convention.²⁰ The omission had been deliberate. But the Court was ready to overlook the original intent of the drafters and interpret the Convention in an evolutive and dynamic fashion:

[T]he Convention is a living instrument which must be interpreted in the light of present-day conditions. Accordingly, Article 11 must be viewed as encompassing a negative right of association. It is not necessary for the Court to determine in this instance whether this right is to be considered on an equal footing with the positive right.²¹

The Court has not always regarded itself so free from the original intent of the drafters.

Unlike the Universal Declaration, the European Convention does not include the right to divorce. This was affirmed by the Court in the *Johnston* case.²² Roy Johnston had separated by mutual consent from his wife in 1965 having recognized that their thirteen-year marriage was irretrievably broken down. Having regulated their own and their three children's rights in an apparently satisfactory fashion, each of them embarked on a new life, each with a new partner. In Roy Johnston's case the relationship with Ms Williams started in 1971, leading to the birth of a daughter in 1978. Since divorce is forbidden in Ireland by virtue of the Constitution, Johnston sought advice as to the possibility of obtaining a divorce in England, but was told that he would have to be resident within British jurisdiction. He desired to obtain a divorce in order to marry Williams-Johnston, with whom he had maintained a common law domestic relationship for fifteen years and to thereby legitimise their daughter. Johnston brought suit in the European Court of Human Rights, arguing that Ireland's prohibition of divorce violated his human rights as prescribed in the Convention by preventing him from remarrying. For her part, Williams-Johnston alleged that Ireland's divorce laws denied her rights to financial support and inheritance rights from Johnston due to an inability to legalize their union. And the illegitimate daughter's complaint stemmed from her inability to

²⁰ Cf. Report of 19 June 1950 of the Conference of Senior Officials, 4 *Collected Edition of the 'Travaux Préparatoires'* at 262 ('On account of the difficulties raised by the "closed-shop system" in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which "no one may be compelled to belong to an association" which features in [Article 20(2)] of the United Nations Universal Declaration').

²¹ *Sigurdur A. Sigurjónsson v. Iceland*, ECHR Series A (1993) No. 264, para. 35.

²² *Johnston and Others v. Ireland*, ECHR Series A (1986) No. 112, 9 EHRR 203.

acquire rights of ‘support and succession’ and ‘the possibility of a stigma attaching to her by virtue of her legal situation’ as an illegitimate child.

The Court decided that Article 8 protection is relevant to the situation of a married but legally separated man and the woman with whom he had lived for years and had a child. In other words, the relationship Johnston had with his lover and their child was sufficient to form an Article 8 ‘family’. The Court however did not find either under Article 8²³ or Article 12²⁴ an implied human right to divorce or remarry. In its view, ‘the ordinary meaning of the words “right to marry” is clear, in the sense that they cover the formation of marital relationships but not their dissolution’. The Court referred to the drafters of the Convention who had based the text of Article 12 on that of Article 16 of the Universal Declaration of Human Rights only partly, including the first sentence (‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.’) but excluding the second sentence (‘They are entitled to equal rights as to marriage, during marriage and at its dissolution.’) – as to why this was so, the Court quoted the explanation Mr Teitgen, Rapporteur of the Committee on Legal and Administrative Questions, had given to the Consultative Assembly:

In mentioning the particular Article of the Universal Declaration, we have used only that part of the paragraph of the Article which affirms the right to marry and to found a family, but not the subsequent provisions of the Article concerning equal rights after marriage, since we only guarantee the right to marry.²⁵

Accordingly, Article 12 was not intended to include a right to have the ties of marriage dissolved by divorce. The Court has, however, repeatedly emphasized in its jurisprudence that the Convention is ‘a living instrument’, to be interpreted in the light of present day circumstances.²⁶ That is, the effects of the Convention are

²³ Article 8 para. 1 provides: ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’

²⁴ Article 12 provides: ‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’

²⁵ 1 *Collected Edition of the ‘Travaux Préparatoires’* at 268.

²⁶ In addition to *Sigurður A. Sigurjónsson v. Iceland*, ECHR Series A (1993) No. 264, para. 35, see, e.g., *Ireland v. United Kingdom*, ECHR Series A (1978) No. 25, para. 154; *Tyrer v. United Kingdom*, ECHR Series A (1978) No. 26, para. 31; *Soering v. United Kingdom* ECHR Series A (1989) No. 161 para. 102; and *Loizidou v. Turkey*, ECHR Series A (1995) No. 310, para. 71.

not to be confined by the conceptions of the period when it was drafted. With this in mind, the applicants in the *Johnston* case set considerable emphasis on the social developments that had occurred since the Convention was adopted, notably the substantial increase in the number of divorces in Europe. But the Court refused to read the right to remarry into Article 12. It noted:

It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions [...] However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.

In interpreting the Convention, in trying to solve the conflicts between rights, the Court does not have a neutral position: it has no technical means to weigh the relevant rights. Which to prefer, individual or collective right? Egoism or altruism?

Rights conflicts cannot be solved by simply deciding whether to prefer individualism or altruism: one leads to private domination and unfettered violence, the other to paternalism and the totalitarian practices of a welfare State. Neither is an unmitigated good. But if there is no single vision, no general blueprint, then everything hinges on the appreciation of the context, on *ad hoc* decision making. This leads to striking a balance. However such balancing act is carried out, it will involve cultural and political assumptions about the values that the good society should prefer – about what the good life is like. This is politics.

6.

The balancing act between egoism and altruism is an act of power. More than that, it is precisely the sort of act of political power that the liberal society originally sought to limit through the harm principle and human rights. Are there no means to limit politics, then? Liberalism has resorted to various alternatives.

One of the ways to attempt at an escape from politics is to adopt a deontological position from which any balancing act seems a futile exercise because justice – the ‘right’ – will always have moral priority over values placed on societal interests and goals – the ‘good’.²⁷ As justice (the right) is prior to the good, this gives individuals rights that override rather than reflect considerations of what the good society

²⁷ The distinction between the right and the good was first, famously, made by Immanuel Kant in Kant 1969.

should prefer. This is premised on the idea that what is 'right' is defined independently of the good and can be legitimated without any particular conception of the good (Rawls 1971). 'Right' is in itself of value. But how helpful is this? While the 'right' principles may through deontological gaze seem self-executing and independent from notions of the good, actual people would still continually have to *decide* whether to act in ways that are right/just. As pointed out by Sartre, Abraham could not escape the decision whether to follow God's command, even if he used God's command to escape the decision whether to sacrifice Isaac (Sartre 1965, 31–32). Moreover, if the right were to absolutely trump the good in individual cases, always, this would open up the terrain for such matter-of-fact statements as 'surely we all understand that it is more important to protect life than property'. But would we all understand? While it would not be difficult to get those nodding that already share the same view, it would be difficult to convince those that do not agree. The basic pluralist tenet of a liberal democracy is to speak to those that are of a different opinion and to solve conflicts of opinion. In an important sense, liberal democracy marks the end of certainties. The diversity of the conceptions of the good necessarily legitimates conflict and division within a society, thus constituting a system of power relations (Mouffe 2000).

That the fact of pluralism poses a problem for deontological liberalism has been recognized by John Rawls (Rawls 1993). Given the plurality of viewpoints that is bound to emerge and persist under the conditions of liberal freedom, how could the 'right' (for Rawls, justice as fairness) be stable and reproduce itself? Rawls' answer to this question is based on the idea that divergent political, moral and religious conceptions of the good could still, despite their diversity, converge on some common ground. In this 'overlapping consensus', citizens would for different reasons come to support the same basic human rights and freedoms and abide by notions of democracy and the rule of law. While Rawls advocates the notion that individuals can find agreement on higher, grander levels of theoretical abstraction when agreements about particulars are untenable, Cass Sunstein moves to the other direction with his distinctive solution to 'the problem of social pluralism' (Sunstein 1995, 1769). Instead of seeking an untenable agreement about broad, abstract and contentious principles, Sunstein conceives of an 'incompletely theorized agreement' among the judiciary that is fuelled by theoretically modest principles to reach consensus about particulars. He shifts his attention, and his hope, to judicial reasoning. But can we really trust the judges to find an implicit agreement in situations of conflict, among parties that are in disagreement? As a sociological description of a smoothly functioning system an 'incompletely theorized

agreement' seems appropriate. Societal actors do pragmatically adjust and adapt themselves to each other each day without any grander foundation to guide this behaviour. However, it is in situations where the normal operation of the system fails and a disagreement arises that a judiciary is needed. In such situations the disagreement will not be about general theories but about very particular issues. Here, for the judges to impose on the conflicting parties an 'incompletely theorized agreement' does not only seem intellectually dishonest (for surely any 'theorizing' of the situation could only reveal the prevailing disagreement) but also patronizing in a way that cannot be accepted in liberal societies: the claim for an 'incompletely theorized agreement' is a claim that the *judges know better* than the parties that an implicit agreement *actually* exists.

Another way for liberalism to try and constrain the politics in solving the conflict between egoism and altruism is to move to the language of value and utilitarian calculation. Here, the propriety of a decision is judged in terms of its consequences: if it maximizes the 'good' – human happiness – it is 'right' and should be carried out (Mill 1991). The right is subservient to the good, and the conception of the good is tied to social welfare, wealth-maximization, value and utility. This is the realm of law and economics, in which economic analysis is used to describe, explain and predict the effects of legal rules (see, for example, Posner 1981). As everyone is assumed to be trying, consciously or intuitively, to allocate resources efficiently, economic analysis is deemed to be able to explain not only the way the law does work but also the way it should work.²⁸ The bluntness and clarity of wealth maximization as a positive analysis and normative goal promises objectivity, automaticity, and neutrality. The problem persists however: exactly how do we value conflicting interests? What is the right measure to use? While we need to calculate the propriety of a judgment on the basis of its consequences and value, we do not really know what that value is to other people. Also, which items should be included in the calculation? More often than not, only such items that the decision-maker considers important will be taken into the calculation. Should not the welfare of those that are the objects of the decisions play at least some role in the equation? And exactly what weight should be given to the various items? If we can answer that, if we can profess to have an idea about a scale to use, we will be feigning to speak the language of objective values – the non-existence of which was

²⁸ See, e.g., Posner & Vermeule 2006 (an economic analysis of relevant legal field leads the authors to give an affirmative reply to their normative inquiry whether 'coercive interrogation' should be legal).

the reason for our need to start calculating in the first place. Our values are *ours*, subjective and accordingly biased. Importantly, some such values are not amenable to calculation at all for the mere articulation of them would banalize them (see Koskenniemi 1997).

Indeed, yet another attempt at refuge for liberalism has been the turn to subjectivity and constructive interpretation that celebrates subjectivity as a necessary component of the interpretative art (Dworkin 1986). Dworkin's literary-aesthetic model illustrates a procedure whereby a legal interpreter, whether a judge or a legal scholar, treats the text as a coherent whole, respecting its integrity, always choosing material that shows the text in its best light. The interpreter is required to engage in a living dialogue between herself and history, evaluating the community's legal and political practices in terms of her own sense of 'right', justice and fairness – but confining her interpretations to ideas that conform to the 'brute facts of legal history' within the community (Dworkin 1986, 255). For Dworkin, this procedure assuring the best fit as well as the best light for each interpretation also assures that there is only one right answer for any conflict between egoistic and altruistic demands. But while a 'right' answer may be available at any given stage, no 'final' answer can ever be arrived at.

Now, these 'alternative' ways to find a solution to the problem of the conflict between egoism and altruism may indeed seem alternatives, different. What is at stake in all of them, however, is a judgment that is based on the structural bias of the given institution. That is to say, all of them serve typical, deeply embedded preferences. In all of them, the resolution to the conflict is sought on the basis of previous practice – on the basis of what the judge feels and considers to be fitting. What counts in all of them is the audience that is being addressed.

A structural bias is not a scandal or a 'bad thing' but the end result of a particular societal system (see Kennedy 1997). In any institutional context there is, always, a constellation of forces that relies on some shared understandings of how the rules and institutions should be applied. Such bias cannot be gotten rid of. It must, however, be observed and reflected upon. For the bias may become a problem – it may become a tool in the hands of the decision-maker, work in favour of those that are privileged, against the disenfranchised. A liberal theory that only focuses on the decision-making procedures is unable to recognize and understand this. It fails to ask: who makes the decision?

Dworkin's interpretative theory does accept the structural bias. When the subjective and objective aspects of the theory are combined, interpretation turns into a dialogue between the interpreter and the tradition of principles, the

institutional history shaping and constraining the interpretation. As such Dworkin's theory certainly is an improvement on the pseudoscientific theories of deontology and utilitarianism. This does not mean, however, that it could produce the sort of 'right' decisions it assumes and desires: disagreement will remain about what counts as the appropriate tradition and what counts as a coherent decision. Human agency and individual choice will linger, no matter how hard one conceptualizes, no matter how sophisticated techniques one adopts. Through his efforts to reconfigure judicial practice and to create the conditions of adjudicative excellence Dworkin has entered the solipsist world of the judge, without paying any real attention to the fact that the judge is, truly, wielding power – among constellation of forces that make up the structural bias. To be able to understand the bias, liberal theories should turn the focus to the decision-maker, the judge. This is all the more imperative now, as Kaarlo Tuori would remind us, that the processes of constitutionalization are pushing and pulling States toward a 'judicial State' (Tuori 2007, 249–275).

Liberal democracy marks the end of certainties and substantive ideas of the good life. When there is no single vision of the good life that rights could express, then there is no general recipe for the solution of rights conflicts. Egoism or altruism? The response, as we have seen, hinges on the appreciation of the context. This does not mean that rights conflicts could be resolved in any which way. In any institutional context there is a structural bias that reflects some shared understanding of what the relevant rights are and how they should be applied. While the existence of the bias as such is not an outrage, its workings can sometimes be exactly that. And so it is essential to be aware of the bias and its consequences. What does it do? How does it affect the distribution of benefits and values? Who does it privilege? Should a causal link between the bias and an injustice be revealed from under the generality of legal language, it is through political contestation and critique that the contingency of the biased position can be demonstrated – and the bias changed (into a bias that may well in its turn start working in favour of the privileged, against the deprived).

So, the issue is not so much whether a balancing of rights has to take place but who in the final analysis is empowered to do the balancing. Egoism or altruism? Who will decide?

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