

Being “realistic” about human rights

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Introduction

It has been my good fortune to sit at the feet of some of the great late 20th-century Anglo-American legal thinkers, not least Dworkin, Raz and Finnis at Oxford. But, as my PhD supervisor at the Faculty of Law at Queen’s University Belfast in the early 1980s, Tom Hadden was, and remains, one of the most formative influences on my thinking and career. I am delighted, therefore, to be able to submit what follows as a modest acknowledgment of the enormous debt I owe to him.¹ Like other contributors to this collection I cannot claim that Tom would endorse everything I have to say here. For one thing, having been bound by an undertaking to keep this venture secret in order not to spoil the surprise, none of us was able to consult him directly in advance. However, I hope that at least the orientation of this article accurately reflects some of the many things I learned from Tom in the four or so years I spent under his supervision. Six of these stand out in particular: the importance of conceptual clarity, historical sensitivity, doctrinal rigour, an awareness of political and social context, ensuring conclusions are well-supported by appropriate evidence, and seeking to identify realisable policy implications rather than indulging in mere negative critique, much less tub-thumping denunciation.

Tom has never been an ivory tower scholar. On the contrary, his academic life has always been inseparable from tireless campaigning across an enormous range of fields linked by the quest for deliverable social justice – the kind which requires hard-headed realism, negotiation and compromise between competing conceptions of what is possible and desirable. Tom has, indeed, been far ahead of his time in several areas, two of which have

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1 This article derives from a conference paper, “Human Rights Realism: the Challenge for Legal and Political Systems”, delivered at the International Seminar on Comparative Law (ISCOM 2008) – Towards Interaction and Convergence of Legal Systems, Faculty of Syariah and Law, Islamic Sciences University, Putrajaya, Malaysia, 18–20 November 2008, and four lectures each entitled “What’s Wrong with Human Rights?”: my inaugural as Professor of Human Rights in the School of Law at the University of Bristol, 8 March 2008; a guest lecture at St Mary Redcliffe and Temple School Sixth Form, Bristol, 27 April 2008; a public lecture at Lander & Rogers (Solicitors) in association with the Institute of Legal Studies, Australian Catholic University, and the Human Rights Law Resource Centre, Melbourne, Australia, 12 December 2008; and a lecture to students and staff at the Faculty of Law, University of Split, Croatia, 3 April 2009. I would like to express my gratitude to all those who made these contributions possible and for the stimulating discussions which ensued. The usual disclaimers apply.

been close to my own professional interests. First, with a few others, he long advocated the kind of inclusive settlement of the “Troubles” which has, in fact, eventually emerged, often a lonely position in the not-so-distant past between the two hitherto colliding juggernauts of the more militant versions of Irish nationalism and Ulster Unionism. Second, in the early 1980s, when I arrived as a PhD student in Belfast fresh from an MSc in Sociology at LSE, Tom was already advocating human rights, not only as the key to the resolution of the conflict in Northern Ireland, but also as the framework for solving many other political, legal and social problems. But back then this was still a view fairly marginal to academic and political debate in the UK and Ireland. Indeed, my only acquaintance with human rights then stemmed from a single topic in the public international law option I’d taken as an undergraduate, itself a subject considered by many to be, at best, on the periphery of legal scholarship and, for some, not even real “law” at all. The mainstreaming of human rights in both international and national legal and political debates since, including in both the UK and Ireland, also reveals how ahead of the times Tom’s thinking then was. However, Tom’s conception of human rights has never embraced abstract theorising which pursues its own logic in a universe parallel to the experience of real people, nor the dry formalism of some human rights law textbooks which too often squeeze the life out of the vision, nor the utopian and sentimental version which sadly motivates some contemporary “human rights fundamentalists” and which brings the whole project into disrepute. Instead, Tom’s has always been a vibrant “human rights realism”, affirming the importance of the international human rights ideal as a set of universal standards, while simultaneously acknowledging that implementation requires compromise and customisation.

Therefore, since “realism” has been one of the hallmarks of Tom’s academic and campaigning life, I thought it might be appropriate to celebrate his achievements with the following attempt to explore what being “realistic” about human rights might mean. We should begin by noting that the idea of fundamental rights – “human” or “natural” – has been deeply contested since the birth of modernity in Europe in the 17th century. Indeed, it would not be an exaggeration to say that the history of the West, and increasingly the world since this time, can be characterised as a series of ideological, political and military struggles over the place fundamental and inalienable individual rights should occupy in modern political, economic and legal systems. The historical landscape might be mapped in various ways. But the current terrain cannot accurately be characterised as a simple contest between those who are “for” and those who are “against” human rights. On the contrary, five contemporary normative perspectives can be identified. We can be indifferent to, or we can ignore human rights (“indifference”). We can be hostile towards them and reject them in their entirety (“hostility”). We can be ambivalent or sceptical about them or accept them but only subject to significant reservations (“scepticism”). We can endorse them realistically (“realism”) or we can endorse them excessively (“perfectionism”). These are, however, poles on a continuum rather than fixed positions, and the debate around them is in a constant state of flux. While some commentators and views are easy to locate, others are much less so. And, like sub-atomic particles in the quantum field, some even seem to occupy more than one position at once.

An attempt will first be made to show why indifference and hostility towards human rights are no longer tenable, if they ever were, and why human rights should be at the core of all legitimate contemporary legal and political systems both national and international. It will then be argued that “human rights realism” is to be preferred to “scepticism” and “perfectionism”. Finally, some of the key challenges which “being realistic” about human rights presents will be discussed.

Indifference and hostility

Of the four least tenable normative positions on human rights, indifference is the easiest to dispose of since, for two reasons, it is simply not legally, politically, or intellectually credible in the contemporary world. First, the human rights ideal has an undeniably high profile in contemporary debates about law, politics and society, both national and international. In their turn these also impact on a diverse range of fields, including, amongst others, medical ethics, counter-terrorist policy, international relations and poverty, to name but a few. Therefore, no one who has the slightest interest in the contemporary world could seriously maintain that human rights can be ignored. No government or state can be indifferent to, or can ignore, them, because the human rights ideal is built into the very fabric of the international system, not least as a result of the numerous references to it in the UN Charter.² But this does not, of course, mean that states are effectively compelled to honour these commitments, a problem to which we will return later. But there is a second argument against indifference towards human rights. The only people in the world today who can afford to be in such a position are those whose human rights are already well protected. Their indifference, therefore, entails an intellectual and moral contradiction because it presupposes, and is sustained by, its very object.

What of hostility towards human rights? Some people in the world today, and some contemporary ideological movements, are wholeheartedly opposed to the very idea of human rights. These include religious fundamentalisms of various kinds and other anti-liberal and anti-democratic conceptions of how power can legitimately be held and exercised. An example of a particularly strident rejection of human rights within the Western philosophical tradition can be found in the claim made by British philosopher Alistair MacIntyre that “the truth is plain: there are no such rights and belief in them is one with belief in witches and in unicorns” because “every attempt to give good reasons for believing that there *are* such rights has failed”.³ However, this opinion was expressed in 1981. In the contemporary West, views such as these have effectively been consigned to the margins of both intellectual and political debates for a very good reason. The challenge, which no contemporary Western thinker or political movement, including MacIntyre, has yet been able to meet, is to find an alternative set of values with anything like the same capacity to become a viable value system for Western public institutions. In other words, no one has been able convincingly to propose what other normative foundations should underpin Western public institutions, or what should replace them and their foundational values if they were to be abolished.

The centre of gravity in the Western debate about human rights has therefore shifted. It is now much less between “exponents” and “opponents” and is, instead, much more a three-cornered debate between “realists”, “sceptics” and “perfectionists”. The experience of the UK provides an illustration of the underlying trend. In the early 17th century, claiming the “divine right of Kings” and rejecting both democracy and natural rights as constraints, the only limitation on its power the Crown acknowledged was that of God. However, from the late 17th century until the end of the 20th century the British constitutional system was “sceptical” of fundamental rights in the sense that, although acknowledged as important statements of value, they did not provide effective legal limits on the supreme public power in the land, now Parliament rather than the Crown. But since the enactment of the Human Rights Act in 1998 the UK has embarked on its own experiment with “human rights realism”, the nature of which will be considered more fully later.

2 E.g. Articles 1, 13, 55, 56, 62, 68 and 76.

3 *After Virtue: A study in moral theory* (London: Duckworth 1981), p. 69 (italics in original).

Scepticism and perfectionism

“Realists”, “sceptics” and “perfectionists” all agree that human rights matter. But they disagree about why and about what follows. It is important, therefore, to consider why human rights should be taken seriously. Many answers have been given in a complex debate which, in various forms, now spans nearly four centuries. It has been argued, for example, that human rights are natural, that they are God-given, that they derive from reason, that they stem from the best instincts in human intuition and imagination, or that they originate in particular kinds of human institution at a particular stage of social evolution.⁴

My own personal synthesis comes down to this. The reason human rights matter is because, without them, we have little hope, in our increasingly integrated but diverse world, of making coherent moral sense of ourselves, our relationships with each other, and with the national and international institutions and systems which exercise power over us. In particular, without human rights, we are unlikely ever to respond appropriately to two features of the human condition which can be regarded as both self-evident and universal. First, every human being wants to avoid suffering, particularly where it is caused by the avoidable and unjustified conduct of those who exercise power. Second, we all want to live our lives in ways we ourselves find fulfilling, whether this be a life of unbridled hedonism or asceticism. Both propositions are self-evident because it is difficult to imagine how any properly developed person could seriously deny either for themselves. Each is also universal because there is no obvious reason why any human being should have a greater claim to their realisation than any other. And by being universal they are, therefore, equally open to all. This is the basis of the human rights ideal. It expresses the notion that everyone possesses a set of individual entitlements, linked to the most fundamental aspects of our well-being, which recognise and give substance to our equal intrinsic worth, and which we possess independently of any other badge of demarcation, be it gender, race, religious or other belief, sexual orientation, etc.

Thus conceived, the human rights ideal has four particular implications. First, human rights are reciprocal and not egotistical, selfish and antagonistic as some have argued.⁵ In other words, if any one of us can claim these entitlements for ourselves we are logically and morally compelled to acknowledge them for all others since they stem from our common humanity. Our primary moral and political obligations are, therefore, the obverse of our own human rights, namely to respect and promote the human rights of others. Second, any right which derives from a specific feature of our identity over and above our common humanity – for example from gender, race, ethnicity, etc – cannot, by definition, itself be a human right. Strictly speaking there is, therefore, no such thing as “women’s human rights” or “gay people’s human rights”, or “disabled people’s human rights”.⁶ However, while women, gay people, disabled people and other minorities have the same human rights as every other member of the human race, disadvantaged groups may require additional rights to enable them to overcome specific obstacles which prevent them from being able to exercise their human rights as effectively as others. But these other rights are facilitative rights, or “rights about human rights” and not, strictly speaking, human rights themselves. Third, since human rights are, by definition, individual rights possessed by real flesh and blood human beings, collective rights cannot be genuine *human* rights either.

4 See e.g. J Donnelly, *Universal Human Rights in Theory and Practice* 2nd edn (New York: Cornell University Press 2003), ch. 1; A Clapham, *Human Rights: A very short introduction* (Oxford: Oxford University Press 2007), ch. 1; M Freeman, *Human Rights: An interdisciplinary approach* (London: Polity 2002), chs 1–5.

5 This claim is strongest in the Marxist tradition, see e.g. S Lukes, “Can a Marxist believe in human rights?” in S Lukes (ed.), *Moral Conflict and Politics* (Oxford: Clarendon Press 1991).

6 Donnelly, *Universal Human Rights*, n. 4 above, chs 12 and 13.

Interests such as national self-determination or economic development can more accurately be regarded as collective goods or other kinds of right, but not human rights as such. Alternatively, they can be seen as preconditions for the fulfilment of a flourishing system of individual human rights which would include specific civil, political, social and economic rights. Finally, because human rights are universal in the sense indicated, all legitimate legal and political systems, institutions and activities must embody a commitment to their realisation in some shape or form.

“Scepticism”, or the “partial endorsement of human rights”, means a reluctance to put human rights at the centre of our political morality and legal systems, nationally and internationally. The many versions each express the common claim that “human rights are OK but . . .” or that “human rights are OK provided . . .”. For example, some feminist authors are ambivalent about the language of rights as a vehicle for advancing women’s interests. As Smart puts it, while

it is difficult to abandon the rights discourse . . . its efficacy is undoubtedly waning and it is becoming all the more urgent to reformulate demands which are grounded in women’s experiences rather than in abstract notions like rights which are increasingly defined as unjustified and selfish prerogatives.⁷

Others maintain that human rights are OK as long as they do not obstruct the exercise of popular sovereignty. For example, in an editorial introduction to a collection entitled *Sceptical Essays on Human Rights*, Tomkins states:

All the participants endorse the importance of human rights within any democratic system of government, but question whether the primary responsibility for the articulation of these rights ought to be taken away from the normal political processes of representative government.⁸

Communitarian commentators also argue that individual rights should be counter-balanced by collective rights and the stronger affirmation of responsibilities. Etzioni, for example, states:

Correcting the current imbalance between rights and responsibilities requires a four-point agenda: a moratorium on the minting of most, if not all, new rights; re-establishing the link between rights and responsibilities; recognising that some responsibilities do not entail rights; and, most carefully, adjusting some rights to the changed circumstances.⁹

In the UK, scepticism about human rights tends to centre on the Human Rights Act to which we will return later.

Many states are also sceptical about human rights, or are only prepared to endorse them with significant reservations. For example, some cynically sign up to international human rights treaties in their entirety with little or no intention of honouring their commitments.¹⁰

7 C Smart, *Feminism and the Power of Law* (London: Routledge 1989), p. 159. Similar sentiments are expressed by, amongst others, C McKinnon, “Feminism, Marxism, method and the state: towards feminist jurisprudence” (1983) 8 *Signs* 635–58 and C Gilligan, *In a Different Voice: Psychological theory and women’s development* (London: Harvard University Press 1982).

8 A Tomkins, “Introduction” in T Campbell, K D Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford: Oxford University Press 2001), p. 2.

9 A Etzioni, *The Spirit of Community* (London: Fontana Press 1993), p. 4.

10 See e.g. O A Hathaway, “Do human rights treaties make a difference?” (2002) 111 *Yale Law Journal* 1935; R Goodman and D Jinks, “Measuring the effects of human rights treaties” (2003) 14 *European Journal of International Law* 171; T Dunne and N Wheeler (eds), *Human Rights in Global Politics* (Cambridge: Cambridge University Press 1999); T Risse, S C Ropp and K Sikkink (eds), *The Power of Human Rights: International norms and domestic change* (Cambridge: Cambridge University Press 1999).

And they can do this with virtual impunity because of the defects of international human rights law to which we will also return. Others cherry-pick the parts of human rights treaties they like while openly and expressly opting out of the rest. For example, according to a recent report from the think tank, the European Council on Foreign Relations, Europe and the United States – whose public institutions are most formally underpinned by constitutional rights – are losing influence over the development of the UN's human rights policy to Russia, China, India and other non-Western states.¹¹ The report claims that, a decade ago, European human rights policies received the support of 72 per cent of UN members, but the endorsement of only 48 per cent in 2007, while the US suffered a steeper decline from 77 per cent to 30 per cent. However, “non-Western states” comprise a highly heterogeneous group, which includes westernising states, states claiming uniquely Islamic, Asian or Chinese conceptions of human rights,¹² underdeveloped countries which set a high premium on economic development,¹³ and Russia, a partly westernised prosperous, secular, industrialised giant suspicious of human rights but with no particularly coherent alternative.

The main defect of human rights scepticism is one of emphasis rather than fundamental error or misconception and lies in paying insufficient attention to the moral primacy of individuals and to the procedural and institutional implications which this suggests. Indeed, the view taken here is that the interface between realism and scepticism provides more fertile ground for debate than that between realism and perfectionism.

But what are “human rights perfectionism” and its most extreme form, “human rights fundamentalism”? It would be a mistake to suggest that there are many genuine human rights “perfectionists” or “fundamentalists” around. This perspective is more like a pole exerting a kind of gravitational attraction for some scholars and activists than a position many would self-consciously claim for themselves. Nevertheless, some contributions to the debate regrettably point in this direction, undermining more than advancing the human rights cause. While hostility towards human rights is closely associated with the “right wing” of the now increasingly redundant modern, Western, political spectrum, human rights perfectionism is closely associated with the anti-capitalist and anti-liberal left. In the post-Cold War era it has become the home of many of those who refuse to acknowledge that the project of the far left has failed, not only politically and economically, but morally and intellectually. Some of its key hallmarks include the following.

First, there is a reluctance to connect alleged human rights abuses with concrete norms in international human rights law. Instead, the point of reference tends to be the commentator's own moral intuitions. The general complaint is often along the following lines – “I don't like how those people are being treated over there, therefore, their human rights are being violated.” But, the problem with moral intuitions is that they vary significantly from person to person. Human rights standards in international law are not the last word on any given human rights issue either. In fact, there are many things wrong with international human rights law to which we will come later. But its great virtue is that it is the result of years, often decades, of deliberation and wide consultation and, therefore, represents the closest thing there is to global value consensus.

Second, human rights perfectionism tends to be associated with the lop-sided view that the worst abuses of human rights in the world today are perpetrated by Western capitalist liberal democracies and, in particular, by the United States. Some commentators even

11 See e.g. European Council for Foreign Relations report, *A Global Force for Human Rights? An audit of European power at the UN*, 17 September 2008.

12 See e.g. A E Mayer, *Islam and Human Rights: Tradition and politics* 4th edn (Boulder: Westview Press 2006); M Svensson, *Debating Human Rights in China: A conceptual and political history* (Lanham: Rowman & Littlefield 2002).

13 B Crossette, “The battle for human rights: a clash of visions between North and South” (2008) 287 *Nation* 20.

suggest that the human rights ideal has itself become a vehicle for oppressive US global domination.¹⁴ It would, however, be equally lop-sided to claim the opposite, that only non-Western, non-democratic states violate human rights. The Abu Ghraib scandal, the treatment of suspects in Guantanamo Bay, the interrogation technique used by the Americans known as “waterboarding” and the US practice of “extraordinary rendition” – taking terrorist suspects for interrogation to countries where torture is condoned – put this beyond doubt. But three things are clear about the West and human rights. First, no Western liberal democracy has a perfect human rights record on its own turf and some have a compelling case to answer for their conduct in other parts of the world. However, secondly, the states which have the best human rights records in the world by any credible criteria, Norway and Denmark, for example, are all Western democracies. Thirdly, as a matter of history, without Western liberal democracy there would be no international human rights ideal at all. This is because, of all the world’s many civilisations, only the West developed the social, political, economic, legal, cultural and intellectual conditions necessary for the contemporary human rights ideal to emerge. And it would not have been institutionalised in the international system as it has been had it not been for the victory of the allied cause in the Second World War and later the Western cause in the Cold War. Other civilisations have, undeniably, espoused noble values,¹⁵ attempted to enshrine them in law and policy, and have contributed to the development of international human rights law, particularly in the post-Cold War era. But they have not effectively institutionalised human rights in their own public institutions – not least because of a commensurate lack of success with democracy and the rule of law – nor have they been the main force behind the modern project of enshrining human rights in international law, nor of the contemporary global extension of the international human rights ideal.¹⁶

A third feature of human rights perfectionism is that those whose analysis is oriented in this direction rarely see the need to provide any empirical evidence for claims that any given country’s general human rights record, or its record in relation to a specific human right, is worse than that of another. Leaving aside the wide consensus on the clusters of states which have the best and the worst overall human rights records, the relative ranking of those in between is not easy, and may even be impossible to determine because the measurement of human rights violations is a much more difficult and controversial exercise than it might seem.¹⁷ For one thing, many human rights violations are invisible and are only known to the violator and the victim. And even where this is not such a problem, what counts as a “human rights violation” is rarely an objective fact but more commonly a matter of evaluation and judgment. Of course, relatively objective estimates can be given for the most severe official abuses such as genocide, mass disappearances, and the systematic use of torture which, in the final analysis, amount to grisly body counts. But when it comes to more subtle human rights like the right to fair trial or the scope for religious freedom, measurement becomes much more problematic. It may even be impossible because one person’s conception of “fairness” or “freedom” may plausibly differ from another’s, in spite of each being referenced to the same concrete international human rights standards.

A fourth problem with human rights perfectionism is that it tends to be associated with an excessive commitment to respecting human dignity which can result in a well-intentioned

14 C Douzinas, *Human Rights and Empire: The political philosophy of cosmopolitanism* (Abingdon: Routledge-Cavendish 2007).

15 See e.g. B G Ramcharan, *Contemporary Human Rights Ideas* (London: Routledge 2008), pp. 8–15.

16 See J Donnelly, “The relative universality of human rights” (2007) 29 *Human Rights Quarterly* 281.

17 For a review of the debate, see S Greer, *The European Convention on Human Rights: Achievements, problems and prospects* (Cambridge: Cambridge University Press 2006), pp. 61–9.

but unwelcome form of paternalism. For example, in September 1994 the police authority in Bonn, Germany, banned a company called Omega from operating a “laserdrome” where “laser sport” was practised. “Laser sport” is a physically harmless combat game where participants, wired with electronic tags, shoot each other with sub-machine-type laser guns.¹⁸ Omega contested the ban in the German courts. But it lost. The courts held that the simulated killing involved in laser sport is a violation of everyone’s basic human right, protected by the German constitution, to have their human dignity respected. And this right is so fundamental it cannot be waived even in the context of otherwise harmless entertainment. There is, of course, a debate to be had about the desirability of combat games of different kinds. But the language of human rights is not obviously the right framework within which to conduct it. The core problem with the decision in the Omega case is that the courts did not take adequate account of three things. First, participation in laser sport is voluntary, therefore, banning it constitutes a restriction on freedom which requires a compelling justification, for example, that it causes harm or palpably violates other rights. Second, the ban does not rest on any credible evidence that laser sport does in fact cause any real harm either to those who practise it or to anyone else. The damage to dignity is at best an ethereal, an exaggerated, or even an imaginary harm. Third, the banning of laser sport is difficult to reconcile with the fact that boxing and martial arts remain legal in Germany.¹⁹ Why do these activities which involve the deliberate infliction of physical pain but not simulated killing, not violate the right to dignity, while laser sport, which involves simulated killing but not the infliction of physical pain, does? The ban on laser sport, therefore, amounts to an incoherent and unjustified restriction of a concrete human right, liberty, in the name of protecting a much more intangible one, dignity, the latter of which is also at least equally “violated” by comparable activities which remain legal.

A final problem is that human rights perfectionism greatly downplays the fact that few human rights are absolute and, therefore, greatly underestimates the extent to which they can, and do, clash with each other and with collective goods such as economic development or national security. This is an issue which will be returned to later.

Realism

The term “realism” means different things in many different disciplines – including art, law, international relations and physics – which there is insufficient opportunity to explore thoroughly here. What it might mean for human rights is open to debate on two levels. First, there is plenty of scope for considering how “human rights realism” differs from “perfectionist” and “sceptical” approaches, and, second, for debate between human rights realists over its detailed implications. In my view, five of the central characteristics of human rights realism are as follows.

First, although human rights must be taken seriously and installed at the very centre of the emergent global value system, realism acknowledges that they can never be fully

18 An English language account can be found in the judgment of the European Court of Human Rights, on a preliminary reference from the German Federal Administrative Court, which held that “Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that the activity is an affront to human dignity”, *Omega Spielhallen-und Automatenaufstellungs-GmbH*, C-36/02, 14 October 2004, para. 42.

19 Following the Winnenden school massacre on 11 March 2009, when 15 people were killed by former student Tim Kretschmar, an enthusiast for paint-balling and violent video and computer games, the German government proposed legislation tightening gun control and banning the use of air rifles to fire paint-filled pellets at opponents (*The Guardian*, 9 May 2009).

20 See, e.g. Donnelly, *Universal Human Rights*, n. 4 above, ch. 8.

implemented. This is not because of the innate wickedness of people, those who exercise power, or the institutions and systems within which we all live our lives. It is because determining what full implementation means will always be a matter of controversy since human rights are by nature vague, imprecise and open to competing interpretations even by those who are fully committed to them. We have, in other words, to be realistic about how close we can get to the fulfilment of the ideal.

Human rights realism is based, second, on a full commitment to anchoring debates about human rights, including and especially about their profile in national legal and political systems, in concrete norms of international human rights law. But, as already intimated, the fact that there are significant problems with international human rights law cannot be denied. The most serious of these is the huge gulf between, on the one hand, the massive international bureaucracies which now exist to tell us what human rights we have, and to monitor whether states adhere to them, and, on the other, the chronically weak mechanisms of enforcement.²⁰ The United Nations now has over a dozen principal agencies working in human rights related fields.²¹ These include its main political organ, the 47-member Human Rights Council, the eight expert committees created by specific treaties and several administrative agencies, such as the Office of the High Commissioner for Human Rights, UNICEF and the UN High Commissioner for Refugees. The administrative agencies carry out vital field work, particularly in humanitarian crises. The others, on the other hand, produce mountains of reports, declarations, and recommendations but, sadly, very little else. The tragedy is that international human rights law is generally only effective with respect to those states which want it to be effective since, in most circumstances, it lacks any real coercive power.

The Human Rights Council provides a particularly sorry illustration of what is wrong with human rights at the UN.²² The council was created in March 2006 to replace the discredited UN Commission on Human Rights which was wound up because of political bias. The election of Libya to the chair in 2003 was the last straw. However, in its first 17 months, the new Human Rights Council fared no better. Only 25 of its 47 member states are democracies. Dominated by a group of Arab and African nations which vote *en bloc*, it issued 13 condemnations, 12 of them against Israel, while refusing to condemn the regimes in Burma, Sudan, or Zimbabwe for the huge human rights crises they currently preside over. While the balance has since been slightly redressed, the bias still remains.

There are no easy solutions to these problems. But three observations can be made about them. First, the fact that there is such a thing as international human rights law is something to be celebrated in spite of the problems about enforcement. The main reason, as already indicated, is that this constitutes the closest thing there is to global value consensus and provides relatively objective standards against which official conduct can be judged by anyone wishing to do so. But second, research indicates that the international human rights system is most effective when dynamic relationships are established with official and unofficial institutions, groups and processes at the sub-national level and that this would be much more difficult to achieve without agreed international standards.²³ Third, economic carrots and sticks often produce better results than political and legal instruments. Take, for example, the case of Turkey which had a terrible human rights record for decades in spite of having ratified the European Convention on Human Rights in 1954.

21 J E Mertus, *The United Nations and Human Rights: A guide for a new era* (London: Routledge 2005).

22 R Farrow, "The UN's human rights sham", *Wall Street Journal Online*, 29 January 2008.

23 See, e.g. T Risse and S C Ropp, "International human rights norms and domestic change: conclusions" in T Risse, S C Ropp and K Sikkink (eds), *The Power of Human Rights: International norms and domestic change* (Cambridge: Cambridge University Press 1999).

The situation only began to improve in the early 21st century when Turkey embarked on negotiations to join the European Union.²⁴

A third feature of human rights realism is the commitment to enshrining international human rights as constitutional rights in national legal systems. But this, in its turn, raises two problems. First, it tends to turn human rights into formal legal doctrines developed by lawyers and judges more in accordance with doctrinal logic than with their underlying purpose. An example can be found in the UK's Human Rights Act which makes it illegal for public authorities to violate the European Convention on Human Rights. The question – what kinds of body can be considered “public authorities” for this purpose? – has given the legal profession a great deal of trouble.²⁵ This problem has been compounded by the fact that, since the 1990s, many public functions have been delegated to private contractors, for example, charitable organisations providing care for elderly people. Judges, lawyers and jurists have sought in vain for the appropriate distinction between “public” authorities on the one hand, and “non public” or “private” ones on the other, by reference to various criteria to do with their function, character, and the nature of the service provided. However, the real issue lies in identifying the consequences for vulnerable people of holding, or refusing to hold, a particular body legally accountable under the Human Rights Act for its conduct. Fortunately, legislation has recently been passed to address some of these difficulties.²⁶

The second problem with the national institutionalisation of human rights is that it creates huge political dilemmas about the role of judges in the legislative process. The relationship between courts, governments and parliaments can be structured in several ways in democratic states.²⁷ At one end of the continuum, judges, such as those sitting on the US Supreme Court, may have the power to annul legislation where they believe constitutional rights have been infringed. At the other end, as in New Zealand, courts are limited simply to interpreting legislation by reference to fundamental rights. Various models can be found in between, including the UK's Human Rights Act which, amongst other things, allows courts to alert the government to the need to refer legislation back to Parliament where there are problems concerning its compliance with the European Convention on Human Rights. This power has, however, been used just over a dozen times since October 2000 when the Act came into force.²⁸ Those on the left of the political spectrum in the UK tend to regard the Human Rights Act as a failure because, they believe, it has changed so little.²⁹ Others, on the political right, regard it as a failure because they think it has changed too much. For example, certain sections of the press are campaigning for the repeal of the Human Rights Act on the grounds that it has tilted the balance in favour of criminals, foreigners, minorities, immigrants etc. at the expense of the human rights of the long-suffering silent majority.³⁰ The Conservative Party advocates replacing the Human Rights Act with a tailor-made British Bill of Rights but has yet to reveal the

24 See Greer, *The European Convention on Human Rights*, n. 17 above, pp. 94–103.

25 R Drabble, “Public authorities and the Human Rights Act” (2006) 11 *Judicial Review* 38; N Bamforth, “The application of the Human Rights Act 1998 to public authorities and private bodies” (1999) 58 *Cambridge Law Journal* 159.

26 Health and Social Care Act 2008, s. 145.

27 For a useful summary see, The Constitution Unit, *Human Rights Legislation* (London: Faculty of Laws, University College 1996), paras 55–87.

28 R Clayton, “The Human Rights Act six years on: where are we now?” (2007) 13 *European Human Rights Law Review* 11.

29 See e.g. K D Ewing, “The futility of the Human Rights Act” (2004) *Public Law* 829; K D Ewing and J-C Tham, “The continuing futility of the Human Rights Act” (2008) *Public Law* 668.

30 Clapham, *Human Rights*, n. 4 above, pp. 2–4.

details.³¹ Responding to this debate, but indicating that it will not propose legislation before the next general election, the government has published a Green Paper on a British Bill of Rights and Responsibilities which would assemble, in a single document, fundamental rights and responsibilities currently scattered across the legal and political landscape.³² But, in order to avoid undermining the Human Rights Act, the intention is that this should function as a set of guiding principles for courts and Parliament rather than providing the basis for fresh justiciable claims.³³

Over the past eight years or so, the Human Rights Act has also attracted more than its fair share of myths.³⁴ Here are just three examples. First, it is a misconception to think that the daily work of the courts is full of human rights challenges.³⁵ In fact the Act is virtually invisible in the routine legal process, featuring, for example, in only 2 per cent of reported appellate cases.³⁶ While the success rate of applications to the House of Lords for leave to appeal in human rights cases is high, only one in three results in a victory on the merits for the original applicant.³⁷ The Human Rights Act is, however, referred to in about a third of House of Lords cases although only substantially affects the results in about one-tenth.³⁸ Another type of misconception stems from often outrageous challenges to administrative decisions, ostensibly on human rights grounds, which ultimately fail precisely because they are outrageous. Typically, the press report the challenge itself as an indicator of the bankruptcy of the Human Rights Act, while the fact that it ultimately flounders is ignored. But by then a misleading impression has already taken root in public consciousness. A good example is the application made in 2001 by the convicted serial killer Denis Nilsen, who complained that his human right not to suffer inhuman or degrading treatment had been violated by a decision of the prison governor to deny him access to gay pornography.³⁹ An incandescent press fulminated at the application and at the Human Rights Act for allowing it to happen. But the fact that the application failed at the first legal hurdle was ignored. Finally, there is absolutely no truth in the rumour that the Human Rights Act has fuelled the so-called “compensation culture”, for the very simple reason that there are only three known cases of compensation being awarded for a successful Human Rights Act claim. The courts have, instead, preferred other remedies.⁴⁰

There are good reasons for regarding the Human Rights Act as a successful exercise in human rights realism. It integrates European Convention standards into national legislative and adjudicative processes without the dislocating and unpredictable consequences which could have ensued had it been used by the courts radically to restructure whole territories of substantive law. It is doubtful if the UK needs a “rights revolution”. But even if it did, the courts would not be the place to achieve it. What the UK requires instead is a firmer commitment to human rights realism, that is, a much more informed debate about how

31 See e.g. *The Guardian*, 28 February 2009.

32 *Rights and Responsibilities: Developing our constitutional framework* Cm 7577 (London: Ministry of Justice (March) 2009).

33 *Ibid.* pp. 8–10.

34 *Review of the Implementation of the Human Rights Act* (London Department for Constitutional Affairs, Justice Rights and Democracy (July) 2006), p. 5.

35 *Ibid.* See also J Raine and C Walker, *The Impact on the Courts and the Administration of Justice of the Human Rights Act 1998*, Lord Chancellor's Department Research Series, No. 9/02 (London: LCD 2002), p. 53.

36 *Review of the Implementation of the Human Rights Act*, n. 34 above, p. 10.

37 S Shah and T Poole, *The Impact of the Human Rights Act on the House of Lords*, LSE Law, Society and Economy Working Papers 8/2009 (London: LSE Law Department 2009), pp. 23–4.

38 *Review of the Implementation of the Human Rights Act*, n. 34 above, p. 10.

39 *Ibid.* p. 30.

40 Clayton, n. 28 above, p. 26.

human rights could be more effectively protected and further progress towards the realisation of this goal.

A fourth feature of human rights realism is the importance of recognising that human rights conflict with each other and with other public goods in ways which cannot be settled objectively even by the best laws and the best courts. The conflict between liberty and dignity, addressed so problematically in the German laserdrome case, has already been noted. But there are many other examples, ranging from the tension between liberty and security in the struggle against terrorism, to controversies such as those over the publication of *The Satanic Verses* and the Danish cartoons of the Prophet Mohammad. But a particularly troubling case, which sparked a huge public controversy in Germany cutting across the usual party political lines, provides a particularly graphic illustration of the merits of realism over both scepticism and perfectionism.⁴¹

On 27 September 2002, a little boy called Jakob von Metzler, the 11-year-old son of a Frankfurt banker, was abducted on his way home. Not long after, the family received a letter demanding a ransom of one million Euros and made arrangements for the kidnapper to collect it from a specified tram stop. During the night, three days later, Magnus Gäfgen, a 32-year old law student and acquaintance of Jakob's sister, picked up the money and wasted no time in ordering a new Mercedes and booking a holiday abroad. But unbeknown to Gäfgen the tram stop had been under police surveillance. Shortly after he collected the ransom, the police arrested Gäfgen and his girlfriend. Gäfgen was told he was suspected of having kidnapped Jakob and was informed about his rights, including to remain silent and to consult a lawyer. Some of the money was also recovered from Gäfgen's flat and later from his bank account. But there was no sign of Jakob. A note planning the crime was also discovered at the flat. When the police confronted Gäfgen with the evidence against him, he changed his story several times. At first he claimed he had found the ransom by chance. Then he admitted to having been involved in the kidnapping but only as the courier. He named others as accomplices. But police checks proved this part of his story to be false.

The public having been informed of Jakob's disappearance, a search party of 1000 volunteers combed a nearby wood. But nothing was found. The situation was now getting desperate. The police realised that if Gäfgen and his girlfriend had kidnapped Jakob by themselves, the fact that they were both in custody meant that Jakob might be dying alone wherever they had taken him. So another tactic was tried. Jakob's mother was brought to the police station to plead with Gäfgen. Gäfgen was unmoved. So, at 5:30 the next morning, 1 October 2002, the deputy chief of the Frankfurt am Main police ordered a subordinate police officer to threaten Gäfgen with a severe beating if he continued to refuse to disclose Jakob's whereabouts. The subordinate police officer not only issued the threat, but also hit Gäfgen's chest with his hand and shook him so that his head hit the wall. Ten minutes after this session of questioning began Gäfgen told the police that Jakob's body could be found under a jetty at a pond near Birstein. The police took Gäfgen there immediately and discovered that it was true. Tests later showed that Jakob had died from suffocation. Tyre tracks matching those of Gäfgen's car, and shoe prints matching his shoes, were also discovered at the scene. When questioned on the way back to the police station Gäfgen confessed to having kidnapped and killed Jakob. Acting on information Gäfgen provided, the police later recovered some of Jakob's belongings and the typewriter used to type the ransom demand.

41 D Schroeder, "A child's life or a 'little bit of torture'? State-sanctioned violence and dignity" (2006) 15 *Cambridge Quarterly of Health Care Ethics* 188.

Gäfgen subsequently repeated his confession, not only to the police, but to a public prosecutor, a district judge, and finally before the regional court on the second day of his trial for abduction and murder in July 2003. He was found guilty and was sentenced to life imprisonment. His appeal was rejected by the Federal Constitutional Court. However, the deputy chief police officer who had ordered Gäfgen to be threatened and the subordinate officer who had issued the threat and had hit him were also tried and convicted for coercion and incitement to coercion. Nevertheless, although these offences carry a maximum sentence of five years' imprisonment in Germany, the court merely imposed suspended fines. Each officer was also transferred to duties unconnected with criminal investigation and the deputy chief was later promoted.

Gäfgen sued the state of Hesse for compensation but without success. Before this claim was settled, he also complained to the European Court of Human Rights that the police threats and the assault violated his right, under Article 3 of the European Convention on Human Rights, not to be tortured or inhumanly or degradingly treated or punished and that his right to a fair trial under Article 6 had also been breached by the events which had subsequently unfolded, including his various confessions. On 30 June 2008, the court concluded, by a majority of six to one, that there had been no violation of either provision.⁴² As far as Article 3 was concerned it was held that the applicant had indeed been subjected to inhuman treatment in the course of police questioning on 1 October 2002 and that this constituted a violation of Article 3. However, by the time he petitioned Strasbourg, before his claim for compensation was settled by the German courts, the European Court of Human Rights decided that Gäfgen could no longer be considered a victim of this violation. It was held that the conviction of the police officers concerned, and the sentences they received, constituted appropriate and adequate redress from the German legal system, given that the abuse amounted to no more than a threat and a relatively minor physical assault. As for Article 6, the court concluded that the proceedings as a whole had not been unfair since the applicant had been convicted entirely on the confession made at trial, which he claimed was motivated by remorse and which, unlike his initial confession, was not tainted by the treatment he received in the police station. The court added that the items of physical evidence discovered as a result of Gäfgen's initial admission to the police – Jakob's body and his belongings together with the tyre tracks, the shoe prints and the typewriter used to type the ransom note – could be deemed to have been obtained as a result of police misconduct. But their effect was merely to confirm Gäfgen's guilt as proven by evidence independent of how he had been treated by the police, namely his courtroom confession supported by other untainted evidence such as the plan of the crime found in his flat.

Of the three positions on human rights under consideration here, realism most fully addresses the moral and legal dilemmas in this case. Perfectionists would take the view that threats of abuse to suspects in police custody must be outlawed and severely punished in all, including these, circumstances. They would, therefore, reject the decisions of the German courts and the European Court of Human Rights on the grounds that the violation of the applicant's rights under Article 3 of the European Convention on Human Rights had not been adequately remedied by the lenient punishment the police officers received. But the problem with this approach is that it ranks the right of a murder suspect to be protected from even the threat of mild physical abuse, higher than the right of a

42 *Gäfgen v Germany*, judgment of the European Court of Human Rights, 30 June 2008, referred to the Grand Chamber on 1 December 2008. Judge Kalaydjieva dissented on the grounds that, although the punishment of the police officers and any compensation the applicant might subsequently receive could be seen as remedying the direct effects of the breach of Article 3, the applicant nevertheless continued to be the victim of a violation of Article 6 because the coercion resulted in both self-incriminatory statements and evidence which irretrievably affected the fairness of the proceedings and justified a re-trial.

kidnapped child to be rescued from the risk of death. Sadly Jakob was already dead when Gäfgen was abused by the police. But nobody except Gäfgen knew this. Would anybody seriously advocate severely punishing the police officers concerned even if the information Gäfgen provided had in fact led to Jakob's life being saved? Human rights sceptics, on the other hand, would not feel so constrained by Article 3 and, while recognising the appropriateness of these standards in most circumstances, would advocate an even more flexible approach than that taken by the relevant courts, involving, for example, refraining from punishing the officers at all, not removing them from criminal investigation work, and possibly even rewarding them for their conduct. However, the difficulty here is that without some official sanction, even in these circumstances, there is an unacceptable risk that the abuse of suspects in police custody might become more routine.

However, for the human rights realist there is no perfect moral or legal solution since each of the alternatives suffers from significant flaws. Nevertheless, the decision taken by the German courts, as confirmed by the European Court of Human Rights, can be commended as the "least bad". In effect, this means that the prohibition against minor inhuman or degrading treatment or punishment found in Article 3 of the European Convention can only be said to be absolute in a formal sense. It can, in other words, effectively be overridden by the competing right to life of a hostage, particularly, perhaps, a kidnapped child. But, several uncommon conditions need to be fulfilled. First, there must be overwhelming evidence that the suspect was involved in the abduction. Second, there must be compelling reasons for believing that the hostage faces an imminent risk of death unless immediately rescued. Third, there must be very good grounds for believing that the suspect is likely to have information which could facilitate a rescue. Fourth, physical coercion must only be applied by law enforcement officials as an absolute last resort. Fifth, this must not be severe. And, finally, those who applied it must be formally, though leniently, punished afterwards.

Finally, human rights realism recognises that although human rights are universal in the abstract sense discussed earlier in this article, there is considerable scope for their institutionalisation in national legal and political systems in ways which are sensitive to features of the particular context provided these do not cause or compound avoidable human suffering, and provided any restriction on liberty is in order to avoid causing physical or psychological harm to others. But an unresolved question, even amongst Western democracies, is when human life begins and therefore, when human rights are acquired, an issue which crystallises in the debate over abortion. Some European countries take a liberal approach, permitting termination in most circumstances up to the point of foetal viability outside the womb. Others have much more conservative regimes which outlaw abortion in virtually all circumstances except where the pregnancy seriously jeopardises the life of the mother. Although the European Commission of Human Rights heard several cases in the 1980s and 1990s, it was not until 2004 that the court considered the matter.⁴³ In *Vo v France*,⁴⁴ medical negligence resulted in the termination of a pregnancy of between 20 and 24 weeks. The mother complained of a breach of the right to life under Article 2 of the European Convention on Human Rights on the grounds that the doctor had been acquitted by the French courts of the crime of causing unintentional injury because the foetus was not considered fully human by that stage of the pregnancy. A majority of the Grand Chamber of the European Court of Human Rights ruled that there had been no violation

43 *H v Norway* (1992) 73 DR155; *Paton v United Kingdom* (1981) 3 EHRR 408; *Briggemann and Scheuten v Germany* (1981) 3 EHRR 244. B Hewson, "Dancing on the head of a pin? Foetal life and the European Convention" (2005) 13 *Feminist Legal Studies* 363.

44 (2005) 40 EHRR 259.

of Article 2. It was held that the domestic legal protection afforded the applicant was adequate, and the requisite procedural requirements had been fulfilled, particularly since it had been open to her to bring civil and/or administrative proceedings in respect of the accident. The majority observed that the Convention is silent as to when human life attracting the protection of Article 2 begins. It also concluded that there is, at best, a consensus in Europe that embryos and fetuses are part of the human race with the potential to develop into persons with full legal rights. But, because there is no consensus on when, legally and scientifically, human life begins, member states must be permitted some latitude in finding their own answers to this question. The majority, therefore, declined to decide whether the foetus in this case was a person or not. Nor was there any need to speculate on possible conflicts between the respective rights of foetus and mother, given that, in this case, they coincided. Because, as the court noted, the Convention does not clearly determine when the right to life is acquired, it follows that, provided national laws are democratic and comply with the principle of legality, the Convention permits abortion up to the point of viability of a foetus outside the womb but does not mandate it. Therefore, the content of national abortion laws may vary from state to state and still be Convention-compliant.

Conclusion

The idea of human rights represents one of the noblest of human aspirations and, in a diverse but increasingly integrated world, offers a clearer and more coherent vision of a better future for all than any of its rivals. For this reason alone it should be institutionalised in all legitimate legal and political systems, both national and international. However, “human rights realism”, which I hope Tom Hadden would endorse, provides a better model for institutionalisation than either “scepticism” or “perfectionism” since only realism adequately acknowledges the benefits and drawbacks. The primary benefit is that the moral primacy of the individual is given formal institutional recognition and protection. But, there are several inescapable problems. The meaning and implications of human rights will always be matters of interpretation, controversy and dispute because they are, by nature, abstract and imprecise. Human rights conflict with each other, and with other social goals, in ways which cannot be settled objectively nor, therefore, totally insulated from the risks of legal formalism, on the one hand, or from cultural assumptions or political partisanship, on the other. Finally, there is the irresolvable paradox that, while human rights are universal in an abstract sense, their institutionalisation can and will legitimately vary from state to state, providing the intrinsic equal worth of all individuals is properly recognised.

