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Do we need unicorns when we have Law?

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Abstract

Theoretical justifications of human rights have been troubled by many criticisms and objections. It has been objected that the source of human rights is unclear as is the meaning attached to human rights. Yet today many human rights have been adopted in positive law. Law students today need to learn about this positive law of human rights and may consider that those debates in human rights theory are pointless. This article examines the extent to which the positive law of human rights answers these questions satisfactorily. It concludes that positive law offers several important answers to these criticisms, but suggests they cannot replace the need for a normative justification. The article concludes that approaches which integrate theory and positive law are fruitful avenues of inquiry.

Do we need unicorns when we have positive law?¹

“The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there *are* no unicorns: every attempt to give good reasons for believing that there are such rights has failed.”(MacIntyre 1990, 69)

Many writers advise us to stop debating questions about the foundation of human rights. They see that it is impossible to provide rights with secure foundations which no doubt explains why the meaning of rights is so contested, indeed interminably debated (MacIntyre 1990, 8). They urge us to give up debating questions about how to best justify and interpret human rights as a normative exercise, just as we are no longer excited about the threat of witches (MacIntyre 1990, 69) or other mythical beasts (Harris 2004). These criticisms are as old as the rights themselves: no sooner had the French National Assembly announced the “rights of man and of the citizen” in 1789 than Jeremy Bentham denounced them as “nonsense upon stilts” (Waldron 1987)! The criticisms have touched on all aspects of human rights: that there was no clear basis for human rights; that rights were thoroughly ambiguous; that they encouraged egoism and selfishness and that they undermined democratic practices; and that rights cannot really express universal values but always protect the particular interests of special groups (propertied classes, whites, men, etc.).

Bentham was an early positivist, and it may be in the rise of positive law that we see the constructive side to the sceptic’s critique of human rights theory. Throughout the 20th Century politicians, civil servants and lawyers appeared to decide the hard questions of human rights and write

them into the positive law of the international human rights framework. Human rights standards were also written into national constitutional law. This process of the positivisation of human rights (Cappelletti 1988, 69) might be thought to resolve many of the theoretical questions legal and political philosophers essentially making their debates redundant (Laws 1998, 257-9; Gearty 2004, 13-21) or irrelevant (Harvey 2004, 501). Certainly a law student would be entitled to ask why we need to concern ourselves with these debates when there is now an authoritative legal text.

This essay will examine the extent to which the availability of positivist sources of human rights can answer some of the long standing criticisms of human rights. It will conclude that such positivist sources can provide partial answers to many criticisms, but cannot provide fully satisfactory answers to all the critiques. The conclusion will be that we need to develop theories of human rights that rely not just on positive sources of law but also theory, and will highlight Habermas' theory of rights as one such approach (Habermas 1995). We will focus on two basic criticisms of human rights theory. First, that human rights have no certain foundation, it is impossible to say on what they are based. A further and related criticism is that rights are deeply ambiguous and it is difficult to know their content. There are many other criticisms of human rights, which we cannot go into here.² With the positivisation of human rights, we must enquire whether we need to wonder about the questions raised by these criticisms. Does positive law provide answers, and does the process of putting the law into positive form offer some insights for human rights theory? Are practical minded students who query the relevance of human rights theory right to put their trust in positive law? This article shall argue that they are only partly right.

The criticism of human rights

The first criticism that might be made of human rights is a very basic one indeed: where do rights come from? What entitles us to say that we have rights simply as human beings, without their being granted by political

authorities? This was an early criticism of human rights, raised by the English social reformer Jeremy Bentham to criticise the invocation of natural rights in revolutionary France. Since the emergence of rights in the late Eighteenth Century, several candidates have been proposed as providing a foundation for human rights: God, nature (especially human reason) and "self-evident truth" (Shestack 2000).

The invocation of "self-evident truth" begs the question, while references to God are deeply problematic in a religiously pluralistic and often sceptical age (Both "self-evidence" and God have made reappearances though in modern philosophy, in the writings of natural lawyer John Finnis (1980) and it should be acknowledged that some people do argue that religious ideas play a role in human rights (Perry 2000).) The claims of human nature or human reason seem more promising, and were often used to justify "natural rights". Early advocates of human or "natural" rights invoked human nature, and especially man's rationality to justify the existence of rights. Yet this is difficult to fathom. Natural lawyers sought to invoke facts about man's nature to justify rights. This faces the difficulty of the natural fallacy: a fact cannot be held to give rise to normative obligations. Somehow normative propositions have to be brought to bear on facts about human nature.

Even aside from that, the particular aspect of human nature that was often invoked, rationality, was controversial. It is not self-evident that this is the most important, special or relevant aspect of man's rationality. People often behave very irrationally. There are other aspects of human nature: human love, empathy, passion, selfishness, sentimentality, or even aggression might all be thought to be important or relevant. Why should we not select one or more of these aspects of human nature to ground a normative theory of human rights? It is not even certain that behaving rationally is always a good thing. Fish argues that people who spout hate speech are behaving perfectly rationally (Fish 2001, 70). There are many critics who find the high-point of rationalism in the Nazi Holocaust, which is portrayed as an exercise in technical, instrumental reason (Bauman 1989,

; Schmidt 2000). According to Rorty, Darwin has demolished the argument that there is a "special added ingredient" or universal characteristic call it what you will, which distinguishes humans from other animals (Rorty 1998, 174). There is a further danger with relying on an argument that rests on a particular understanding of human nature, which is that one might slip into the position of denying the humanity of anyone who disagrees (Strong 1996, xxii).

A final possibility is to found rights on a moral or political theory or legal theory, which often pays tribute to the rational nature of the human being. Undoubtedly if we could rely on a particular moral or political theory, we could answer many questions. There are certainly many such candidates. Richards grounds a theory of rights in a theory of reasons for actions (Richards 1971). Gewirth develops a theory of rights based on what any human agent must will and combines this with the concept of consistency (Gewirth 1996). John Rawls offers two principles of liberalism based on what rational and reasonable people would choose in a hypothetical position which models the requirements of impartiality (Rawls 1972). Ronald Dworkin bases the idea of rights on a deep abstract, right, the right to idea of equal concern and respect (Dworkin 1985, 191).

These efforts to ground human rights in human nature or more correctly a political, moral or legal theory are all deeply controversial. Paradoxically the rationalist tradition so long associated with natural rights traditions also *undercuts* the argument that reason is the basis for rights. The rationalist tradition systematically critiqued sources of authority (religion, convention or tradition), comparing all claims to authority to the requirements of "reason". These were found wanting and had to be abandoned. Yet this same tradition demands that we examine how rights can be based on facts about human reason, and the withering examination leaves us with few foundations for rights (MacIntyre 1990, 44-47; Gearty 2004, 17-19).

One advocate of liberal rights has stated this problem with greatest force. Even if there are objectively right answers as to what rights exist, we

have no agreed upon method for identifying them. The fact of persistent disagreement makes reference to objective theories of rights implausible, especially when combined with reliance on an unelected judiciary to protect them (Waldron 2001, 164ff.; Harvey 2004).

There is another reason to be unsettled about the turn to politics or morality. Human rights law aims (or at least professes to aim) to *transcend* such theories. Human rights are supposed to represent commitments which all can subscribe to, whether they are liberals or socialists, conservatives or radicals. If human rights must be grounded in a political theory then it is difficult to see how this claim to transcend political allegiances can be made. If human rights theory is grounded on a liberal political theory (say that of Rawls) then there is no reason to expect socialists or conservatives to agree to its demands.

Is there any way for a politics of human rights to be neutral with respect to politics? It is difficult to see how this can be, and it may be undesirable to remove human rights entirely from politics (Klug 2005, 12). The application of human rights will presumably in at least some instances have politically partisan effects. Human rights must sometimes run counter to the programmes of specific partisan political forces. If human rights law is not somehow neutral or separate from ordinary politics, then this poses a serious problem. Why should we expect all political persuasions to adhere to human rights standards? The only way for this to be done is to make disagreement central to rights.

Many critics of human rights have latched on to these problems of identifying the foundations for human rights. This paradox of the Enlightenment rationalistic tradition has been noted by the communitarian Alasdair MacIntyre who believes that the rationalistic tradition has left morality without any secure foundations, cultural or otherwise. He dismisses rights talk as being as sensible as speaking of "unicorns" and "witchcraft" (MacIntyre 1990, 69). They are fictions which can only be made operational by *smuggling in social values* (MacIntyre 1990, 106).

From a pragmatic viewpoint, we find a similar claim. Rorty decries anything that sniffs of “foundationalism” – the belief that one can “find” “right answers” to moral questions and persuade others that those answers are “rationally” correct (Rorty 1998). Rorty agrees that human rights reflect a particular culture of bourgeois liberalism, one which should be spread across the world. He thinks we would be better off forgetting about the foundations of rights and more concerned about debating how best to promote them. Rorty argues that it does not matter where rights come from. We need not try to persuade others through reasoned argument that rights are a good thing and we should respect them (Rorty 1998, 176-180). Rather we should just accept the fact that we live in a rights conscious bourgeois culture, and we find this satisfying. We should do our best to reproduce this way of life (the “human rights culture”), to make it popular, through educating or manipulating the sentiments of others (Rorty 1998, 176). Should we debate with any form of moral relativist or sceptic, this answer may appear satisfactory on first glance. After all, if a critic insists that there are no right answers to these sort of moral questions, then all answers would appear equally valid, including our own culturally specific one. Why not impose it? Indeed the cultural relativist would get into difficulties arguing against the imposition of bourgeois liberalism, since she would have to rely on some ideal of tolerance or equality or self-determination to argue against imposition. Yet all these are themselves universal values! Thus the relativist counter-argument against the imposition or insinuation of bourgeois liberalism is self-defeating.

The anti-foundational criticism of human rights is often related to the argument that human rights are vague and ambiguous and there is no foundation of neutral basis for determining the meaning of rights (Fish 2001). Such ambiguity comes from various sources. The words in a rights declaration are often very general. Some documents express them in unrealistic absolute terms, and of course rights may conflict. Indeed the text is not always a reliable limit on the expansion of human rights, as courts not infrequently invoke extra-textual values and rights. The ambiguity of rights (and their source) also leads to an often worrying tendency towards “rights

inflation". Here again, Jeremy Bentham was an early contributor with his scathing critique on the loose language of the French Declarations.

The list of vague terms in declarations of rights is a long one – “right to life”, “due process of law”, “prescribed by law”, “private and family life”, “fair trial”, “public order”, etc. Take even that classic and (most basic?) of rights, the “right to life”. This can be given very many different meanings. It may prohibit the death penalty for instance, or it may be seen as compatible with the lawful imposition of a death sentence. The right to life may entail a compromise position, that, for instance the death penalty is permitted for murderers but not for rapists; or that it is permitted but only if applied in a non-discriminatory manner with rigorous procedural safeguards. There is considerable difference between these positions, and yet the unvarnished invocation of the right to life does not provide a clear guideline as to which to prefer. Aside from this clear case of a state imposed death sentence, there are other questions about the parameters of the right to life. It might be argued that the right to life is engaged where someone dies in a hospital due to negligence, even though the death is not deliberately inflicted by the state. Again this does not flow directly from the clear words of the right to life. Or we can imagine cases where the State lets a poor person starve to death; or an individual loses her job and with it the means to provide food for herself and her family. It could be argued that these engage the right to life. The Indian Supreme Court has decided that basic rights such as the right to life also include the right to privacy, dignity and to earn a livelihood.⁴ We could discuss whether a State’s human rights obligations extend to adopting environmental policies that prevent industrial pollution or to fund research into the health risk caused by mobile phones. These may all be arguable positions, but they cannot hang just on the textual phrase of the “right to life”. And we have not even discussed letting someone die with dignity, active euthanasia, assisted suicide,⁵ abortion or foetal rights.⁶

Article 3 of the European Convention on Human Rights prohibits absolutely torture or inhuman or degrading treatment or punishment. What

constitutes torture? At what point does the humiliation which occurs regrettably often in social life become “degrading treatment”? Even the fairly simple case of the rigorous interrogation techniques used in Northern Ireland during the 1970s provoked disagreement as to how they should be characterised. The British Army used “five techniques” of in-depth interrogation: hooding prisoners, making them stand in uncomfortable positions, subjecting them to white noise, depriving them of sleep and keeping them on a minimal diet.⁷ Whilst the European Commission on Human Rights unanimously characterised this as torture, the European Court of Human Rights split three ways on how to characterise this treatment. The majority thought this was prohibited “inhuman and degrading treatment” (para. 167), a minority of four judges (including the Irish judge) considered it to be the more serious violation “torture”, while a final viewpoint (expressed by the UK judge) suggested that it did not amount to either. The proper meaning of the concepts of “inhuman or degrading treatment” has continued to plague the Court. There have been debates over when corporal punishment of a child becomes inhuman and degrading treatment, and over when awful prison conditions violate Article 3.⁸

The ambiguity of rights is often enhanced by a tendency to treat them as absolutes. Bentham was particularly annoyed by the tendency to phrase rights in absolutist terms. The French Declaration of 1789 held that rights were “imprescriptible”, while the US 1791 Bill of Rights is emphatic that “Congress may *make no law abridging* the freedom of speech” (italics added). The 1937 Irish Constitution speaks of the “inalienable and imprescriptible” family rights (Article 43). This temptation to use the language of absolutes is prominent in some liberal writings. John Rawls speaks of principles that form an “inviolability founded on justice that even the welfare of society as a whole cannot override” (Rawls 1972, 3), while Ronald Dworkin famously describes rights as “trumps” (Dworkin 1978, 364; 1985, 198).

Yet rights need often to be restricted and even taken away. Despite the absolute prohibition on laws abridging freedom of speech, many laws of Congress have abridged freedom of speech. "Speech" such as "fighting words" and obscenity have even been held to fall outside that clear and unambiguous prohibition. The "inalienable" and "imprescriptible" rights of the married family in the Irish Constitution have not prevented the children of married families being given up for adoption. Giving no doubt great joy to Bentham's heart, Article 17 of the French Declaration of 1789 both describes property as an inviolable right and provides that it can be taken away where public necessity so requires and compensation is paid.

Another problem of ambiguity is what to do when rights conflict. Classically, an individual's right to privacy may conflict with the press' right to freedom of expression; a rape victim's right to physical integrity and privacy may clash with a defendant's right to a fair trial; an individual's right not to associate may hinder others' right to engage in effective collective action; a child's right to a religious education may conflict with other children's right to an education free from religion, or the latter's right with their parents' right to influence their education. Supposing a person convicted of child sexual abuse moves into a residential neighbourhood - should the local families be informed of his record? The collision of rights that are labelled inviolable makes it difficult to know how to respond to these questions.

The ambiguity of the texts of human rights declarations is not helped by courts frequently making use of concepts for which there is no explicit textual basis! Some judges of the US Supreme Court have relied on searching for rights in the "penumbras" and "emanations" of the Bill of Rights.¹⁰ The Irish courts have adopted a concept of "unenumerated rights" which are not explicitly mentioned in the text of the Constitution and yet are entitled to constitutional protection.¹¹ The High Court of Australia has handed down decisions on the fundamental right to political communication, although this right is not set out in the constitutional text, arguing that it stems from the structure of the Constitution.¹² Most

spectacularly the European Court of Justice decided that the duty to apply the law implicitly included the duty to uphold general principles of law, which themselves include human rights.¹³

The possibility of handing down entire new doctrines, and giving expansive interpretations to rights should alert us to a further source of ambiguity which is that of "rights inflation". The human rights agenda has moved far from a few simple rights to life, liberty and the pursuit of happiness, or liberty, security, property and resistance to oppression. Other rights have joined the canon. These include rights of a socio-economic nature such as rights to housing, education, social assistance. They include rights which protect our relationships with others such as association, assembly, family rights, rights to enjoy a culture and speak a language. These rights which look at our ties with others often give rise to the idea of group rights, that entities like families, ethnic groups, religious groups, "peoples" have rights. These rights include such important principles as existence, peace, a clean environment, and development.

The rhetorical force of human rights is such that advocates of a cause will often seek to characterise it as a right (Griffin 2001, 15). Notoriously the inflation of rights poses problems.¹⁴ Many object that social and economic rights are no more than aspirations, while people's rights are even more like utopian aspirations (Tomuschat 2003, 48-51; Sunstein 1993). Furthermore given rights to groups may well conflict with the rights that are giving to individuals. The inflation of human rights challenges the simple starting premise of individuals having enforceable claims against state interference.

Aside from these more specific objections, the inflation of rights has a more general problem. If rights talk is to have any meaning then it must introduce something distinctive and useful into our political and legal practices. If it is the case that all social and political arguments (development, peace) can be treated as rights claims, then it is difficult to see what distinctive contribution rights talk can make to public discourse.

Given the ambiguity of these terms, the clash of rights, the unnecessary rhetoric of absoluteness, the tendency to find new rights or at least rights doctrines, and to inflate the catalogue of rights, it is no wonder that rights claims can be controversial!

The possibilities of positive law

The idea of human rights then is beset with problems, both when it comes to identifying their source and when it comes to identifying them. Can positive law resolve some of these criticisms, and allow us to sidestep the debates about the foundation of human rights?

Certainly one of the earliest critics of natural rights talk thought so. For the legal positivist Jeremy Bentham, it was intellectual confusion to talk of rights based on "nature". In nature there were no legal rules, and without legal rules it is pointless to talk of "rights". For legal rules, one needs a legislator and a sanction to attach to the violation of any legal rules. Who promulgates these "natural rights"? What sanction attaches to the violation of these "natural rights"? The only secure foundation for rights is law, according to Bentham.

Nowadays we have a plethora of legal documents. The United Kingdom has incorporated the European Convention on Human Rights via the 1998 Human Rights Act, while in Northern Ireland there is ongoing debate about the adoption of a Bill of Rights suited to the circumstances of Northern Ireland (Northern Ireland Human Rights Commission 2004). The European Union Charter of Rights will acquire legal force if and when the European Constitution is adopted (Rogers 2002). These texts represent only a small percentage of those human rights texts adopted world wide, many of which the United Kingdom has ratified though not incorporated. At the United Nations level alone, there is the 1948 Universal Declaration of Human Rights, and a host of legally binding treaties dealing with general categories of human rights,¹⁵ certain specific human rights,¹⁶ the human rights of certain vulnerable groups¹⁷ and the prohibition of discrimination.¹⁸

Aside from these legally binding treaties the UN has also issued Declarations identifying other types of rights, on the rights of members of minorities,¹⁹ on the right to development,²⁰ right to peace,²¹ and on the rights of people with disabilities.²² There are also regular proposals to expand these treaties and declarations; a covenant on the rights of people with disabilities will probably emerge (UN News Service 2004), whilst there has also been a controversial debate on a convention eliminating discrimination on the grounds of sexual orientation (Amnesty International 2003). Aside from these, there are many regional instruments in Europe, the Americas and Africa, and some regional organisations such as the Council of Europe have produced a similar plethora of human rights instruments.

A sceptic of human rights theory might well argue that there is no need for complicated and controversial arguments about human nature and capacities – the basis of human rights lies in the positivist sources of law (Gearty 2004, 19). As one UK judge has noted we have human rights law and not merely “free floating moral” argument (Laws 1998, 259).

This answer is often useful, important and indeed reassuring. Once a positive legal norm is in force in a state there is a clear reason for public officials to respect it: there is no need to provide them with an independent reason to treat it as important. Once the Human Rights Act incorporated the European Convention on Human Rights into UK law there was no longer any need to provide an independent reason why public authorities should (e.g.) respect the right to privacy. It is now simply possible to refer to Article 8 of the European Convention. Arguments about the source of rights are simply sidestepped.

This is a central feature of law on a positive account. Law allows us to forget about first order justification: we need simply worry about what the law says rather than the reasons of the persons promulgating it. This is particularly attractive in international human rights law, because it allows persons from many different traditions to agree upon a text, even though they may have different justifications for why they support a text. (One

might draw comparisons with the idea of an “overlapping consensus” in the work of Rawls (Rawls 1993, 140).)

We have seen that the criticism of human rights that they lack foundations is often associated with the claim that rights are indeterminate, radically so. The positive law of human rights does not merely sidestep questions about foundations, but also allows for some of these difficult criticisms of rights indeterminacy to be answered.

Modern human rights texts are more realistically drafted than the early ones – they recognise that rights have limits, and even that some rights can be suspended; they specify the scope of a right more precisely. Certainly there are texts which speak in very vague terms, without any qualifications, but these tend to be the older documents (the 1789 French Declaration, 1791 US Bill of Rights, even the 1937 Irish Constitution). A glance at the European Convention on Human Rights indicates the care increasingly taken in drafting rights. The right to life in Article 2 gives an indication as to the scope of the duty to protect life, and also specifies fairly clearly the limits on the right to life.²³ Similarly Article 5 ECHR does not talk about the “inviolability” of personal liberty, but specifies the circumstances in which detention is permitted (Article 5.1), and the rights to be recognised to detained persons (Article 5.2-5.5).

Not all rights set out in the Convention are so specific of course. Certain classic rights such as privacy (Article 8), freedom of religion (Article 9), freedom of expression (Article 10) and freedom of association (Article 11) are still expressed in very general terms. However these terms are not unlimited – the second section of each of these articles recognises that rights may be “qualified” or “limited”. Any notion that rights are unlimited or that they ever come into conflict is avoided.²⁴ The limitation clauses providing for the limits of rights often explicitly recognise that rights conflict. For instance Article 10.2 ECHR lists “protection of the rights of others” as one reason for allowing free expression rights to be limited. The limitations clauses of modern bills of rights are often seen as a crucial element of rights protection. Indeed, the limitation clause of the 1982

Canadian Charter of Rights and Freedoms is placed in Section 1 of the Charter to emphasised its central role. The need to limit rights is further recognised in the development of derogation clauses in human rights texts, which allow for certain rights to be subject to further limits in times of national emergency. Article 15 ECHR and Article 4 of the International Covenant on Civil and Political Rights offer examples of this realistic approach to the drafting of modern human rights texts. Significantly these derogation clauses also try to provide some clarity and safeguards about the extent of permissible limits.²⁵

Whilst the texts themselves have become less ambiguous, they still tend to be lapidary. However other aspects of the positive law of rights further reduces the dangers of ambiguity. A number of human rights institutions endeavour to give greater certainty to the content of these rights by issuing lengthier texts offering more detailed commentary on these rights. This is particularly the case of the United Nations treaty-monitoring bodies. There are six of these, soon to be joined by a seventh, which monitor the implementation of the UN human rights covenants.²⁶ These bodies issue "General Comments" or "General Recommendations" which elaborate on the meaning of the terms of the treaties. In the hands of these independent experts the brief rights of the Covenants are given detail which expands to sometimes dozens of pages.²⁷

Aside from efforts to develop more realistic and specific textual requirements, human rights law includes a number of specific judge made doctrines which aim to deal with the vagueness seemingly inherent in human rights. The European Court of Human Rights has developed a particular series of tests for deciding when so-called qualified rights²⁸ have been legitimately restricted for instance. The Court asks whether the limit is being used for a "legitimate purpose", whether it is "prescribed by law" (legality), and whether it is "necessary in a democratic society" (proportionate). Though these headings are brief enough, the case law of the Court has given greater specificity to the requirements of each of these especially the latter two.

The concept of "legitimate purpose" is given somewhat greater specification in each of the articles of the European Convention. Even so these aims tend to be fairly broad – they include general concepts like "public morality", "public order" and even when there is a list, it is not necessarily a closed list.²⁹

The prescribed by law test has been broken down into distinct elements, such as whether there is a basis for a restriction in national law, national law has been complied with, whether the national legal authority is sufficiently clear as to allow people to foresee how their rights will be limited,³⁰ whether they are publicly available and legally binding,³¹ and whether the national legal authority provides safeguards for the protection of rights.³² With the development of this doctrine the European Court of Human Rights has not merely reduced ambiguity but declared that in a certain fashion ambiguity is itself a denial of human rights (discussed in detail in (Gearty 2004, 60ff.).

The requirement that a restriction must be necessary in a democratic society (the requirement of proportionality) has been developed into a number of distinct questions by the European Court of Human Rights, the German Constitutional Court, the Canadian Courts,³³ the New Zealand courts,³⁴ the South African Constitutional Court,³⁵ and the UK courts under the Human Rights Act. The European Court of Human Rights makes the proportionality inquiry more manageable by considering specific questions such as whether the restriction corresponds to a pressing social need,³⁶ whether it is rationally related to the legitimate aim,³⁷ whether it includes adequate safeguards for rights, whether the legitimate aim could be satisfied by a less restrictive measure and whether the restriction abolishes the essential core of the right rather than merely restricting it.³⁸

As should be clear by these examples, ambiguity is further lessened because human rights courts can rely on their own precedents.³⁹ Even where courts cannot rely on their own precedents, other jurisdictions offer and frequently refer to foreign precedent in an international "transjudicial communication" (McCrudden 2000), a process approved by Law Lords

(Steyn 2004, 142). The idea of referring to foreign experience in human rights law as an aid to interpretation has a particular appeal in the area of human rights law. If human rights have a universal claim then one should expect that case law from all jurisdictions would offer guidance. There are many examples of courts referring to foreign cases. The European Court of Human Rights regularly refers to the common standards which it finds among European countries (or conversely to the need for deference to national authorities when there is a lack of common standards.). Even the United States courts, long reluctant to look beyond their shores, have recently made reference to international jurisprudence.⁴⁰

Positive Law does not have all the answers: back to unicorns and witches

Reliance upon positive law may seem to avoid the problems of providing a foundation for human rights and also offers to dispel the ambiguity of human rights. It may lead us to think that worrying about the foundations of human rights is unnecessary. Yet this answer is dissatisfying. What should we say to a Government that refuses to sign up to a human rights treaty? What do we say when we are debating whether or not a particular right should be included in a legal document? Can we criticise the contents of human rights declarations for failing to protect rights? Can we interpret human rights texts without engaging with debates over the nature of human rights?

Positive law does not give anyone a reason to adopt or respect it. Prior to incorporation of the 1950 European Convention on Human Rights via the 1998 Human Rights Act, we could not for instance make an argument that the UK should adopt the ECHR or any other human rights treaty simply by referring to the text of the ECHR! Similarly today, those arguing that the UK should incorporate *other* international human rights texts (e.g. the European Social Charter or the International Covenant on Economic, Social and Cultural Rights) (Van Bueren 2002) cannot simply

point to the terms of those treaties (Griffin 2001, 21). Similarly we cannot make an argument about whether Northern Ireland should adopt a Bill of Rights simply by referring to the texts of the NIHRC consultation paper or the terms of the Good Friday Agreement.

The need for reasons is also apparent in arguments on the international scene. Today we cannot make arguments about why (e.g.) the United States should ratify the 1979 Convention on the Elimination of Discrimination against Women or the 1989 Convention on the Rights of the Child or the 1966 International Covenant on Economic Social and Cultural Rights simply by referring to those texts, or even to the Universal Declaration of Human Rights and international customary law.⁴¹ Nor can we make arguments about whether or not a state should accept a treaty with reservations simply by making reference to the treaty or rules of public international law. Whilst this might yield a technical legal answer as to the possibility for such reservations, it does not provide an answer as to what the state should do.

In some ways the very extent and dynamism of the international human rights texts make the recourse to human rights theorising inevitable. What rights should be protected in treaties? Should the rights of individuals be protected or the rights of groups? Are some of the rights, such as the right to development or peace, as real and important as more specific individual rights to health care or life? Should the emphasis be on the rights people have or their duties? Should the rights of "peoples" be protected? Who should be covered by international texts prohibiting discrimination – people with disabilities, gay men and lesbians? These are all questions that cannot be answered simply by reference to existing positive law texts. To label this a limitation of positivism is perhaps unfair. Many positivists have argued that the question of what the law should be or ought to be, i.e. what statute should be adopted, what treaty should be ratified, is not properly a question for positive law. The science of law is concerned with the question of what is the law. To argue that positivism cannot answer the question what ought the law to be is to miss the point. Even should we accept this though it

points to an admitted limitation of positivist law and the need to engage in theoretical debates.

In all cases we would need to explain why the text should be adopted. Presumably we would make such arguments based on either the intrinsic importance of human rights, and / or on the benefits which a bill of rights offers to society or individuals. This is an invitation to theorise. We need to consider why rights are valuable, whether in themselves or instrumentally. We need to address the relationship of rights to other values such as human dignity and democracy. Indeed even a sceptic of human rights theorising such as Gearty embraces the importance of concepts such as dignity and democracy (Gearty 2004, 8-30). To say that we have positive law and that suffices runs the risk of falling into the complacency that some have accused Rorty of (Eagleton 2000, vi).

It is the very critics of human rights theorising which gives the strongest warning of the need for theory. As Gearty recognises the Human Rights Act needs to be interpreted in the light of principles. If the human rights texts are divorced from principles then they may be used for all sorts of purposes. Positive human rights might become reified in themselves or used for principles which we do not happily accept. As Gearty notes commercial lawyers may quickly become leading advocates of human rights law (Gearty 2004, 114). This may or may not be what we want, but I think it highlights the need to debate the purpose for which we invoke rights and how they relate to other values. Gearty's response to the dangers of the privileged monopolising the Human Rights Act includes, for instance, placing great stress on the concept of human dignity, but again though this is theorising.

Similarly positive law does not eliminate ambiguity. Positive law does offer some responses possible then to the objections rooted in the alleged ambiguity of rights. We have certainly not dispelled all ambiguity (imposing meaningful limits when courts are prepared to read in unenumerated rights is not an easy task). Several of the responses we have given carry the seeds of new ambiguities. Some have questioned the merits

of transjudicial communication as a means of reducing uncertainty. Most importantly applying human rights standards requires some guidelines as to how to interpret the magnificent generalities of bills of rights. Conor Gearty for instance proposes civil liberties, legality and human dignity within the context of a representative democracy, as the values which should inform the application of the Human Rights Act (Gearty 2004). Yet the choice and meaning of these concepts are not themselves without difficulty.

The concepts we have mentioned may reduce ambiguity, or at least offer guidelines for the application of human rights law. They cannot abolish ambiguity. Nor should we seek to abolish ambiguity. The classic legal positivist, HLA Hart argued that law needed to retain some flexibility (Hart 1961). According to Hart we can never know the circumstances in which the law will fall to be applied, nor how our purposes may change over time. For law to remain useful over time (especially fundamental rules) then it must be possible to reinterpret them. This is especially true in the area of human rights law. The drafters of the European Convention on Human Rights probably never considered that gay men might invoke Article 8's respect for private life to cover private consensual sexual activity, or even have envisaged the possibilities of modern gender reassignment tendency. The very terseness of the general language of this human rights text has allowed for the rights of members of these groups to be protected.⁴²

Positive law provides resources for alleviating some of the problems associated with the ambiguity of human rights by allowing for the deployment of more careful language, more developed doctrines which reduce uncertainty and the possibility of communication over time and across borders. It does not however avoid the need to consider the theory of human rights.

A sceptic might want to suggest that we do need to consider the theory of human rights but we do not need to be worried about their *foundations*. Yet understanding the debate about the foundations is

necessary to working out theories of rights. A theory grounded on autonomy is likely to yield very different results from a theory based on dignity.

Conclusions

What conclusions can we draw about the theory of human rights after considering the contributions of positivist human rights law?

The process of putting human rights into positive law tempers several of the criticisms of human rights and perhaps suggest that some ways of formulating human rights theory may need rethinking. The positive law of human rights allows us to give greater precision to the scope of human rights, for instance. Positive law offers guidelines as to how to apply human rights using such doctrines as legality and proportionality. Positive law also allows some limited answers to questions about foundations of human rights.

The resources offered by positivism to deal with the criticisms are often instructive but are rarely complete. Debates about the proper scope of human rights law, indeed, over what rights we have, are not likely to diminish. And when it comes to the foundational questions about human rights, relying on positive law fails to provide us with a critical edge; it fails to tell what rights we should legislate for. This balance sheet of the benefits and limits of positive law suggests that approaches which *blend* positive law and human rights theory are likely to be the most instructive ways forward.

Further, we must not lose sight of those objections which made the recourse to positive law attractive in the first place. In particular a theory of human rights must avoid or address objections of too easy a claim of transcendence (Gearty 2004, 19). A theory of rights must avoid claiming too strong a sense of objectivity, (or if you prefer must strive to be "post-metaphysical"). Aside from avoiding a claim of access to an objective reality, it must also account for the fact of disagreement which is endemic in human rights discussions (Waldron 2001). Human rights are political (Klug

2005, 12) though hopefully in a principled sense (Gready 2003) and a human rights theory must explain how human rights can provide a common platform for people who disagree politically.

One possible contender for this is offered by Habermas' discourse theory of law which seeks a middle ground between empirical theories of law and normative conceptions (Habermas 1995). Habermas assigns central importance to law in his theory of politics and that theory of law must express itself through the language of rights. Even more relevantly though, Habermas' theory makes allowance for disagreement, in that citizens are perceived as deciding for themselves through democratic deliberation, how to define their rights (Habermas 1995, 125-8). This article provides support for such a discourse theory as a fruitful avenue of inquiry; what would a Habermasian understanding of human rights law look like.

Debates about the foundations of human rights should certainly not displace debates about the law of human rights or attempts to understand the politics of human rights, but I would hesitate before dismissing them as irrelevant or redundant. In conclusion, we may not need unicorns and witches, but we cannot entirely avoid arguments about the foundations of rights.

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Footnotes

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² There are many other criticisms of human rights. A popular criticism is that rights tend to be the rights of individuals and that rights theorists ignore the importance of social groupings, and the need to take into account the interests and needs of other persons. A fourth and final criticism is that human rights represent the interests of just one cultural group and fail to make allowance for cultural diversity. There is also the well known criticism that human rights are incompatible with democracy, and some of the other ideological criticisms, e.g. that human rights protect the interests of men rather than everyone (Charlesworth and Chinkin 1993).

⁴ See for an application of this in the context of employment discrimination against someone infected with HIV: *X v. Y Corp.* [1999] 1 Law Reports of the Commonwealth 688 (High Court (Bombay) India).

⁵ *Pretty v. United Kingdom* (2002) 35 European Human Rights Reports 1 (2002/04/29).

⁶ *Vo v. France* European Court of Human Rights (2004/07/08).

⁷ *Ireland v. United Kingdom (Ill Treatment in Northern Ireland case)* (1978) 2 EHRR 25.

⁸ *Kalashnikov v. Russia* (2002) 36 E.H.R.R. 587 (2002/07/15).

¹⁰ *Griswold v. Connecticut (Contraception case)* (1965) 381 U.S. 479.

¹¹ For instance the courts have used this doctrine to uphold the right to travel abroad and communicate although these rights are not found in the Irish Constitution: *State (M.) v. Attorney General and Ireland* [1979] Irish Reports 73; *Kearney v. Minister for Justice* [1986] Irish Reports 116, [1987] I.L.R.M. 52. Recently the courts have indicated that they will be more reluctant to invoke this doctrine. Significantly this reluctance is related specifically to the protection of social and economic rights. See *Sinnott v. Ireland* ([2001] IESC 39) [2001] 2 Irish Reports 545 and *D. (T.) et al v. Minister for Education, Minister for Health, Ireland and the Attorney General, and the Eastern Health Board* ([2001] IESC 86) [2001] 4 Irish Reports 259.

¹² *Australia Capital Television v. Commonwealth Australia* [1992] 177 C.L.R. 106. That a democratic legal framework necessarily presupposes some human rights is an argument made by one UK judge as well (Laws 1995).

¹³ *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle fur Getreide* (case 11/70) [1970] ECR 1125, [1972] Common Market Law Reports 255.

¹⁴ Interestingly these arguments about rights, their justification and content, are often used by rights activists against types of rights with which they disagree. So there are advocates of "basic" civil and political rights who criticise socio-economic rights, asking how courts can enforce rights to food, adequate housing and shelter. Similarly, there are advocates of civil, political and socio-economic rights who deprecate the third generation rights for dressing up a social claim as a right, and thereby threatening to devalue the meaning of rights as a whole.

¹⁵ 1966 International Covenant on Civil and Political Rights; 1966 International Covenant on Economic, Social and Cultural Rights.

¹⁶ 1984 Convention Against Torture.

¹⁷ 1989 Convention on the Rights of the Child, 1990 Convention on the Rights of Migrant Workers.

¹⁸ 1965 Convention on the Elimination of Racial Discrimination, 1979 Convention on the Elimination of Discrimination against Women.

¹⁹ 1992 *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.

²⁰ 1986 *Declaration on the Right to Development*.

²¹ 1984 *Declaration on the Right of Peoples to Peace*.

²² 1975 *Declaration on the Rights of Disabled Persons*.

²³ "Article 2.1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 2.2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection."

²⁴ *Brown v Stott* [2003] 1 A.C. 681, 707 per Lord Steyn.

²⁵ These were recently explored by the House of Lords in *A v. Secretary of State for the Home Department* ([2004] UKHL 56) (2004/12/16).

²⁶ The documents representing their work are found at the website of the High Commissioner for Human Rights (www.ohchr.org). Helpfully the High Commissioner's office publishes a compilation of all the comments.

²⁷ See for instance the 20 page General Comment of the Committee on Economic, Social and Cultural Rights: 2000 *The right to the highest sustainable standard of health* (Art.12), *General comment 14*.

²⁸ "Qualified" rights refers to those rights which are in two parts in the European Convention, e.g. Article 8's right to private and family life and Article 10's right to free expression. These articles set out the right in one clause, and then have a second paragraph where such rights may be subject to "necessary" limits in a democratic society.

²⁹ In *Demuth v. Switzerland*, (2004) 38 European Human Rights Reports 423 the Court accepted that maintaining the "quality and balance" of programmes was a legitimate aim for the purposes of Article 10.2 (free expression), even though not specifically listed therein.

³⁰ Restrictions based simply on "good morals" will be too vague: *Steel v. United Kingdom*, (1999) 28 European Human Rights Reports 603 as will restrictions not to act *contra bonos mores*: *Hashman and Harrup v. United Kingdom*, (2000) 30 European Human Rights Reports 241 (1999/11/25). See also *Rotaru v. Romania*, (2000) European Court of Human Rights (2000/05/04) where the Court held that a measure restricting privacy must define the circumstances in which invasions of privacy are permitted, who can be subject to surveillance, what kind of information should be sought, and so forth. In one Belgian case, the Court indicated that the right to a fair trial would be violated if it were not possible to foresee how court procedures would work: *Coeme v. Belgium*, ECtHR (2000/06/22).

³¹ *Khan v. United Kingdom*, (2001) 31 European Human Rights Reports 1016 (2000/05/12)

³² *Rotaru v. Romania*, (2000) European Court of Human Rights (2000/05/04).

³³ Many commentators refer to the Canadian jurisprudence under Section 1 of the Charter. The Canadian Supreme court offers a particularly crisp definition in *R. v. Oakes* [1986] 26 Dominion Law Reports 4th 200. Dickson CJC summarized the requirements: there must be "concerns which are pressing and substantial in a free an democratic society" and the requirements of proportionality: "the measures adopted must be carefully designed to meet the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short they must be rationally related to meet the objective. Second the means, even if rationally connected to the objective in the first sense, should impair the right 'as little as possible' ... Third there must be a proportionality between the effects of the measure ... and the objective."

³⁴ Article 5 of the New Zealand Bill of Rights.

³⁵ Section 36 of the Constitution.

³⁶ For instance where Latvia sought to ban someone from politics due to her activities with the Communist party prior to democracy, the Court noted that Latvia had waited until 1995 to do something about this, which did not indicate a pressing problem: *Zdanoka v. Latvia*, ECtHR (2004/06/17). In the classic *Dudgeon* case, the Court held there could not be any pressing social need for Northern Ireland's anti-sodomy laws as there were infrequent prosecutions under it: *Dudgeon v. United Kingdom*, (1981) 4 European Human Rights Reports 149.

³⁷ Prohibiting women from receiving information about abortion services abroad was not rationally related to any aim of stopping them going abroad for the purposes of obtaining an abortion— they did so anyway: *Open Door Counselling Ltd and the Dublin Well Woman Centre v. Ireland*, (1992) 14 European Human Rights Reports 131.

³⁸ *Heaney and McGuinness v. Ireland*, (2001) 33 European Human Rights Reports 264.

³⁹ The European Court of Human Rights has amassed a considerable body of case law behind it, deciding about 800 cases a year at the time of writing. Whilst no other international court or court-like institution has such a body of case law, there is also considerable case law in the different national jurisdictions.

⁴⁰ Kennedy J. has referred to landmark decisions of the European Court of Human Rights on sexual privacy issues in *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). International practice has also been invoked in *Roper v. Simmons*, 161 L.Ed. 2d 1, 45-49 (2005), Supreme Court outlawing the execution of juveniles.

⁴¹ There is an argument that some of the norms of the Universal Declaration now form customary international law, but this does not stretch to the entire corpus of the international human rights framework.

⁴² There is an evolution in both cases. Gay rights evolve from *Dudgeon v. United Kingdom*, (1981) 4 European Human Rights Reports 149 to later cases such as *Lustig-Prean v. United Kingdom*, (1999) 29 European Human Rights Reports 548. The transgender cases demonstrate an even swifter evolution from *Rees v. United Kingdom*, (1987) 9 European Human Rights Reports 56 to *Goodwin v. United Kingdom*, (2002) 35 European Human Rights Reports 447.