Chapter Eight: Individualistic and Systemic Conceptions of Human Rights

The previous chapter discussed different types of duties, noting in particular the distinction between duties which are owed to others (directed duties) and undirected duties not owed to specific individuals[1882] and giving a number of examples of the latter undirected duties in Convention law. This chapter returns to the perspective of rights and highlights the problems that flow from the fact that the Court, at present, focuses near-exclusively on rights and corresponding directed duties. While such directed duties grounded on human rights are well-suited to capture private interests,[1883] in line with human rights and the directed[1884] duties they ground being typically understood as justified[1885] by reference to the position of the rights holder, interpreting these duties as protecting interests other than those of the rights holder leads to problematic inconsistencies within the Court's case law. Where activities, such as legal services or journalism, significantly affect *public* interests, a combination of directed duties based on private interests and undirected duties based on public ones is more appropriate, as will be argued in Chapter Nine. This is because the Convention and most of the Court's case law are based on an understanding of human rights that will be labelled as 'individualistic' for present purposes and assumes that the Convention rights are justified only by what they do for the individual; interpreting human rights in a 'systemic' way, by reference to what they do to advance interests that are not those of the rights holder and which would be better protected by undirected duties, thus sits uneasily with much of Convention law.

1882 cf eg Japa Pallikkathayil, 'Revisiting the Interest Theory of Rights: Discussion of The Morality of Freedom' (2016) 14 Jerusalem Review of Legal Studies 147, 154.

1883 On the terms 'private interest' and 'public interest' see Chapter One, 65ff.

1884 In recent times 'philosophers have claimed that the Theories of Rights debate is, or ought to be recast as being, about how best to explain a "directed" duty's direction', David Frydrych, 'The Theories of Rights Debate' (2018) 9 Jurisprudence 566, 577 with further references, as well as the further references below in n 1940.

1885 On the interchangeable nature of the terms 'justifying', 'founding', 'basing', 'deriving' or 'grounding' see Samantha Besson, 'Justifications' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2022) 25.

The present chapter shows that using exclusively directed duties is problematic because combining legal doctrines developed on individualistic understandings of human rights with systemic readings leads to inconsistencies. In a first section (I.), the chapter explains the predominantly individualistic justifications of human rights that mark the debate on moral human rights and examines to what extent these are reflected in Convention law. A second section (II.) does the same for systemic justifications of human rights, once again beginning with the debate on moral human rights before turning to black-letter Convention law. Finally, a third section (III.) shows that combining systemic justifications of Convention rights with doctrines – such as regarding the scope of the Convention rights and on proportionality – which are premised on an individualistic view leads to inconsistencies within the Court's case law.

Due to inconsistent terminology across the literature, a definitional note is in order. For present purposes, a conception of human rights will be termed

> 'individualistic' if 'any given right is justified by what it does for its holder, considered independently of whether it serves or disserves people other than its holder'.[1886]

This definition builds on terminology that already exists in the literature. By contrast, a conception of human rights will be called

> 'systemic' if it justifies rights (also) by whether the right serves or disserves people other than its holder.

These descriptions have been developed in the philosophy of moral human rights, not as regards the legal human rights of the Convention. This is in keeping with a significant lack of theoretical analysis of the Convention.[1887]

1886 Rowan Cruft, 'Human Rights as Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) 130. Cruft, here, is describing Joseph Raz's influential theory of rights, which will be dealt with in greater detail below at 402ff. Defining 'individualistic conception[s] of human rights – as based on the good of the right holder' see also Rowan Cruft, 'Journalism and Press Freedom as Human Rights' (2022) 39 Journal of Applied Philosophy 359, 361.

1887 Noting this eg Alain Zysset, *The ECHR and Human Rights Theory* (Routledge 2017) 20, Bosko Tripkovic and Alain Zysset, 'Uncovering the Nature of ECHR Rights: An Analytical and Methodological Framework' (2024) 24 Human Rights Law Review 1, 4, and Kanstantsin Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (CUP 2021) 112ff.

The Court itself is vocally sceptical of theory,[1888] which is problematic because it shifts the underlying questions from the explicit to the implicit level – it is impossible to apply human rights *without* a vision of what justifies them and what they should do.[1889] '[T]he justifications of rights at least co-shape the expectations about their appropriate substance and about the appropriate holders, who should enjoy legal rights and who not',[1890] meaning that ignoring these questions is not an option. Unfortunately, this under-theorisation of the Convention is in line with the widely-noted general under-theorisation of legal, as opposed to moral, human rights.[1891] There is a broad[1892] and long-standing[1893] consensus that there is an insufficient link between the theory of moral human rights and the debate on legal human rights, which is partly due to many authors not clarifying which of the two they are discussing.[1894]

1888 See famously, in the context of 'horizontal effect', the Court's statement in *VgT Verein gegen Tierfabriken v Switzerland* App no 24699/94 (ECtHR, 28 June 2001), para 46 that it 'does not consider it desirable, let alone necessary, to elaborate a general theory concerning the extent to which the Convention guarantees should be extended to relations between private individuals *inter se*'.

1889 Particularly since Art. 31 § 1 VCLT requires that a treaty shall be interpreted 'in the light of its object and purpose', meaning that the answer has a direct doctrinal impact. The Court itself, when discussing Art. 31 § 1 VCLT, has typically merely highlighted 'the object and purpose of the Convention as an instrument for the protection of individual human beings' (*Loizidou v Turkey (Preliminary Objections)* App no 15318/89 (ECtHR, 23 March 1995), para 72; similarly *ND and NT v Spain [GC]* App no 8675/15; 8697/15 (ECtHR, 13 February 2020), para 172) or 'an instrument for the protection of human rights' (*Magyar Helsinki Bizottság v Hungary [GC]* App no 18030/11 (ECtHR, 08 November 2016), para 121; *Slovenia v Croatia [GC]* App no 54155/16 (ECtHR, 18 November 2020), para 60). That, however, begs the question.

1890 Anne Peters, 'The Importance of Having Rights' (2021) 81 Heidelberg Journal of International Law 7, 10.

1891 Besson (n 1885) 23ff.

1892 For further references see eg Samantha Besson, 'Human Rights: Ethical, Political…or Legal? First Steps in a Legal Theory of Human Rights' in Donald Earl Childress (ed), *The Role of Ethics in International Law* (CUP 2011) 213; Allen Buchanan, *The Heart of Human Rights* (OUP 2013) 50; Eric Posner, 'Human Welfare, Not Human Rights' (2008) 108 Columbia Law Review 1758, 1767.

1893 See eg Saladin Meckled-García and Basak Çali, 'Lost in Translation: The Human Rights Ideal and International Human Rights Law' in Saladin Meckled-García and Basak Çali (eds), *The Legalization of Human Rights* (Taylor & Francis 2005) 10, 10; George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 5.

1894 On this criticism see eg Buchanan, *The Heart of Human Rights* (n 1892) 12, 81. Noting that 'the majority of human rights theorists […] justify human rights […]

Given this lack of theoretical analysis specifically of the Convention rights, 'the obvious place to turn to for justification then is [general] human rights philosophy or theory'.[1895] The idea that human rights philosophy can usefully inform human rights law is so widespread in both anglophone and other discourses[1896] as to have been referred to as the 'orthodox' position.[1897] Nonetheless, given that this 'Mirroring View'[1898] has recently come under criticism, a brief digression seems appropriate to explain why the debate on moral human rights can nonetheless inform a study of the law of the European Convention.

The debate on moral human rights is useful because the positive legal human rights contained in the Convention are both conceptually and textually linked to moral human rights.[1899] Conceptually, this is because '[t]he law institutes human right-holders as such and makes universal moral rights human rights, either by recognizing them as legal rights or

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without clarifying why justifications are needed in the first place or what exactly they are justifying' Besson, 'Justifications' (n 1885) 24.

1895 Besson, 'Justifications' (n 1885) 24.

1896 For an overview of the 'mirroring view' from the German-language literature see recently eg Moritz Blöchlinger, *Normative Legitimität von Recht, Moral und Menschenrechten im Lichte der positivistischen Trennungsthese* (Duncker & Humblot 2022) 31ff.

1897 Andreas Follesdal, 'Theories of Human Rights' in Reidar Maliks and Johan Karlsson Schaffer (eds), *Moral and Political Conceptions of Human Rights* (CUP 2017) 78; Jesse Tomalty, 'Justifying International Legal Human Rights' (2016) 30 Ethics & International Affairs 483, 483; Mark D. Retter, 'The Road Not Taken: On MacIntyre's Human Rights Skepticism' (2018) 63 The American Journal of Jurisprudence 189, 195 with further references. For further formulations see eg Besson, 'Human Rights: Ethical, Political…or Legal? First Steps in a Legal Theory of Human Rights' (n 1892) 211 n 1; Joseph Raz, 'Human Rights in the Emerging World Order' (2010) 1 Transnational Legal Theory 31, 34.

1898 Introducing this (critical) term Buchanan, *The Heart of Human Rights* (n 1892) 14ff, who notes at 17 that '[t]he Mirroring View holds that to justify an international legal human right typically involves defending the claim that a corresponding moral human right exists'. See also Allen Buchanan, 'Why International Legal Human Rights?' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 245 as well as, from the German-language literature, Theodor Schilling, *Internationaler Menschenrechtsschutz* (4th edn, Mohr Siebeck 2022) 4. Noting the predominance of the Mirroring View in the work of many influential contemporary philosophers Rowan Cruft, 'Human Rights Law Without Natural Moral Rights' (2015) 29 Ethics & International Affairs 223, 223.

1899 See similarly from the German-language literature Paul Tiedemann, *Philosophische Grundlagen der Menschenrechte* (Springer 2023) 13ff.

by creating them in recognition of certain fundamental universal moral interests'.[1900] Even legal human rights are '[f]or better or for worse … seen as formulating valid moral claims'[1901] because 'grounding legal human rights in prelegal moral rights does an especially good job of reflecting the importance we want to give legal human rights'.[1902] Textually, the Convention, through its links to the Universal Declaration of Human Rights, refers back to moral justifications;[1903]

> in denying the relevance of [moral human rights] to the justification of [international legal human rights], [criticism of the Mirroring View] sits awkwardly with the preambular language of core ILHR documents, which strongly suggests that the rights contained therein are intended to give legal expression and force to the rights held by all humans simply in virtue of being human.[1904]

For the present question, reference to the philosophy of moral human rights is all the more possible because, in what follows, no normative claim will be made that the Court *should* follow one of these theories. Instead, theories developed in the philosophy of moral human rights will be used in a weaker sense as descriptive tools to highlight the potential reasons for inconsistencies in the Court's case law.

However, even if the debate on moral human rights is more advanced than that on legal human rights, it equally suffers from (albeit less pronounced) problems.[1905] Even for moral human rights authors have noted the problematic tendency to 'write about human rights [but] leave entirely unspecified what our particular aim and approach is'.[1906] Moreover, nor is there a universally accepted theory for moral human rights – '[t]here

1900 Besson, 'Justifications' (n 1885) 29. For a similar argument as regards domestic constitutional rights see Robert Alexy, 'The Existence of Human Rights', *Law's Ideal Dimension* (OUP 2021) 145.

1901 Onora O'Neill, 'Response to John Tasioulas' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 71.

1902 Cruft, 'Human Rights Law Without Natural Moral Rights' (n 1898) 229.

1903 Developing this argument in greater detail and for international human rights law generally see eg Besson, 'Justifications' (n 1885) 24; Tomalty (n 1897) 487.

1904 Tomalty (n 1897) 487; Buchanan argues against this point in *The Heart of Human Rights* (n 1892) at 73.

1905 As Besson, 'Justifications' (n 1885) 25 puts it: 'if it is true that the justifications of human rights and their role are indeterminate and contested, it should be a consolation to realize that so is the rest of human rights theory'.

1906 James Griffin, 'Human Rights: Questions of Aim and Approach' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) 15.

is nothing approaching a consensus'.[1907] Instead, '[a]lthough rights are the distinctive normative concept of modern times, philosophers' analyses of the concept are a jumble'.[1908] In fact, questions have even been raised whether a single theory is desirable or indeed possible. Perhaps '[t]here is no "one-size-fits-all" theory of human rights, either of their moral foundations or of their scope'.[1909]

As a result of this plurality, it can in principle be permissible to adduce several different justifications for legal human rights.[1910] However, in the context of the European Convention on Human Rights, the present study posits that the Court's case law should aim to be consistent across different cases. Therefore, multiple theories are unproblematic only if they do not contradict each other. While it is possible for the Court to apply different justifications in different areas, it should not combine these unless they are compatible with each other.

The following sections set out two major theoretical approaches to moral and legal human rights, individualistic (I.) and systemic (II.) understandings. It then highlights (III.) that the criterion of compatibility between the two is not met because the former understanding excludes considerations that the latter would include. Note that the debate on 'political' conceptions of human rights,[1911] which focus on the role that human rights play between

1907 Scott FitzGibbon, 'The Ethical Bases of Human Rights' (2019) 19 Journal of Law in Society 19, 19.

1908 Leif Wenar, 'Rights and What We Owe to Each Other' (2013) 10 Journal of Moral Philosophy 375, 378.

1909 Letsas (n 1892) 25.

1910 For an introduction to the debate over monist and pluralist accounts of the justification of human rights see eg Besson, 'Justifications' (n 1885) 32ff. As Alexy notes, 'the assumption that there must exist precisely one standard general ground for individual rights which has to be embraced … obscures the insight that there may exist a bundle of quite different reasons behind any individual right, and that different rights may rest on quite different reasons' (Robert Alexy, 'Individual Rights and Collective Goods' in Carlos Nino (ed), *Rights* (NYU Press 1992) 164). See also Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 120 on 'foundational pluralism'. Noting that this is also true for 'international legal human rights' Buchanan, *The Heart of Human Rights* (n 1892) 50.

1911 For an introduction see eg Gerhard Ernst and Jan-Christoph Heilinger, 'Introduction' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) VIIff. For to the extent ascertainable the first discussion of a political conception specifically in the context of the Convention see Tripkovic and Zysset (n 1887).

States, will not be addressed; these conceptions not only 'mi[ss] the intranational purpose of human rights',[1912] but generally also offer no guidance on how to interpret human rights in individual cases because they simply presuppose a moral theory of rights.[1913] Moreover, the text below largely cites materials written in the English language because in recent years this has been the main language of debate;[1914] however, as the literature in French, German and Russian shows and in line with human rights' claim to universalism, the ideas discussed in the following sections are not peculiar to anglophone discourse.[1915]

I. Individualistic conceptions of human rights

The classic justification for human rights is individualistic: Human rights are justified by what they do for their holder, regardless of whether this serves or disserves anyone else. 'An assumption shared by almost all [the] diverse conceptions [of human rights] is that human rights … are held by the right-holder for their own sake, rather than for the sake of others beyond the right-holder'.[1916] The present section highlights the predominance of individualistic conceptions in moral human rights theory (1.). It then argues that this type of individualistic conception sits well with both the Convention text and the Court's case law and is thus arguably the premise underlying the legal human rights of the Convention in most areas (2.).

1912 Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 Ethics 711, 726.

1913 David Miller, 'Joseph Raz on Human Rights: A Critical Appraisal' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 235.

1914 Bridging the linguistic gap between English and German see eg the contributions in Johannes Haaf and others (eds), *Die Grundlagen der Menschenrechte* (Nomos 2023), as well as the recent overview in Blöchlinger (n 1896).

1915 For an introduction in German see eg Tiedemann (n 1899); in French see eg Samantha Besson, 'Structure et nature des droits de l'homme' in Maya Hertig Randall and Michel Hottelier (eds), *Introduction aux droits de l'homme* (2014); in Russian see eg the first two chapters of Aleksandr Antonovič Kovalev, *Meždunarodnaja zaščita prav čeloveka: Učebnoe posobie* (Statut 2013).

1916 Rowan Cruft, *Human Rights, Ownership, and the Individual* (OUP 2019) 118.

1. Individualistic conceptions in moral human rights theory

Most moral human rights theory is individualistic in the sense explained above, ie human rights are justified by what they do for their holder. 'Individual moral rights, of which human moral rights are a sub-species, are not only rights *of* individuals, they are also grounded in some normatively salient characteristic of the individual right-holder'.[1917] 'Human rights share with rights of all kinds a commitment to the importance of certain individual interests'.[1918] Indeed, 'individualistic justification [is] one of the hallmarks – maybe even the one hallmark – of human rights'.[1919] 'Only the interests of the right-holder, and not anyone else's interests, need to be invoked as part of the positive case for the right's existence'.[1920] This 'individual-centred'[1921] approach is so common that authors typically do not even make it explicit – where they do, it is frequently referred to as the 'orthodox'[1922] or 'traditionalist'[1923] view. 'The idea of human rights … is rooted in a sort of ethical or normative individualism which views the human individual as the most important entity that exists in the world'.[1924] As a result, 'there must be something about the right-holder that is of suffi-

1917 John Tasioulas, 'On the Nature of Human Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (de Gruyter 2011) 29 (emphasis in original).

1918 Jeremy Waldron, 'Rights and Human Rights', *The Cambridge Companion to the Philosophy of Law* (CUP 2020) 156.

1919 Cruft, 'Human Rights as Rights' (n 1886) 129, and similarly at 136.

1920 John Tasioulas, 'On the Foundations of Human Rights' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 61.

1921 Başak Çalı, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 Human Rights Quarterly 251, 253 referring in passing to 'the individual-centred concerns which generate human rights'.

1922 Tasioulas, 'On the Nature of Human Rights' (n 1917) 20, 26ff; Tasioulas, 'On the Foundations of Human Rights' (n 1920) 45; Follesdal (n 1897) 80ff; FitzGibbon (n 1907) 29; Andrea Sangiovanni, *Humanity Without Dignity* (HUP 2017) 177. Note that in many of these contributions 'orthodox' is used as a label to contrast against 'political' theories as described at text to n 1911.

1923 Alon Harel, 'Revisionist Theories of Rights: An Unwelcome Defense' (1998) 11 Canadian Journal of Law and Jurisprudence 227, 227: 'Traditionalists are committed to the view that [a] right is grounded in individualistic reasons alone and hold that this position has important implications for the scope of the right'.

1924 Waldron, 'Rights and Human Rights' (n 1918) 157. Note that a similar idea underpins the definition of 'public interests' chosen for this study and discussed in Chapter One, 65ff, particularly the rejection of so-called 'unitary conceptions'.

cient moral importance to ground the duties and it is because this is so that the duties are owed to him or her'.[1925] What exactly this 'something' is is disputed,[1926] with various authors citing aspects as diverse as eg dignity,[1927] independence,[1928] needs,[1929] capabilities,[1930] autonomy,[1931] vulnerability[1932] and, of course, combinations of the foregoing,[1933] but human rights, on these views, are always individualistically justified.[1934] Of course, this does

1925 Buchanan, *The Heart of Human Rights* (n 1892) 58.

1926 Note that this is also true on non-consequentialist theories of human rights (for an introduction see eg William J. Talbott, 'Consequentialism and Human Rights' (2013) 8 Philosophy Compass 1030), which are also, perhaps even more (Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 350ff), focused on the individual. Highlighting that '[w]e should reject as false the choice between a status-based or dignitarian account of human rights and an interest-based account' Tasioulas, 'On the Foundations of Human Rights' (n 1920) 56 (since the question is ultimately definitional, as explained eg in James Sherman, 'A New Instrumental Theory of Rights' (2010) 13 Ethical Theory and Moral Practice 215, 218; Leif Wenar, 'The Value of Rights' in Joseph Keim Campbell, Michael O'Rourke and David Shier (eds), *Law and Social Justice* (Bradford 2005) 201).

1927 Tasioulas, 'On the Foundations of Human Rights' (n 1920) 55. For a discussion of dignity regarding legal human rights see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 European Journal of International Law 655. Note that 'dignity' is a particularly popular topos in the German-language literature, partly for reasons related to the prominence this concept enjoys in German constitutional law, but even beyond a strictly legal setting, see eg Tiedemann (n 1899) 73ff. Highlighting its significance from the Russian literature eg Andrej Jurov, 'Vvedenie v koncepciju prav čeloveka' in Vadim Karastelev (ed), *Kurs «Prava čeloveka»: učebnoe posobie* (Moskovskaya Xel'sinkskaya Gruppa 2012) 10 with further references.

1928 Ariel Zylberman, 'The Very Thought of (Wronging) You' (2014) 42 Philosophical Topics 153, 161.

1929 David Miller, 'Grounding Human Rights' (2012) 15 Critical Review of International Social and Political Philosophy 407.

1930 Amartya Sen, 'Human Rights and Capabilities' (2005) 6 Journal of Human Development 151.

1931 James Griffin, *On Human Rights* (OUP 2008) 32ff.

1932 Martha Fineman, 'The Vulnerable Subject' (2008) 20 Yale Journal of Law and Feminism 1.

1933 Waldron, 'Rights and Human Rights' (n 1918) 161. For a broader overview see eg FitzGibbon (n 1907), and the eight possible justifications discussed by Alexy, 'The Existence of Human Rights' (n 1910) 147.

1934 Cruft, 'Human Rights as Rights' (n 1886) 130. See, for similar links between human rights and private interests, eg Griffin, 'Human Rights: Questions of Aim and Approach' (n 1906) 10; Waldron, 'Rights and Human Rights' (n 1918) 153; Tasioulas,

not mean that a positive impact on others cannot be a pleasant side-effect of human rights. It simply means that the justification of this right does not depend on whether it has this effect. For human rights as classically understood, '[i]ndividualistic justification is central'.[1935] Moreover, this individualistic conception is not limited to the anglophone sphere, but instead is also shared in the general literature on human rights in French,[1936] German[1937] and Russian.[1938]

(a) *Interest theories of rights as individualistic conceptions*

In fact, this focus on the individual is frequently seen not just as one of the hallmarks of *human* rights, but of *all* legal rights,[1939] in the sense that it

'On the Foundations of Human Rights' (n 1920) 50; Robert Mullins, 'Rights, Roles and Interests' (2019) 16 Journal of Ethics and Social Philosophy 98.

1935 Rowan Cruft, 'Why is it Disrespectful to Violate Rights?' (2013) 113 Proceedings of the Aristotelian Society 201, 206. Note that this also holds good for procedural approaches to human rights such as the one proposed by Forst (n 1912).

1936 See eg Besson, 'Structure et nature des droits de l'homme' (n 1915) 23ff, highlighting the individualistic focus of international human rights at 25; Emmanuel Decaux, 'L'intérêt général, « peau de chagrin » du droit international des droits de l'homme ?' in Anémone Cartier-Bresson and others (eds), *L'Intérêt Général : Mélanges en l'Honneur de Didier Truchet* (Dalloz 2015) 125; Louis Favoreu, *Droit des libertés fondamentales* (8th edn, Dalloz 2021) 16.

1937 See eg the discussion of the development in Franziska Martinsen, 'Theoretische Grundlagen der Menschenrechte zwischen Ideengeschichte und Zukunft' in Johannes Haaf and others (eds), *Die Grundlagen der Menschenrechte* (Nomos 2023), in Markus Wolf, 'Allgemeines Selbstbewusstsein: Eine hegelianische Alternative zu "orthodoxen" und "politischen" Konzeptionen der Menschenrechte' in Johannes Haaf and others (eds), *Die Grundlagen der Menschenrechte* (Nomos 2023) 70ff as well as the discussion in Tiedemann (n 1899), particularly chapters 2–6. Discussing the contemporary English-language debate in German see particularly Hubert Schnüriger, *Eine Statustheorie moralischer Rechte* (Brill 2014).

1938 See eg the introduction in Jurov (n 1927) 14ff, Kovalev (n 1915), particularly chapters 1 & 2, or Mark Gibni, 'Formirovanie i razvitie koncepcii prav i svobod čeloveka' in Sergej Aleksandrovič Balašenko and Ekaterina Aleksandrovna Dejkalo (eds), *Prava čeloveka: Učebnoe posobie* (Junipak 2015) 14ff.

1939 Waldron, 'Rights and Human Rights' (n 1918) 156: 'Human rights share with rights of all kinds a commitment to the importance of certain individual interests'. Note, however, that Rowan Cruft, 'Human Rights as Individualistically Justified: A Defence' in Thom Brooks (ed), *Current Controversies in Political Philosophy* (Routledge 2015) argues that this 'account of *rights in general* is better taken as a theory of the narrower category [of] *human rights*' (emphasis in original).

is the feature that explains the 'directedness' of the corresponding duty.[1940] This is the case if one follows an 'interest theory' of rights,[1941] since 'the basic idea underlying the Interest Theory is that every right protects some aspect of a person's welfare'.[1942] Such theories exist in a number of legal systems[1943] and are widely accepted in contemporary legal theory,[1944] including the theory of human rights.[1945] They propose that 'the essential feature of rules which confer rights is that they have as a specific aim the protection

1940 In this sense see eg Hillel Steiner, 'Directed Duties and Inalienable Rights' (2013) 123 Ethics 230, 232; Zylberman (n 1928) 156ff; Pallikkathayil (n 1882) 153ff; Allen Buchanan and Gopal Sreenivasan, 'Book Review: Cruft, Rowan. Human Rights, Ownership, and the Individual ' (2021) Ethics 383, 384; Simon Căbulea May, 'Address, Interests, and Directed Duties' (2022) 39 Journal of Applied Philosophy 194, 195.

1941 It is also true if one follows a 'will theory' (for an overview including the theory's problems see eg Leif Wenar, 'The Nature of Rights' (2005) 33 Philosophy & Public Affairs 223, 238), because even these theories remain focused on the rights-holder (and their ability to form a will), cf Frydrych (n 1884) 578. However, these theories will not be discussed in greater detail for present purposes since they are unsuitable for the Convention (they can explain neither unwaivable Convention rights nor the extension of scope *ratione personae* even to individuals who cannot form a will). See generally the criticism in eg Matthew H. Kramer, 'Rights Without Trimmings', *A Debate Over Rights* (OUP 2000) 69.

1942 Kramer (n 1941) 62.

1943 See eg for a French-language perspective Decaux (n 1938) 125 and, discussing inter alia the German debate, Jean-Louis Bergel, *Théorie générale du droit* (Dalloz 2003) 38ff. Moreover, the debate in German law dates to the 19th century, see for example the interest theory expounded by Rudolf von Jhering; comparing this debate to later debates in English, including many of the authors cited above, see Gerhard Wagner, 'Rudolph von Jherings Theorie des subjektiven Rechts und der berechtigenden Reflexwirkungen' (1993) Archiv für die civilistische Praxis 319, 321, as well as more recently Schnüriger (n 1937). For an overview in the context of German fundamental rights law see Klaus Stern, 'Band III/1: Allgemeine Lehren der Grundrechte' in Klaus Stern (ed), *Das Staatsrecht der Bundesrepublik Deutschland* (CH Beck 1988) 524ff.

1944 Wenar, 'The Nature of Rights' (n 1941) 240 with further references.

1945 cf Wenar, 'The Value of Rights' (n 1926) 201 with further references in n 43; Waldron, 'Rights and Human Rights' (n 1918) 152; Griffin, 'Human Rights: Questions of Aim and Approach' (n 1906) 10; George Letsas, 'Rescuing Proportionality' in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (OUP 2015) 328; Miller, 'Joseph Raz on Human Rights: A Critical Appraisal' (n 1913) 232; Besson, 'Justifications' (n 1885) 26; Eva Erman, 'The "Right to Have Rights" to the Rescue' in Mark Goodale (ed), *Human Rights at the Crossroads* (OUP 2014) 74.

or advancement of individual interests or goods'.[1946] In fact, these theories are arguably more convincing as theories of human rights than they are as theories of rights in general.[1947]

A – perhaps the most[1948] – classic account of such an interest theory in English[1949] is the one by Joseph Raz,[1950] which is widely acknowledged as a 'classic exposition'[1951] and used as a basis by many subsequent authors.[1952] Raz gives the following '*Definition:* "X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.[1953] Since the first limb of Raz' test is mainly intended to exclude as

1946 Neil MacCormick, 'Rights in Legislation' in Peter Hacker and Joseph Raz (eds), *Law, Morality, and Society - Essays in Honour of HLA Hart* (OUP 1977) 192.

1947 cf eg Cruft, *Human Rights, Ownership, and the Individual* (n 1916) 19. To provide just one example: Raz' statement that '[r]ights are never justified just because they serve the public interest' (Joseph Raz, 'Rights and Politics' (1995) 71 Indiana Law Journal 27, 39) is much more defensible as regards *human* rights than as regards rights generally, since the limitation that the right must serve the rights holder's interest can easily be introduced as a definitional criterion for *human* rights, while it is not clear what would stop the legislature granting claim-rights in the Hohfeldian sense even where these do not serve the rights holder.

1948 '[M]ost influential' Griffin, 'Human Rights: Questions of Aim and Approach' (n 1906) 4; 'most widely-cited' Leif Wenar, 'Rights' in Edward Zalta, Uri Nodelman and Colin Allen (eds), *Stanford Encyclopedia of Philosophy* (2021) 19; NE Simmonds, 'Rights at the Cutting Edge' in Matthew H. Kramer (ed), *A Debate Over Rights* (OUP 2000) 204.

1949 cf n 1943. Highlighting Raz' significance from a Russian perspective see Max Aleksandrovič Belyaev, 'Pamjati Džozefa Raza (1939–2022)' (2022) 12 Teoretičeskaja i prikladnaja jurisprudencija 75.

1950 To the extent ascertainable, the arguments made in what follows also hold good for other versions of the interest theory. Raz' description has been chosen because it is particularly widespread.

1951 Tasioulas, 'On the Foundations of Human Rights' (n 1920) 50.

1952 Jeremy Waldron, 'Rights in Conflict', *Theories of Rights* (OUP 1989) 128; Waldron, 'Rights and Human Rights' (n 1918) 152; Frances Myrna Kamm, *Intricate Ethics* (OUP 2007) 244; Besson, 'Human Rights: Ethical, Political…or Legal? First Steps in a Legal Theory of Human Rights' (n 1892) 231; Anne Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (2016) 5 Transnational Environmental Law 1, 18ff; Zysset (n 1887) 21; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 1893) 102. Drawing on this definition in the French-language discourse see Besson, 'Structure et nature des droits de l'homme' (n 1915) 25.

1953 This is the definition provided in Joseph Raz, 'The Nature of Rights' in Joseph Raz (ed), *The Morality of Freedom* (Clarendon 1988) 166. Raz repeats the same definition with minor variations throughout his work.

rights holders non-human animals,[1954] the main point for present purposes is that '[a] person has a right if and only if an interest of his is a sufficient ground for holding another to be subject to a duty'.[1955] A 'person's interest [is] understood to mean that which is good for him, ie that which makes his life intrinsically a better life, better not for others or for a cause but in itself as a human life'.[1956] Rights, therefore, are 'intermediate conclusions between statements of the right-holder's interests and another's duty'.[1957]

According to this theory, rights are firmly individualistic. As Waldron puts it, these 'interests are individualised concerns'.[1958] Indeed, Raz even refers to the 'truism' that 'the objects of rights – that is, what one has a right to – … will be of value to the rights-holder themselves'[1959] because '[r]ights are always to what is in the interest of the right-holder'.[1960]

(b) *The role of public interests in individualistic conceptions*

In individualistic conceptions of human rights, public interests are typically seen as categorically different from private interests.[1961] According to these 'traditionalist' accounts, 'collective concerns cannot be intrinsic reasons, ie, they cannot be the reasons by virtue of which the demand is classified as a claim of *right*'.[1962] Instead, '[u]nder the traditionalist view, valuable human

1954 Obviously, this is controversial, see eg Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law' (n 1952). For an introduction to the general debate on criteria for rights-holdership see Kenneth Campbell, 'Legal Rights' in Edward Zalta, Uri Nodelman and Colin Allen (eds), *Stanford Encyclopedia of Philosophy* (2021) 9ff.

1955 Joseph Raz, 'Legal Rights' in Joseph Raz (ed), *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon 1995) 266.

1956 Raz, 'Rights and Individual Well-Being' (n 1955) 46.

1957 Raz, 'Legal Rights' (n 1955) 259.

1958 Waldron, 'Rights and Human Rights' (n 1918) 153.

1959 Raz, 'Human Rights in the Emerging World Order' (n 1897) 35.

1960 Raz, 'Rights and Individual Well-Being' (n 1955) 46.

1961 From the French literature see eg Favoreu (n 1938) 149ff, Xavier Bioy, *Droits fondamentaux et libertés publiques* (6th edn, LGDJ 2020) 238ff as well as Decaux (n 1938), particularly at 124, and, from the German literature, eg Josef Isensee, 'Gemeinwohl im Verfassungsstaat' in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland: Band IV: Aufgaben des Staates* (3rd edn, CF Müller 2015), para 37ff, and Klaus Stern, 'Band III/2: Allgemeine Lehren der Grundrechte', *Das Staatsrecht der Bundesrepublik Deutschland* (CH Beck 1994) 343ff.

1962 Harel (n 1923) 233 (emphasis in original).

concerns can be divided into two kinds: individual and public. The former can give rise to rights while the latter cannot'.[1963] This, of course, leaves open the possibility that such public concerns can give rise to undirected duties; it merely denies that public concerns can generate the type of directed duties typical of human rights.

Instead, where public and private interests interact, public interests are typically understood as factors that are to be weighed *against* individual concerns (since protection of individual concerns is independent of whether they further public interests); the whole point of human rights, in these conceptions, is to eliminate certain options that would otherwise be pursued for the common good. As Dworkin puts it, 'the role of … rights in the political process … supposes, in our political community, an antagonism between appeals to rights and appeals to the general welfare'.[1964] 'Rights are normally understood as restrictions upon taking the most effective means to realizing desired or desirable ends'.[1965] This is the reason why it is 'widely held that there is an inherent tension between human rights and public interest'.[1966] Although Raz himself goes on to criticise it,[1967] he acutely summarises this view as 'many have seized on the primacy of individual rights as one sign that the special role of rights, their special function or significance in moral and political thought, is that they represent the individual's perspective or interest against the general or public good'.[1968]

2. Individualistic conceptions of Convention rights

On the whole, such individualistic conceptions of human rights can explain many features of the Convention and the Court's case law,[1969] which has

1963 Ibid 236.

1964 Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 434.

1965 cf eg Samuel Freeman, 'Problems with Some Consequentialist Arguments for Basic Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (De Gruyter 2011) 109.

1966 Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 1893) 99.

1967 As will be shown below at 419ff, Raz' later writing seems to abandon the individualistic conception underlying his classic formula.

1968 Raz, 'Rights and Individual Well-Being' (n 1955) 44.

1969 See similarly Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (6th edn, Sweet & Maxwell 2019) 3–017; Lichun Tian, *Objektive Grundrechtsfunktionen im Vergleich* (Duncker & Humblot 2012) 41, 61, 221; Volker

referred to the Convention as 'designed to protect individuals' human rights'.[1970] If individualistic conceptions are predominant in the debate on moral human rights, these perspectives also arguably underpin a number of key doctrines in relation to the legal human rights of the Convention. In fact, there is even much in the Court's language to suggest that it embraces some form of an interest theory of rights, since it often speaks in terms of 'interests'.[1971]

The Convention's drafting history is unhelpful, since '[g]enerally, negotiators tended to assert their own conceptions of human rights rather than tackle those espoused by their colleagues. Accordingly discourse on the nature of human rights tended to be more a series of isolated utterances than a dialogue'.[1972] However, the final text of the Convention contains a number of elements that fit best with an individualistic conception of human rights.

This is the case, for example, as regards the clear separation in the Convention between the State on the one hand and the individual on the other. This is easy to explain for an individualistic conception of human rights, since those individualistic conceptions separate clearly between private interests and public ones. According to an individualistic conception of human rights, only individual interests can give rise to human rights because only human beings are classed as absolutely, intrinsically valuable. The State, conversely, is valuable only derivatively, by means of what it does for these human beings, and thus has no *individual* interests of its own. As a result, the State cannot have human rights – it does not have the type of individual interests which human rights protect, because the State is not

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Röben, 'Grundrechtsberechtigte und -verpflichtete, Grundrechtsgeltung' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 9. Noting generally for legal human rights that the 'liberal philosophical tradition is much closer to the paradigm of human rights law' Pavlos Eleftheriadis, 'Human Rights as Legal Rights' (2010) 1 Transnational Legal Theory 371, 386.

1970 *Verein KlimaSeniorinnen Schweiz and others v Switzerland [GC]* App no 53600/20 (ECtHR, 09 April 2024), para 501.

1971 See similarly Zysset (n 1887) 21; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 1893) 100; George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal of Legal Studies 705, 718; Vladislava Stoyanova, *Positive Obligations under the European Convention on Human Rights* (OUP 2023) 16.

1972 Danny Nicol, 'Original Intent and the European Convention on Human Rights' (2005) Public Law 152, 158.

valuable independently of its contribution to human well-being.[1973] The interests which the State pursues, the public interest, cannot give rise to human rights on classic individualistic conceptions.

For the Convention, this conceptual separation between the State and the individual becomes clear literally from the first article, since Art. 1 ECHR distinguishes between the High Contracting Parties, who are obliged to 'secure' the Convention rights, and 'everyone' (else), who are entitled to human rights. This substantive provision finds its procedural equivalent in Art. 34 ECHR, under which only a 'person, non-governmental organisation or group of individuals' can bring an application against one of the States. The Court explained this position – that the State does not hold the type of interests protected by the Convention – in the recent judgment in *OOO Memo v Russia* (2022), where it held that 'civil defamation proceedings brought, in its own name, by a legal entity that exercises public power may not, as a general rule, be regarded to be in pursuance of the legitimate aim of "the protection of the reputation … of others" under Article 10 § 2'.[1974] In line with the individualistic premise that the State's lack of individual interests means that it cannot hold human rights, the Court noted the State's derivative value and highlighted that 'bodies of the executive vested with State powers are essentially different from [private] legal entities … [because] they exist to serve the public'.[1975] As a result,

> by virtue of its role in a democratic society, the interests of a body of the executive vested with State powers in maintaining a good reputation essentially differ from both the right to reputation of natural persons and the reputational interests of legal entities, private or public, that compete in the marketplace.[1976]

1973 McCrudden (n 1927) 679 refers to this as 'the limited-state claim': 'the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa'. For perspectives from French-, German- and Russian-language literature see Chapter One, 65ff.

1974 *OOO Memo v Russia* App no 2840/10 (ECtHR, 15 March 2022), para 47. Simultaneously, 'this does not exclude that individual members of a public body, who could be "easily identifiable" in view of the limited number of its members and the nature of the allegations made against them … may be entitled to bring defamation proceedings in their own individual name' (ibid) because they *are* human-rights holders.

1975 Ibid (n 1974), para 44. Moreover, in ibid, para 39 the Court linked reputation to human dignity, as it has done in a number of cases since at least *UJ v Hungary* App no 23954/10 (ECtHR, 19 July 2011), para 22.

1976 *OOO Memo v Russia* (n 1974), para 47. See also *Mária Somogyi v Hungary* App no 15076/17 (ECtHR, 16 May 2024), para 36.

Moreover, the typical individualistic separation between private interests and public interests is also textually recognised in Arts 8 – 11. These articles each contain a first paragraph that lists certain individual interests (respect for private and family life, freedom of thought, conscience and religion, expression, assembly and association) that are generally protected. A second paragraph then sets out the criteria under which, exceptionally and in the name of one of the public interests exhaustively[1977] listed as legitimate aims,[1978] these interests can be interfered with. Because individuals are prima facie free to do whatever they like (paragraph 1) and the State can only interfere with their interests under certain additional conditions (paragraph 2), these provisions create a rule-exception relationship between the enjoyment of Convention rights and State interference: Any interference with the scope of a right will be unlawful *unless* it can exceptionally be justified.[1979] This opposition between individual and public interests is in keeping with classic tenets of individualistic understandings of human rights.[1980]

If that shows the textual basis for the separation between private interests and public interests, the Court has also received this into its case law from an early date. As the Plenary Court seminally put it in *Soering v UK* (1989) for Art. 3,[1981] 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental

1977 *OOO Memo v Russia* (n 1974), para 37, *Aliyev v Azerbaijan* App no 68762/14; 71200/14 (ECtHR, 20 September 2018), para 182, and eg Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (7th edn, CH Beck 2021), § 18, para 12.

1978 Highlighting that 'public interest is the umbrella term for different interests which are invoked in limitation clauses' Simone Peter, *Public Interest and Common Good in International Law* (Helbing Lichtenhahn 2012) 39; noting that a frequent justification for these limitations is 'because of the need to balance the interest of the community against the interests of the individual' eg Bernadette Rainey and others, *Jacobs, White & Ovey: the European Convention on Human Rights* (7th edn, OUP 2017) 340. For a discussion from the French literature see Decaux (n 1938) 124, highlighting legitimate aims as a reflection of the *intérêt général*.

1979 Anne Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (2021) 19 International Journal of Constitutional Law 1135, 1139.

1980 See similarly Leanne Cochrane and John Morison, 'Public Interest' in Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (2017), para 22.

1981 And therefore, ironically enough, in relation to a norm that precisely does *not* ostensibly permit balancing.

rights'.[1982] The Court, therefore, generally seems to take the view that the Convention conceptualises private interests and public interests as opposed to each other, as is evident from this text block which has now migrated across the Court's case law to form a staple of analysis under Art. 1 Protocol 1,[1983] which explicitly makes reference to 'the public interest'.

Finally, this type of individualistic conception as an appropriate basis for the interpretation of the Convention is also reflected in the way the Court has emphasised the key importance of the individualistic concept of human dignity.[1984] As the Grand Chamber noted in *I v UK [GC]* (2002), 'the very essence of the Convention is respect for human dignity and human freedom',[1985] and as a result 'the notions of self-determination and personal autonomy are important principles underlying the interpretation of its guarantees'.[1986] 'Any interference with human dignity strikes at the very essence of the Convention'.[1987] As has been shown above, in the debate on moral human rights, these values are typically adduced by individualistic justifications of human rights.

II. Systemic conceptions of human rights

While individualistic conceptions of human rights, under which human rights are justified by what they do for their holder *regardless* of whether

1982 *Soering v UK* App no 14038/88 (ECtHR (Plenary), 07 July 1989), para 89; *Maria Azzopardi v Malta* App no 22008/20 (ECtHR, 09 June 2022), para 52. Similar dicta appear as early as *Sporrong and Lönnroth v Sweden* App no 7151/75; 7152/75 (ECtHR (Plenary), 23 September 1982), para 69.

1983 *Brumărescu v Romania* App no 28342/95 (ECtHR, 28 October 1999), para 78; *Carmelina Micallef v Malta* App no 23264/18 (ECtHR, 28 October 2021), para 40. Highlighting the need for 'a balance between the demands of the public interest involved and the applicant's fundamental property rights' eg *Kotov v Russia [GC]* App no 54522/00 (ECtHR, 03 April 2012), para 110.

1984 See similarly Schilling (n 1898) 23.

1985 *I v UK* App no 25680/94 (ECtHR, 11 July 2002), para 70; *Ražnatović v Montenegro* App no 14742/18 (ECtHR, 02 September 2021), para 37. For a recent study of the role of 'dignity' in the Court's case law see Veronika Fikfak and Lora Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) 22 Human Rights Law Review 1.

1986 *Jehovah's Witnesses of Moscow and others v Russia* App no 302/02 (ECtHR, 10 June 2010), para 135.

1987 *Bouyid v Belgium [GC]* App no 23380/09 (ECtHR, 28 September 2015), para 101; *Skorupa v Poland* App no 44153/15 (ECtHR, 16 June 2022), para 257.

this serves or disserves anyone else, are thus generally the most widespread both as regards moral human rights and as regards the Convention, they are not the only possible interpretation of human rights. Instead, there are also approaches that permit justifying human rights by reference to the contribution they make to the interests of persons *other than* the rights holder.[1988]

This section discusses these systemic conceptions of human rights and the frequent objections brought forward against them. It begins with an overview of the debate on moral human rights (1.) and continues by comparing this debate to the Court's case law (2.), before finally discussing the problem of human rights justified by reference to specific roles (3.).

1. Systemic conceptions in moral human rights theory

As regards moral human rights, there are only comparatively few theorists who try to justify all or many human rights by reference to what they (also) do for persons other than the rights holder and try to argue that 'rights can be used to defend and promote societal interests'.[1989] This may be because many classic human rights intuitively seem more obviously to further the interests of the rights holder than a wider public interest. Not being killed or tortured instinctively seems to do more for the person who is saved from this unpleasant treatment than for a general interest in these activities not taking place.

Perhaps the most prominent attempt to *generally* justify human rights by their contribution to interests other than those of the rights holder is by John Stuart Mill.[1990] Mill famously saw the value of rights in enabling 'experiments of living' so that 'the worth of different modes of life should be proved practically, when any one thinks fit to try them' as a 'chief ingredient of individual and social progress'.[1991] Nonetheless, this attempt to conceive of human rights generally as justified by reference to public interests has re-

1988 These theories are thus already committed to the consequentialist analysis proposed by eg interest theories (cf n 1926), but differ from individualistic consequentialist approaches in that they also consider the consequences for others than the rights holder.

1989 See the description given by Harel (n 1923) 233.

1990 John Stuart Mill, *On Liberty* (4th edn, Longmans, Green, Reader & Dyer 1869), as well as the discussion in eg Talbott (n 1926) 1033.

1991 Mill (n 1990) 104–5.

mained comparatively niche. Instead, overarching conceptions of all human rights are typically not justified by reference to promoting the interests of anyone other than the rights holder. Presumably, this is because it is not clear why, if the focus is on promoting societal interests, one still needs the separate category of 'human rights' in the sense of positions assigned to individuals. If the goal is to further a public interest, individual human rights seem more likely to be a hindrance than a help.[1992]

Instead, it is far more common to adduce a contribution to public interests as an additional justification only for certain human rights, rather than for human rights generally. Systemic arguments have been made to justify human rights such as eg freedom of religion (which 'serve[s] communal peace'),[1993] economic freedom (which 'contributes greatly to the existence of an open market')[1994] or equality rights (as furthering efficient resource allocation in markets).[1995] In fact, public-interest justifications can be adduced for a number of human rights; for example, the right to education contained in Art. 2 Protocol 1 presumably has a positive impact on a State's gross domestic product.

Most prominently, however, such justifications have been developed for the right to freedom of expression.[1996] As Wenar explains,

> [t]here are, in the broadest terms, two views of the value of the right to free speech. On the first view, speech rights are good in themselves. To respect a person's speech rights is simply to respect the inherent dignity and worth of that person as a rational and autonomous being. On the second view, speech rights are means to ends. We ascribe speech rights because doing so will help us to achieve desirable states of affairs like democratic stability, market efficiency and greater enlightenment.[1997]

1992 Hence eg utilitarianism's traditional scepticism of human rights.

1993 Raz, 'Liberty and Rights' (n 1953) 251.

1994 Joseph Chan, 'Raz on Liberal Rights and Common Goods' (1995) 15 Oxford Journal of Legal Studies 15, 18. For the complex situation in EU law see eg Francesco de Cecco, 'Fundamental Freedoms, Fundamental Rights, and the Scope of Free Movement Law' (2014) 15 German Law Journal 383.

1995 Antje von Ungern-Sternberg, 'Autonome und funktionale Grundrechtskonzeptionen – Unter besonderer Berücksichtigung der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte' in Nele Matz-Lück and Mathias Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem* (Springer 2012) 70.

1996 See seminally Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1 Philosophy & Public Affairs 204.

1997 Wenar, 'The Value of Rights' (n 1926) 179.

Since the latter 'approach to rights will aim to bring about a particular distribution (end state, pattern) of interests, and will ascribe whatever rights are necessary to achieve this distribution',[1998] it requires a vision of that final result. For freedom of expression, this end state is frequently posited as a society in which political debate is possible, and consequently the rights that are necessary to achieve this result are ascribed – rights particularly protecting political expression. Wenar, for example, highlights that '[a] right permitting false political speech … has important stabilizing influences in a democratic system', while a right to false commercial speech could presumably not be justified on this basis (since it adversely affects the public interest in a functioning economy).[1999] As Raz notes,

> [i]n the Common Law freedom of expression is regularly defended, where it is defended, on grounds of the public interest, that is on the interests of third parties. The right-holder's interest itself, conceived independently of its contribution to the public interest, is deemed insufficient to justify holding others to be subject to the extensive duties and disabilities commonly derived from the right of free speech.[2000]

Typically, this is taken to mean that these 'different views concerning the scope of the right to free speech necessarily affect the scope of *protection* of speech'.[2001]

However, the problem with justifying human rights by reference to what they do for public interests is that this seems to weaken the protection these rights provide.[2002] This is because on these understandings it is not clear what should happen when human rights do not contribute to optimising public interests.[2003] For such situations, systemic conceptions of human

1998 Ibid 193.

1999 Ibid 197.

2000 Raz, 'The Nature of Rights' (n 1953) 179, as well as the discussion in Raz, 'Free Expression and Personal Identification' (n 1955). Of course, the second sentence of this quotation effectively gives up Raz' own definition of rights, as will be discussed below at text to n 2044ff.

2001 Harel (n 1923) 227, highlighting this assumption in the general debate and challenging this view.

2002 See Cruft, 'Human Rights as Rights' (n 1886) 133 noting 'the common concern that non-individualistic theories of human rights are inadequate', as well as Onora O'Neill, 'Ethical Reasoning and Ideological Pluralism' (1988) 98 Ethics 705, 710 noting that '[d]espite J. S. Mill's optimism about the close fit between utilitarian foundations and liberal conclusions, utilitarian reasoning is widely thought unable to explain why rights should be taken as overriding'.

2003 Indeed, on individualistic conceptions one of the main functions of human rights is to protect the position of the individual precisely in those situations when their

rights seem inclined to reduce the weight of the right because it does not contribute to the public interest, rather than only when it causes harms. To quote Raz, 'if rights do not represent the special force of the interest of the right-holder then they cease to capture the idea of a protective shield against the claim of the well-being of others'.[2004] As Chan notes, in this kind of approach,

> the protection of a liberal right would not be offered to those individuals whose enjoyment of the right does not contribute to the common good. There is nothing in the approach to guarantee that no individual should be excluded from enjoying a liberal right even if that enjoyment does not contribute to the liberal culture. … In this regard the more popular view of rights, the individualist, right-holder's interest view, has an advantage. For this view stresses that even if protecting those people mentioned above [uneducated outcasts, communists or fascists] does no general good to the society, their interests should still be protected by rights, unless their enjoyment of rights cause much harm to others. Fundamental moral rights do not depend on their positive externalities.[2005]

In the words of Pallikkathayil,

> [o]ne might worry that by treating rights as mere tools, and by extension treating the status of right-holding as a mere tool, [utilitarianism] cannot do justice to the significance of rights. And one might have a similar worry about [systemic conceptions of human rights] insofar as [they] too sometimes treat rights as instruments for promoting others' interests.[2006]

The reason for this 'worry' is that ultimately such a systemic approach 'leave[s] no political concept to express the important idea that the fundamental interests of an individual should be protected even if *not* protecting them would rather enhance the good or interest of society'.[2007] Moreover, given that these views can interpret the scope of the right in terms of public interests, it is not clear that they will be able to perform the (relatively clearer) balancing exercise typical of individualistic conceptions; instead, they may simply interpret scope in a narrow way without the relative clarity of tests that provide more detailed steps.[2008]

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rights do *not* contribute to optimising public interests, since in other situations the individual's interests are unlikely, practically speaking, to be at risk.

2004 Raz, 'Liberty and Rights' (n 1953) 250.

2005 Chan (n 1994) 29.

2006 Pallikkathayil (n 1882) 157.

2007 Chan (n 1994) 30.

2008 On the problems such public-interest conceptions cause for human rights *law* see below III.

Finally, it is not clear that such conceptions can support the 'limited-state' claim above,[2009] that is the idea that the State differs categorically from individuals in that it is not absolutely, but only derivatively valuable (and therefore cannot hold human rights). This is because such conceptions ultimately also make the individual derivatively valuable, since their protection is justified by reference to what the exercise of their rights does to further a public interest. Since the position of the individual is not recognised independently of the public interest, it seems dubious whether the separation between an intrinsically valuable individual and the only derivatively valuable State can be upheld. Indeed, it is only for individualistic views that 'a necessary condition for any individual's capacity to have rights, leaving aside artificial agents such as corporations, is that their existence and well-being have intrinsic and non-derivative value'.[2010] If human rights are grounded not (only) in the idea that human beings are 'sources of ultimate moral concern', the 'intrinsic or non-instrumental value' of their 'existence and welfare',[2011] it becomes difficult to justify why the State should be excluded from holding human rights. Both the value of human rights and of the State then derive from furthering the public interest because the individual is 'ultimately treated as a resource for promoting the good'.[2012] This is in contrast to individualistic conceptions, which typically highlight that 'individuals should be treated as ends and not simply as means to an end'.[2013]

2. Systemic conceptions of Convention rights

In line with the strong support for individualistic conceptions identified above and the difficulty that approaches that focus on public interests have in recognising human rights, there is comparatively little support for systemic conceptions in the Convention. The closest textual link seems to be Art. 10 § 2's wording, which notes that the exercise of freedom of expression 'carries with it duties and responsibilities', thus presenting a slightly different perspective than private interests. However, this phrase can also

2009 McCrudden (n 1927) 679 and n 1973.
2010 Tasioulas, 'On the Foundations of Human Rights' (n 1920) 55.
2011 Ibid 55.
2012 Kamm, *Intricate Ethics* (n 1952) 248.
2013 McCrudden (n 1927) 659.

be understood in line with an individualistic conception to highlight that freedom of expression is more likely than other human rights to conflict with public interests or with the interests of other rights holders. In keeping with this limited textual support, systemic conceptions of human rights do not appear to have played a significant role in the Court's case law outside the two areas discussed in the present study, the media and legal services, despite the fact that such justifications would also be possible for other rights contained in the Convention.[2014]

Nonetheless, for the media and legal services, the Court's case law frequently adduces systemic conceptions. This is in line with the Court's emphasis that these two areas are 'essential' for the Convention system to function[2015] – the Court thus clearly wants to limit States' leeway in these areas due to the strong link between public interests and the media and legal services, and in the absence of alternative doctrinal tools[2016] controls States' obligations by means of rights.

The Court's case law on the media has been discussed in greater detail in Chapter Six. For present purposes, it suffices to recall that, in language strikingly reminiscent of Mill,[2017] the Court, since the foundational *Handyside* judgment, sees freedom of expression as serving not only the (private) interest in 'the development of every man', but also the public interest as 'one of the essential foundations of [a democratic society]' and 'one of the basic conditions for its progress'.[2018] On this basis, the Court has interpreted the right to freedom of expression as (also) securing 'pluralism'.[2019] That this is not a private interest of the individual rights holder is

2014 See n 1993 to 1995 and accompanying text. For the example of systemic conceptions applied to protect freedom of parliamentary speech see below n 2083 and accompanying text.

2015 Compare *Bladet Tromsø and Stensaas v Norway [GC]* App no 21980/93 (ECtHR, 20 May 1999), para 59, which concerns the media, to the description of legal services in *Elçi and others v Turkey* App no 23145/93; 25091/94 (ECtHR, 13 November 2003), para 669, discussed in detail in Chapter Five, 240ff.

2016 For an alternative approach recognising undirected duties see Chapter Nine.

2017 See n 1991 and accompanying text.

2018 *Handyside v UK [Plenary]* App no 5493/72 (ECtHR, 07 December 1976), para 49, see recently eg *NIT SRL v Moldova [GC]* App no 28470/12 (ECtHR, 05 April 2022), para 177, where the Court referred to these 'general principles' as 'well established in the Court's case-law'.

2019 cf *Informationsverein Lentia and others v Austria* App no 13914/88 and others (ECtHR, 24 November 1993), para 38, see recently eg *NIT SRL v Moldova [GC]* (n 2018), para 184. See, in greater detail, Chapter Six, 314ff.

clear from the Court's explicit holding in *Goodwin* that there is an 'interest *of democratic society* in securing a free press',[2020] which 'will weigh heavily in the balance in determining … whether the restriction was proportionate to the legitimate aim pursued'.[2021] The Court, therefore, follows a systemic conception of freedom of expression in the media cases,[2022] interpreting the rights of the individual rights holder in terms of what they contribute to the public interest in pluralism. This focus on a public interest is also reflected in the fact that the Court, in essence, enquires into whether the applicant's reporting fulfilled a legitimate aim for Convention purposes when it highlights the particular protection accorded to 'reporting facts capable of contributing to a debate in a democratic society'.[2023]

As regards legal services, the Court also clearly interprets the rights of lawyers in terms of the extent to which they advance public interests or the interests of the client. Examples abound in Chapters Two, Three and Five. To revisit just one case: The *Niemietz* judgment on professional secrecy for lawyers and Art. 8 shows the Court's systemic conception of the lawyer's rights well. Here, the Court argued that 'where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention'.[2024] What the Court did not highlight explicitly is that these 'rights guaranteed by Article 6 of the Convention' were not those of the applicant, but those of potential clients. It thus focused not on positions protecting the private interests of the applicant lawyer, but on public interests and the interests of third parties. Moreover, in the professional secrecy case law, the Court never enquires into whether the parties actually *wanted* the information concerned to be secret, but applies blanket protection under Art. 8 to any information. While easily explainable from the point of view of a public interest in the general protection of

2020 Emphasis added. Consistent case law since *Goodwin v UK [GC]* App no 17488/90 (ECtHR, 27 March 1996), para 45, see recently eg *Sedletska v Ukraine* App no 42634/18 (ECtHR, 01 April 2021), para 62.

2021 *Goodwin v UK [GC]* (n 2020), para 40, see recently eg *MAC TV sro v Slovakia* App no 13466/12 (ECtHR, 28 November 2017), para 39.

2022 cf eg the summary in Arjen van Rijn, 'Freedom of Expression (Art. 10)' in Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn, Intersentia 2018) 765ff.

2023 *Axel Springer AG v Germany [GC]* App no 39954/08 (ECtHR, 07 February 2012), para 91. This point will be discussed in greater detail below at 426ff.

2024 *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992), para 37; for further citations see Chapter Two, n 432.

professional secrecy, this is difficult to reconcile with merely the protection of the applicant's private interests in an individualistic sense.

This systemic approach is also clear from the Court's strong emphasis on the applicant's *role*. The Court consistently highlights that lawyers in a given case were acting as defence attorneys and thus contributing to a public interest in a functioning justice system.[2025] This justification for their rights does not derive solely from their own interests and is thus not an individualistic one. Moreover, departure from an individualistic conception of the Convention is also visible from the fact that the Court interprets this role as not only granting rights, but as also imposing some sort of vague duties. The 'special role of lawyers, as independent professionals, in the administration of justice entails a number of duties'.[2026] For example, as the Court held in *Nikula v Finland* (2002), it is 'legitimate to expect [lawyers] to contribute to the proper administration of justice'.[2027] Moreover, the Court has elsewhere highlighted that lawyers have certain 'tasks'.[2028] The imposition of such obligations flowing from a human rights document is difficult to reconcile with an individualistic conception of the Convention rights; clearly, they cannot flow from the private interests of the rights holder because they bring with them considerable burdens. It can be explained more easily by a systemic conception of human rights: On this, human rights can be interpreted in terms of what they contribute to others' interests, which makes these theories more suitable for explaining additional obligations derived from human rights documents.

3. Role-bearer rights as an example of the shortcomings of individualistic conceptions?

Though the Court presumably did not pay specific attention to it, the emphasis on the 'special role of lawyers' reflects the terminology of a recent

2025 See Chapter Five, 225ff, and eg 464 below.
2026 *Namazov v Azerbaijan* App no 74354/13 (ECtHR, 30 January 2020), para 46.
2027 *Nikula v Finland* App no 31611/96 (ECtHR, 21 March 2002), para 45, discussed in detail in Chapter Five, 227ff.
2028 cf eg *Morice v France [GC]* App no 29369/10 (ECtHR, 23 April 2015), para 149; *Beuze v Belgium [GC]* App no 71409/10 (ECtHR, 09 November 2018), para 128; *Bono v France* App no 29024/11 (ECtHR, 15 December 2015), paras 52, 55.

debate in the English-language[2029] literature on moral human rights. In recent times, there has been some discussion noting that so-called role-bearer rights – rights that relate to a specific *role* exercised by the rights holder – represent a challenge for classic individualistic conceptions of rights.[2030] This is because such rights, in practice, are often much stronger than the rights holder's own interest in the activity appears to be – if the rights holder even has such an interest at all. This discrepancy between the common usage of the language of rights and the interest theory is typically interpreted to mean one of two things: Either the individualistic focus of the classic interest theory is incorrect;[2031] or these cases are best resolved not only by means of rights, but with the help of other concepts (such as duties, as has been suggested in Chapter Seven and will be developed in greater detail in Chapter Nine).[2032]

As regards legal human rights, there does not, as yet, appear to be a debate on this point, nor has there been a discussion anywhere specifically concerning lawyers.[2033] The following section sets out the state of debate on moral human rights, which typically takes journalists[2034] as an example, before highlighting that the problem is, if anything, even more complicated for lawyers, where there are explicit rules concerning the relationship between the interests of the lawyer and their subordination to the interests of the client.

2029 To the extent ascertainable there is no parallel debate in French, German or Russian.

2030 Mullins (n 1934); Pallikkathayil (n 1882); Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886).

2031 See the alternative definitions of 'rights' discussed in eg Wenar, 'Rights' (n 1948) 17ff.

2032 See eg Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886) 359; Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 Oxford Journal of Legal Studies 257, 266; as well as the discussion in Wenar, 'The Nature of Rights' (n 1941) 244. Ironically enough, Raz himself seems to have countenanced this possibility when he notes that the arguments for protecting freedom of expression as a matter of individual rights are public-good arguments and the case for a subjective right is essentially that this is more *efficient*, see Raz, 'Free Expression and Personal Identification' (n 1955) 168.

2033 However, Raz himself notes at one stage that 'the rights of priests, doctors and lawyers to preserve the confidentiality of their professional contacts are likewise justified ultimately by their value to members of the community at large', Raz, 'The Nature of Rights' (n 1953) 179, but then uses journalists as his main example.

2034 Mullins (n 1934) 100ff; Pallikkathayil (n 1882); Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886).

(a) *Moral human rights debate on journalists as role-bearers*

Notably, Raz himself was significantly critical of what he described as '[t]he Individualistic Fallacy [, which] leads to the false belief that all rights – or more modestly, all important rights – are justified by concern for the rightholder and his interests'.[2035] However – quite aside from the fact that, if this is a fallacy, it nonetheless appears to be a fallacy the Convention is based on –,[2036] Raz' own formula arguably did much to contribute to this position.

To recall Raz' original framing of the interest theory, '"X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty'.[2037] The problem in applying this formula to journalists is that the interests *of the journalist* are usually not seen as sufficient for grounding the very strong protection that the media typically enjoys.[2038] In fact, Raz realised this problem with his definition.[2039] He explains it as

> the weight of the right does not match the right-holder's interest which it serves, because in all of [these cases] the right is justified by the fact that by serving the interest of the right-holder it serves the interest of some others, and their interest contributes to determining the weight due to the right.[2040]

2035 Raz, 'Rights and Politics' (n 1947) 27.

2036 See above at 406ff.

2037 Above n 1953.

2038 As Raz himself notes, '[t]he rights of journalists (however qualified) to protect their sources are normally justified by the interest of journalists in being able to collect information. But that interest is deemed to be worth protecting because it serves the public. That is, the journalist's interest is valued because of its usefulness to members of the public at large', Raz, 'The Nature of Rights' (n 1953) 179.

2039 Raz describes it as 'a puzzle about rights which, even if not deep, is revealing of the motives for many of the common views held about them. On the one hand, typically rights are to what is, or is thought to be, of value to the right-holder. On the other hand, quite commonly the value of a right, the weight it is to be given, or the stringency with which it is to be observed do not correspond to its value to the right-holder', Raz, 'Rights and Individual Well-Being' (n 1955) 45. Gopal Sreenivasan, 'Public Goods, Individual Rights and Third-Party Benefits' in Mark McBridge (ed), *New Essays on the Nature of Rights* (Bloomsbury 2017) 132 highlights that this is 'an additional test [Raz] introduces in subsequent work'.

2040 Raz, 'Rights and Individual Well-Being' (n 1955) 50. See similarly Raz, 'Liberty and Rights' (n 1953) 248 and at 261 where he notes that 'the interest of the right-holder in itself, in the case of many of the rights which were used as examples above, is insufficient to justify that degree of protection'.

According to this test, 'other people's interests count for the justification of the right only when they are harmoniously interwoven with those of the right-holder, ie only when benefiting him is a way of benefiting them, and where by benefiting them the right-holder's interest is served',[2041] that is 'as long as the third-party interests are served *precisely by serving* the individual's own interest'.[2042]

The problem with Raz' explanation is that it is incompatible with his own theory, which, as shown above,[2043] generally explains the Convention rights rather well. As a number of authors have noted, 'while Raz presents this as a way to interpret his theory it is actually an admission of defeat',[2044] at least if one accepts the premise that 'the vesting of an individual with a given claim-right … should reflect nothing apart from the *intrinsic* standing of the individual who is to possess it'.[2045] '[I]f the satisfaction of the interests of others is the reason why the journalist gets a right to have his interest protected, his interest is not sufficient to give rise to the duty of noninterference with his speech'.[2046] 'This argument in fact denies the right-holder's interest view of rights'[2047] because '[t]he rights holder's

2041 Raz, 'Rights and Individual Well-Being' (n 1955) 51.

2042 Sreenivasan, 'Public Goods, Individual Rights and Third-Party Benefits' (n 2039) 133, who also questions whether this is true in Raz' examples, since the interests of the third party and of the individual differ.

2043 406ff.

2044 Cruft, 'Human Rights as Rights' (n 1886) 131; similarly Cruft, 'Why is it Disrespectful to Violate Rights?' (n 1935) 207ff; Rowan Cruft, 'Introduction' (2013) 123 Ethics 195, 197. The inconsistency with Raz' definition is also highlighted in Wenar, 'The Nature of Rights' (n 1941) 242; Sreenivasan, 'A Hybrid Theory of Claim-Rights' (n 2032) 265ff; Leif Wenar, 'The Nature of Claim-Rights' (2013) 123 Ethics 202, 206; Wenar, 'Rights' (n 1948) 18; Freeman (n 1965) 117; Buchanan, *The Heart of Human Rights* (n 1892) 59; Simon Căbulea May, 'Directed Duties' (2015) 10 Philosophy Compass 523, 530; Janis David Schaab, 'Why It Is Disrespectful to Violate Rights: Contractualism and the Kind-Desire Theory' (2017) 175 Philosophical Studies 97, 100; Cruft, *Human Rights, Ownership, and the Individual* (n 1916) 30ff.

2045 Sreenivasan, 'A Hybrid Theory of Claim-Rights' (n 2032) 266, who notes that 'at a minimum, this requirement is a *desideratum* for a theory of claim-rights, one that derives from the aim of preserving the connection between the language of rights and liberal individualism'.

2046 Kamm, *Intricate Ethics* (n 1952) 245.

2047 Chan (n 1994) 26 – noting, in particular, that '[n]owhere does Raz state the reason as explicitly as I do here'. Cruft, *Human Rights, Ownership, and the Individual* (n 1916) 18 gives a vivid example of why Raz' 'interpretation' is problematic: 'For example, we would find ourselves saying that my employer's duty to pay my salary is a duty which is owed not only *to me* but also *to my local shopkeepers*. Because I spend my salary in their shops, they have an interest at stake in my being paid,

interest is dependent on the interests of others whom the role benefits, and therefore not an individually sufficient reason for any duty'.[2048]

> Roles like 'journalist' are often said to have a non-individualistic justification. Many of the role-based duties associated with journalism are grounded not by the interests of the journalist, but by the way in which journalists serve the interests of others. It appears to follow that any rights associated with the role of journalist must also be justified by consideration of the general interest, and that therefore the interests of the individual are not sufficient to ground any duties.[2049]

As a result, some authors highlight that '[j]ournalists' communicative rights are therefore not simply instances of the more general right to communicate held by everyone',[2050] and indeed it is not self-evident that they are human rights at all,[2051] since to class them as such 'deviates from the view that human rights are held universally by everyone'.[2052] Journalists, in these cases, have their rights not *qua* human, but *qua* journalist.[2053] Simply put, the fact that their protection is not premised on their own interests 'makes it very difficult to explain the ordinary thought that *free speech rights are the rights of speakers*'.[2054]

To date, the relatively recent debate on role-bearer rights has not yielded final results, though it can certainly be credited with identifying a problem. There are a number of alternative theories of rights,[2055] each with their own advantages and drawbacks, none of which has yet managed to achieve anywhere near the acceptance of interest theories of rights. In addition, there are also a number of authors who have considered the possibility that these cases should therefore not be resolved via rights, but instead

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and on [Raz'] interpretation it is unclear how we could stop that interest inheriting the duty-grounding importance of my own interest in my salary: the shopkeeper's interest is served by the way the duty serves my own interest. But surely my employer's legal duty to pay my salary is not itself owed to local shopkeepers as well as to me'. (emphasis in original)

2048 Mullins (n 1934) 100.
2049 Ibid 104.
2050 Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886) 359.
2051 Discussing this objection ibid 369.
2052 Ibid 369.
2053 For this separation see eg Mullins (n 1934) 105.
2054 Wenar, 'Rights and What We Owe to Each Other' (n 1908) 394 (emphasis in original).
2055 Noting 'ever more sophisticated versions' Campbell (n 1954) 7.

via duties in the public interest.[2056] For the moment, the debate on moral human rights and role-bearers thus seems unresolved.

(b) *Lawyers as a particularly complicated case of role-bearer rights*

The compatibility of journalists' strong protection with standard theories of rights is therefore far from self-evident. However, the role of lawyer arguably not only mirrors many of these problems. Due to a number of specificities of the position of lawyers, the question how and whether their rights can be classed as human rights may be even more complicated than it is for journalists.

The problem is that if one takes Raz' classic definition of rights,[2057] according human rights to lawyers as regards their professional activities would require us to say that an aspect of the lawyer's well-being (their interest) is sufficient reason to create duties on the State. The difficulty with this line of reasoning is that it is quite clearly not the one embraced by the Court. Instead, the Court argues consistently by means of the systemic value of the lawyer's human rights as furthering the interests of others – it argues primarily by reference to the well-being (the interests) of the client (see Chapters Two and Three). By contrast, the well-being of the lawyer (discussed in Chapter Four) enjoys at best limited protection, since it is mainly a (commercial) interest in the exercise of a profession and the Court largely does not engage with this profession's public-interest dimension in those cases. Notably, while in *Elçi and others v Turkey* (2003) the Court mentioned 'the freedom of lawyers to practise their profession without undue hindrance',[2058] this is not a right explicitly contained in the Convention, nor was the quote subsequently reprised.

If, in line with individualistic understandings of human rights, one focuses on what a right does *for the rights holder*, lawyers' rights allow them to exercise their profession – but that is not a right explicitly protected by the Convention, and even the limited protection of professional life that

2056 See n 2032.
2057 See 420.
2058 *Elçi and others v Turkey* (n 2015), para 669, discussed in detail in Chapter Five, 240ff.

exists under Art. 8 ECHR[2059] is considerably weaker than the stand-alone rights to exercise one's profession contained in many other human-rights documents.[2060] In fact, even if one focuses instead on eg the right to freedom of expression, a lawyer's *own* private interests when speaking in court are arguably of a commercial nature (exercising their profession) – and in the Court's usual jurisprudence commercial speech is *less*, not *more*, protected.[2061] Lawyers' own interests therefore do not seem to justify the comparatively strong protection that they are accorded.

Moreover, matters are even more complicated because there are separate rules concerning the 'interests' of lawyers. While one can assume that the Convention can recognise that lawyers have a private interest in their general exercise of legal services, assuming that lawyers have *any* private interests where they are acting for a client in an individual case is far more problematic. This is because *when acting as a lawyer* lawyers are not supposed to have private interests at all (otherwise the risk of a conflict of interests looms large), but instead to act exclusively in the interests of the client,[2062] as the Court has highlighted in many cases, for example when it emphasises the lawyer's 'duty to defend *their clients*' interests zealously',[2063] their role as 'intermediaries',[2064] not as a party, as 'independent',[2065] or that '[a]n advocate representing a client is speaking on behalf of that client and

2059 cf eg *Denisov v Ukraine [GC]* App no 76639/11 (ECtHR, 25 September 2018). Note that as regards judges and prosecutors, the Court openly argues by reference to their independence, cf eg *Kartal v Turkey* App no 54699/14 (ECtHR, 26 March 2024), para 76, and *Stoianoglo v Moldova* App no 19371/22 (ECtHR, 24 October 2023), para 38.

2060 Such as for example the German Basic Law under Art. 12.

2061 As Harel (n 1923) 230 notes, '[t]he right to free speech is justified on the ground that it is conducive to autonomy, or the market place of ideas, but not on the grounds that it is conducive to the financial interests of the rightholder'. On the Court's constant jurisprudence that commercial speech will be less protected see eg *Sekmadienis Ltd v Lithuania* App no 69317/14 (ECtHR, 30 January 2018), para 73.

2062 For a particularly clear statement from soft law see eg Principle 2.7 of the CCBE Code of Conduct, noting that 'a lawyer … must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow members of the legal profession'.

2063 *Nikula v Finland* (n 2027), para 54; *Bagirov v Azerbaijan* App no 81024/12; 28198/15 (ECtHR, 25 June 2020), para 51 (emphasis added).

2064 *Nikula v Finland* (n 2027), para 45, discussed in detail in Chapter Five, 227ff.

2065 cf eg *Morice v France [GC]* (n 2028), para 135, as well as the discussion in Chapter Two at 145 and in Chapter Five.

for the purpose of effectively defending the client's – not his or her own – interests'.[2066]

There is an argument to be made that, at least on an interest theory of rights, this prevents the application of human rights to lawyers acting in individual cases,[2067] and that their activities should be protected either only via the client's human rights or via undirected duties on the State.

Moreover, there is a further key difference to the debate surrounding journalists. The entire debate regarding role-bearer rights for journalists is premised on justifying the additional rights that come from the role, ie the elevation of the individual journalist's protection.[2068] For lawyers, things are far more complex. As shown in Chapters Four and Five, there are also wide areas where the role of lawyer triggers additional *restrictions* on human rights.

Taken together, these points highlight that there are significant tensions between standard doctrines of human rights and the protection of lawyers. The traditional interest theory cannot easily justify applying human rights to lawyers, since the interests protected are those of their clients and the general public interest in the rule of law. Conversely, systemic theories are not easy to reconcile with a number of standard doctrines of the Court's case law, as will be shown in the following section.

III. Mixing individualistic and systemic conceptions leads to inconsistent case law

As has been shown, there are significant differences of opinion in a number of areas of moral human rights theory. The Court, presumably as a result of its tendency not to interact directly with theoretical questions, has not addressed these, but has simply applied a mix-and-match approach that combines different conceptions of human rights. This is problematic because these understandings are not necessarily compatible: While individualistic conceptions justify human rights *only* by what they do for the rights holder, systemic ones permit interpreting these rights *also* according to what they

2066 *Rogalski v Poland* App no 5420/16 (ECtHR, 23 March 2023), Joint Dissenting Opinion of Judges Wojtyczek and Poláčková, para 3 (this is not part of their dissent, but a summary of the Court's case law).

2067 For further development of this point see below 433.

2068 This is because of the assumption that 'the indirect effects of strong speech rights are mostly appealing', Wenar, 'The Value of Rights' (n 1926) 194.

do for the interests of other rights holders or for the public interest. The two conceptions thus differ significantly and can lead to different outcomes on cases.

Within the law of the Convention, the clash of these conceptions is particularly obvious as regards the scope of the Convention rights *ratione personae* (1.) and *ratione materiae* (2.), as regards proportionality analysis (3.) and as regards procedural questions regarding burden of proof (4.). Common to all of these areas is that the Court has developed most of its general, overarching doctrines on the basis of an individualistic conception of human rights. As will be shown in the remainder of this chapter, doctrines premised on this conception are at least in tension with the type of systemic conception the Court advocates for the media and for lawyers, and perhaps even incompatible; the next chapter (Chapter Nine) argues that the public interest in these areas would be better reflected by means of an undirected duty on the State.

1. Tensions regarding scope *ratione personae*

The first noticeable difference between individualistic and systemic conceptions is as regards the scope of the Convention rights *ratione personae*. For an individualistic conception, scope *ratione personae* is a relatively uninteresting point:[2069] In most cases, where individuals apply, the only question is whether, in terms of the applicant's person, it is possible in general that they hold private interests of the type protected by the Convention. For a systemic conception, which can also include public interests in the justifications of human rights, this question is significantly blurred: Should scope *ratione personae* be determined by reference to private interests or by reference to the public interest, or perhaps by reference to both simultaneously?

(a) *Is a private interest always required?*

The first question on which individualistic and systemic conceptions can differ is whether the scope of the Convention rights is engaged if there is no *private* interest involved, as where the State acts to fulfil public interests. For

2069 See eg ECtHR, *Practical Guide on Admissibility Criteria* (2022), paras 217–41.

the vast majority of situations where the State is active, there is no debate on this because human rights norms seem immediately inappropriate for application to State activities – they are, if anything, geared as rights *against* the State, not as rights *for* the State. It therefore seems difficult to imagine State activities that even resemble the positions protected by human rights such as that to life, freedom from torture and slavery, or liberty and security.[2070] However, the situation is less obvious where State bodies perform activities that strongly resemble those performed by private (non-State) actors, particularly as regards communicative activities by the State. According to an individualistic conception of the Convention rights, their scope *ratione personae* should not be engaged, since the State is valuable only derivatively and thus cannot hold the kinds of private interests protected by human rights. A systemic conception is not committed to this position: Instead, it can focus on the fact that according human rights protection to bodies organised as part of the State can, in certain circumstances, further the private interests of others, or indeed public interests.

A classic question in this field is whether independent public service broadcasters organised as part of the State should be able to rely on the human right to freedom of expression. On an individualistic understanding, the simple answer would be that this does not fall within the scope of the Convention rights. The State, unlike human beings, is not intrinsically valuable. Since it is valuable only derivatively, it cannot hold human rights. A systemic conception, by contrast, can argue that as long as the public service broadcaster is sufficiently independent, their activities can further public debate on political matters just as much as private broadcasters can, and that they can therefore promote a public interest. This is the line of reasoning that the Court, in its case law permitting public service broadcasters to rely on the Convention, has followed,[2071] though recent judgments are beginning to show greater critical awareness of the difficulty

2070 Note that matters are already different as regards certain elements of the right to a fair trial, where there are some legal systems, such as German constitutional law, which allow even State bodies to invoke requirements such as impartiality, see eg Bundesverfassungsgericht BVerfGE 6, 45.

2071 The Court makes essentially systemic arguments in its line of cases recognising their standing under Art. 34, cf Chapter Six at 334. Highlighting that 'there was little difference between Radio France and the companies operating "private" radio stations' eg *Kotov v Russia [GC]* (n 1983), para 94, where the Court also emphasises the similarity in analysis of the concepts 'governmental organisation' and 'public authority' (ibid, para 95).

in reconciling this position with individualistic conceptions of the Convention.[2072]

(b) *Is a private interest always sufficient?*

If the foregoing has concerned the question of whether a private interest is *necessary* to engage the scope *ratione personae* of the Convention rights, individualistic and systemic conceptions of human rights can also diverge on whether such a private interest is, on its own, *sufficient*.

If one applies a systemic conception, it is entirely possible to require that the rights holder be not only the type of person that can hold private interests, but also the kind of person whose protection furthers the *public* interest. In fact, as regards the media and legal services, the Court frequently tests twice for scope *ratione personae*: once as regards *ratione personae* for private interests, and once to assess whether the applicant is the type of actor for whom a special protective regime based on the public interest applies. Where the actors engaged are obviously non-State, the Court is typically quick to affirm scope *ratione personae* in the sense of an individualistic conception. Nonetheless, at a later stage in its reasoning, it then frequently applies a second *ratione personae* test when it assesses whether the applicants are part of the group that it sees as serving public interests.

For example, this second test of scope *ratione personae* is essentially what the Court is performing when it assesses whether the applicant was acting as a lawyer for Convention purposes[2073] and focuses on the applicant's

2072 See the Joint Partly Dissenting Opinion of Judges Paczolay, Wojtyczek and Poláčková in *Croatian Radio-Television v Croatia* App no 52132/19 and others (ECtHR, 02 March 2023), who hold the explicit view that protecting the autonomy of public broadcasting services is not a question of human rights because '[]the status of Convention right-holder stems from the nature of an entity as a grouping of individuals and derives ultimately from human nature and human dignity' and thus 'denotes separation from the State'. As a result, on the Court's current case law, '[t]he Convention … becomes an instrument protecting, without distinction, fundamentally different legal positions: rights and freedoms anchored in human dignity, principles of State organisation, empowerments granted to State bodies, relations between various State bodies, and so forth. As a result, fundamental human rights stemming from human dignity are diluted in a legal cocktail which becomes indigestible'.

2073 See eg *Morice v France [GC]* (n 2028), para 146, as well as the case law cited on 225.

'special status'[2074] as a lawyer as a prerequisite for the application of certain strands of its case law. This is a test for the scope *ratione personae* of the role-bearer rights the Court applies to lawyers. Perhaps even more explicitly, the Court has performed such a second-level *ratione personae* analysis as regards the media. In *Magyar Helsinki Bizottság v Hungary [GC]* (2016), the Court explicitly differentiated between 'everyone' and 'the press': 'While Article 10 guarantees freedom of expression to "everyone", it has been the Court's practice to recognise the essential role played by the press in a democratic society … and the special position of journalists in this context'.[2075] In these cases, the Court tests for scope *ratione personae* twice: once in the classic liberal sense of being part of 'everyone', ie being able to hold private interests, and once in a second, public-interest based *ratione personae* analysis, where the Court tests whether the applicant satisfies the personal requirements of being part of the press/of being a journalist, which engage a separate regime within the Convention.

In addition to the Court not making sufficiently clear that it is in essence testing a second time for scope *ratione personae*, this approach shows well the tensions between individualistic and systemic conceptions of human rights. For individualistic conceptions, there is only one personal status relevant for human rights, that of being of ultimate, intrinsic value and thus being able to hold private, that is non-derivative, interests.[2076] By contrast, the double testing the Court performs under its systemic conception in these cases effectively introduces different classes of human-rights holders into the Convention at the level of personal scope, which sits uneasily with the Convention text's consistent use of the more neutral terms of 'everyone' and 'no one'. Instead, were one to codify the Court's case law, the relevant provisions would have to read not 'everyone has the right to', but 'journalists' or 'lawyers' 'have the right to',[2077] which raises the question

2074 *Nikula v Finland* (n 2027), para 45, discussed in detail in Chapter Five, 227ff.

2075 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1889), para 165.

2076 This is the reason why Cruft notes that 'there are notable costs to this expansive approach [of classing journalists' role-defining rights as human rights]: it deviates from the view that human rights are held universally by everyone; it also muddles the distinction between human rights and role-based rights', Cruft, 'Journalism and Press Freedom as Human Rights' (n 1886) 369. Raz actually hints at a similar point himself in Raz, 'The Nature of Rights' (n 1953) 170 when he notes the difficulty in deriving freedom of political speech from the general right to freedom of expression.

2077 cf in this relation Judge Walsh's statement in his Dissenting Opinion in *Goodwin v UK* that 'the Court … has decided in effect that under the Convention a journalist

of whether these issues can properly be understood as ones of *human*, as opposed to journalists' or lawyers', rights. Given that the Convention's rules on scope purport to be universal, treating this question as one of human rights is not self-evident. Moreover, as Chapter Nine will show, it is not the only way of protecting the activity in question.

(c) *Can the categories of scope* ratione personae *and* ratione materiae *be maintained on a systemic understanding?*

More fundamentally, it is not clear whether the separation between scope *ratione personae* and scope *ratione materiae* – which is well-established in the Court's case law[2078] – can usefully be maintained by systemic understandings of human rights. This is because that separation itself already appears to be premised on an individualistic understanding of human rights. On such an individualistic understanding, scope *ratione personae* assesses whether the applicant can, generally speaking, hold the type of private interests the Convention protects – which means essentially determining that they are a human being, non-governmental organisation or qualifying group of individuals. Scope *ratione materiae* then assesses whether their activity falls within the ambit of one of the Convention rights.[2079] Scope *ratione personae* assesses whether they qualify as a rights holder; scope *ratione materiae* assesses whether their activity is protected by the Convention. The first of these tests relates to a status, the second to an activity.

This separation works far better on an individualistic understanding than on a systemic one, at least for those situations where the applicant is not obviously a non-State individual. Since systemic understandings take as (one) criterion for assigning Convention rights whether the public interest is being furthered, they introduce an activity-based criterion into both of

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is by virtue of his profession to be afforded a privilege not available to other persons', *Goodwin v UK [GC]* (n 2020), Separate Dissenting Opinion of Judge Walsh, para 1.

2078 For *ratione personae* see eg *Ireland v UK [Plenary]* App no 5310/71 (ECtHR, 18 January 1978), para 238; *Mamasakhlisi and others v Georgia and Russia* App no 29999/04; 41424/04 (ECtHR, 07 March 2023), para 291; for *ratione materiae* see eg *De Wilde, Ooms and Versyp ('Vagrancy') v Belgium (Merits) [Plenary]* App no 2832/66 and others (ECtHR, 18 June 1971), para 47; *LB v Hungary [GC]* App no 36345/16 (ECtHR, 09 March 2023), para 60ff.

2079 ECtHR, *Practical Guide on Admissibility Criteria* (n 2069), para 278ff.

the tests, which questions the separation between the two. Where a public interest is furthered, a systemic conception can accord rights without necessarily being committed to following the strict delimitation of rights holdership *ratione personae*. On a systemic conception, the question, for example, of whether Convention rights can be assigned to public service broadcasters thus hinges on the extent to which they are independent enough that their activities may further media pluralism. Questions of abstract ability to hold human rights in the sense of an analysis scope *ratione personae* do not arise because the main question is broadcasters' activities, not their status. Perhaps unsurprisingly, in its case law applying the Convention rights to public service broadcasters, the Court thus does not operate in the substantive categories of scope *ratione materiae* and scope *ratione personae*. Instead, it fudges this question by performing its assessment only under the all-encompassing procedural category of 'locus standi' under Art. 34.[2080]

2. Tensions regarding scope *ratione materiae*

Moreover, a similar problem regarding the necessity and sufficiency of private interests appears as regards scope *ratione materiae*. To enjoy the protection of the Convention, does an activity have to serve a private interest? And, if it does, is that always enough to engage the protection of the Convention rights?

(a) *Is a private interest always required?*

The first of these questions concerns whether the scope of the Convention rights is engaged for activities that *only* serve a public interest, but not a private one.

Individualistic conceptions of human rights would tend not to see these activities as the exercise of human rights (but instead to resolve them via other concepts). Since there is no *private* interest in the activity, it does not

2080 *Croatian Radio-Television v Croatia* (n 2072), para 79; *Radio France and others v France (dec)* App no 53984/00 (ECtHR, 23 September 2003), para 26ff. On the problematic mixing of procedural and substantive questions see similarly Chapter Seven, 381ff.

fall within the scope *ratione materiae* of human rights norms. For example, German constitutional law, which is typically seen as essentially premised on an individualistic understanding of human rights,[2081] does not apply freedom of expression to speech in parliament or in other State bodies.[2082] This is because protecting such speech is not derived from the individual Member of Parliament's intrinsic value as a human being or their private interests, but from the *public* interest in MPs being able to speak as part of the political process. Members of Parliament speak not qua human, but qua elected representative, ie qua office-holder (role-bearer). Their rights in parliament are not supposed to further their private interests – that would be corruption –, but the public interest.

Moreover, the structure of human rights analysis (broadly similar in German and ECHR law) as developed on the basis of an individualistic understanding also seems inappropriate to resolve these cases: Nobody has a prima facie right to speak freely in parliament which can only be restricted according to the standards applied to human rights (legitimate aim, necessity, proportionality). Instead, such speech is by its very nature subject to further regulation, for example as regards speaking time limits, in order for parliament to function. The matter thus concerns not the external relationship between the State and a non-State actor, for which such tools are well-suited, but the internal organisation of the State. The German courts therefore resolve these questions by reference to organisational provisions concerning the role of the parliament and the rights of its members, not by reference to human rights.

A systemic conception, by contrast, is not committed to protecting only private interests and can thus easily treat these cases as ones of human rights, drastically broadening the ambit of human rights norms. For example, the European Court of Human Rights, despite highlighting that the reason for protecting parliamentary speech is *not* the speaker's own interest, nonetheless applies Art. 10. The Court reasons that '[t]here can be no

2081 Klaus Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' in Klaus Stern and Florian Becker (eds), *Grundrechte-Kommentar* (3rd edn, Wolters Kluwer 2019), para 1.

2082 Rainer Grote and Nicola Wenzel, 'Die Meinungsfreiheit' in Oliver Dörr, Rainer Grote and Thilo Marauhn (eds), *EMRK/GG Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (3rd edn, Mohr Siebeck 2022), para 55.

doubt that speech in Parliament enjoys an elevated level of protection'[2083] because 'freedom of parliamentary debate is of fundamental importance in a democratic society'.[2084] That this protection is not primarily based on the human-rights holders' own interests is particularly clear from the Court's judgment in *Lombardo and others v Malta* (2007), where the Court

> recall[ed] that while freedom of expression is important for everybody, it is especially so for elected representatives of the people. They represent the electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with their freedom of expression call for the closest scrutiny on the part of the Court.[2085]

Here, the Court openly uses the systemic value of parliamentary expression as a justification for applying the human right to freedom of expression under Art. 10, which sits uncomfortably with more classic individualistic conceptions of human rights that refer back to the right-holder. It is true that 'there can be no doubt that speech in Parliament [should enjoy] an elevated level of protection'; however, there can be significant doubt whether this is a question of the human right to freedom of expression of members of parliament.[2086]

The same problem, whether human rights can be applied even where there is no private interest, arises for lawyers acting on behalf of clients because it is not clear that lawyers have any private interests in these situations. Aside from the conceptual difficulties mentioned above,[2087] in many cases before the Court, lawyers themselves have emphasised that they are not acting in their private interest, but in that of the client. For example, in *Mesić v Croatia* (2022), the lawyer consistently emphasised[2088] that he was only relaying the ideas and information provided by his client.[2089]

2083 *Karácsony and others v Hungary [GC]* App no 42461/13; 44357/13 (ECtHR, 17 May 2016), para 138. Indeed, the point is frequently no longer debated, *Ikotity and others v Hungary* App no 50012/17 (ECtHR, 05 October 2023), para 29.

2084 *Karácsony and others v Hungary [GC]* (n 2083), para 139.

2085 *Lombardo and others v Malta* App no 7333/06 (ECtHR, 24 April 2007), para 53.

2086 For an alternative explanation of these cases based on a combination of undirected and directed duties see Chapter Nine.

2087 423ff.

2088 *Mesić v Croatia* App no 19362/18 (ECtHR, 05 May 2022), paras 6, 7, 9, 64ff, discussed in Chapter Six, 344ff.

2089 The same is true for the section in which the Court focused on 'The applicant's status as a high-ranking State official and Mr Jurašinović's status as an advocate', ibid, para 103ff. Neither of these positions derives from the intrinsic value of the individual; instead, they are both essentially public functions.

For an individualistic understanding, there are thus significant obstacles to applying the Convention rights to lawyers acting on behalf of clients. By contrast, on a systemic conception, the application of the Convention rights to lawyers' professional activities is far easier to explain: While lawyers may not be acting in their own *private* interests where they represent clients, they are, on the Court's case law, clearly furthering both the interests of the client and a public interest, as reflected both in the Court's reference to legal services as a 'public service'[2090] and in lawyers' semi-public status as 'officers of the court'.[2091] A systemic conception can thus easily class these cases as within the scope of the Convention rights *ratione materiae*.

However, that this is in tension with the rest of the Court's case law becomes clear if, for example, one compares the situations of judges and lawyers. The Court appears to apply individualistic conceptions to the former and systemic conceptions to the latter.

On the Court's case law, judges fall within the scope of the Convention rights *ratione personae* because they are human beings; however, to the extent ascertainable,[2092] the Court treats their professional activities as not falling within the scope of the Convention rights *ratione materiae* because these activities do not reflect any private interest on the part of the judge.[2093] Aside from the fact that Art. 6 ECHR requires precisely that the judge have *no* private interest in the outcome of the case,[2094] this application of an individualistic conception of human rights seems convincing inter alia because of the general freedom from justificatory requirements that human rights bring: The State, acting through judges and prosecutors, *should* have to justify why it acts, unless one wants to give it the kind of general freedom to act that non-State individuals enjoy, which seems

2090 *H v Belgium* App no 8950/80 (ECtHR, 30 November 1987), para 46 (b).

2091 See Chapter Two, 122ff, as well as the discussion in Chapter Five, 225ff.

2092 However, for a recent case applying freedom of expression to a prosecutor see *Brisc v Romania* App no 26238/10 (ECtHR, 11 December 2018), complete with a scathing Dissenting Opinion by Judge Kūris, joined by Judge Yudkivska.

2093 Notably, cases concerning unfair dismissal of judges argue by reference to the impact of the dismissal on the judge's private life, rather than by reference to any protected interest in exercising the functions of judge. See eg *Denisov v Ukraine [GC]* (n 2059), particularly at para 115ff.

2094 Note *Kyprianou v Cyprus [GC]* App no 73797/01 (ECtHR, 15 December 2005), para 118, where the Court highlighted that the 'subjective' limb of the 'impartiality' test requires that there be no 'personal conviction or interest of a given judge in a particular case'. For an introduction to the philosophical literature on such public roles see eg Waheed Hussain, 'The Common Good' in Edward Zalta, Uri Nodelman and Colin Allen (eds), *Stanford Encyclopedia of Philosophy* (2018) 11.

incompatible with the Convention's structure aimed at limiting State activities to pursuing the public interest.

On the other hand, the Court does apply the Convention rights to lawyers acting in the course of their professional activities, without explaining why their situation as regards judicial proceedings is different from that of judges. While the Court has highlighted that lawyers 'cannot be considered to be [organs] of the State',[2095] it has also classed them as 'intermediaries between the public and the courts'.[2096] This seems to be some kind of half-way position, meaning that it is not obvious why for individualistic conceptions lawyers will be sufficiently 'non-State' to apply human rights without qualms. Unless one wants to grant a drastically stronger right to exercise one's profession than the Convention to date recognises, lawyers' comparatively strong position cannot be justified by reference to their own private interests, but only because of a *public* interest in the rule of law and the administration of justice. For an individualistic conception, this means that treating the rights of lawyers in litigation as human rights is at least problematic. They speak not qua human, but qua lawyer.

(b) *Is a private interest always sufficient?*

Furthermore, individualistic and systemic conceptions also differ on whether a private interest will always be sufficient for scope *ratione materiae*. Instead, systemic conceptions can restrict the scope of human rights so as not to apply to activities that do not further the relevant public interest.

In this vein, if freedom of expression is interpreted to secure public debate, lowering[2097] or excluding protection for expression that is not seen as furthering such a debate is entirely consistent.[2098] Moreover, if freedom of expression is applied to lawyers, but interpreted in line with a systemic conception as protecting their functions *and* if these functions are seen as

2095 *Siałkowska v Poland* App no 8932/05 (ECtHR, 22 March 2007), para 99, discussed in detail in Chapter Two, 124ff.

2096 *Nikula v Finland* (n 2027), para 45, discussed in detail in Chapter Five, 227ff.

2097 cf eg the *von Hannover v Germany (No 2) [GC]* App no 40660/08; 60641/08 (ECtHR, 07 February 2012) saga.

2098 To the extent that the Court is very hesitant to entirely exclude statements from the protection of Art. 10 at the level of scope *ratione materiae* this shows a combination of systemic and individualistic approaches, cf eg Matthias Cornils, 'EMRK Art. 10 Freiheit der Meinungsäußerung' in Hubertus Gersdorf and Boris Paal (eds), *BeckOK Informations- und Medienrecht* (CH Beck 2021), para 5.

essentially limited to litigation, it is easy to understand why their freedom of expression will be less protected than that of other individuals as regards statements made outside the courtroom.

An individualistic conception, by contrast, can of course permit restrictions where there is a conflict between the private interest protected by freedom of expression and a public interest. However, it cannot simply reduce the level of protection because of a lack of contribution to the public interest. Instead, the private interest of the rights holder in freedom of expression is protected per se, regardless of what it does for any other person. The 'privileged position accorded by the Court in its case law to political speech and debate on questions of public interest'[2099] is thus harder to justify on an individualistic conception than on a systemic one.

3. The Court's proportionality analysis as essentially premised on an individualistic conception

If questions of scope of the Convention rights therefore already show tensions between individualistic and systemic conceptions,[2100] perhaps the most significant tension between these conceptions of the Convention rights regards their ability to justify the Court's proportionality analysis.[2101]

2099 *Magyar Helsinki Bizottság v Hungary [GC]* (n 1889), para 163, discussed in Chapter Six at 310ff.

2100 No discussion of the general criticisms of proportionality as a standard in human rights law is offered here because in any case proportionality analysis is an established doctrine in the Court's case law. For an introduction to the extensive debate on proportionality-based and 'trumping' conceptions of human rights see eg Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468, 475 and Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) Modern Law Review 671, 673ff.

2101 Interestingly, this does not appear to be a point that features in the debate on conceptions of moral human rights. That may be because that discourse is generally largely detached from legal practice, and consequently does not pay much attention to how to resolve concrete cases. Noting that '[p]roportionality has attracted even less philosophical attention [than human rights], though it has received extensive doctrinal treatment by European constitutional theorists and lawyers … [because] it is … too lawyerly a concept to attract philosophical interest' Letsas, 'Rescuing Proportionality' (n 1945) 318.

This is because proportionality analysis in human rights law[2102] seems to be largely premised on an individualistic conception that separates between private and public interests and then weighs these against one another.[2103] Proportionality analysis as used by the Court is a protective mechanism for private interests in the sense of narrowing the field of permissible interference with the individual's legal position; it is not to date used as a cure-all for resolving all types of conflicts between varying public interests.

Moreover, the separation between private and public interests is not only reflected in all three limbs of the Court's proportionality test, but also underpins the very existence of that test – the idea that the State can only interfere with human rights where this is proportionate. The fact that the State must justify its actions, whereas the human-rights holder is under no such justificatory requirement, is a reflection of the distinction between the intrinsically valuable human being and the only derivatively valuable State. The State has no value in itself and thus has to justify its actions; the individual *is* valuable in themselves and does not need to justify themselves. This conceptual distinction is reflected legally in the lopsided structure of the proportionality test in human rights law as applied only to the interference,[2104] not to the exercise of the human right. The exercise of the right does not need to be justified.

Given this close link to individualistic understandings, it is not clear whether proportionality analysis can be applied in the same way where both sides of the scale are interpreted in light of public interests. The test as

2102 On other uses see eg Anne Peters, 'Proportionality as a Global Constitutional Principle' in Anthony F. Lang and Antje Wiener (eds), *Handbook on Global Constitutionalism* (Elgar 2017).

2103 See in this sense eg Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 The Cambridge Law Journal 174, particularly at 179; Peters, 'Proportionality as a Global Constitutional Principle' (n 2102) 254; Çalı (n 1921) 253; Tsakyrakis (n 2100) 468; Madhav Khosla, 'Proportionality: An Assault on Human Rights?: A Reply' (2010) 8 International Journal of Constitutional Law 298, 298; Pavel Ondřejek, 'The Theoretical Basis of the Relationship between Fundamental Rights and Public Interests' in Luboš Tichý and Michael Potacs (eds), *Public Interest in Law* (Intersentia 2021) 69. From the French-language literature, see eg Bioy (n 1961) 234, from the German-language literature see eg Schilling (n 1898) 51ff.

2104 Peters calls this 'crucial feature of the suitability and necessity tests' 'their *asymmetrical* quality' (emphasis in original) and notes that '[t]he test does not work the other way round', Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (n 1979) 1140. Referring to 'a priori preference of fundamental rights … to the public interest' eg Ondřejek (n 2103) 70.

applied by the European Court of Human Rights is at least not designed, and possibly unsuitable, for weighing public interests on the 'rights' side against other public interests on the 'interference' one.[2105] The asymmetrical nature of the test, as well as the idea of bipolar weighing between the applicant's interests and the public interest, seem difficult to reconcile with a systemic conception of human rights.

Moreover, there are also more specific difficulties at each of the three stages of the test. At its simplest,[2106] 'the principle of proportionality consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrow sense'.[2107] For the Convention, these are framed as the requirements of a legitimate aim and of necessity in a democratic society, which comprises the second and third principles. For all three limbs of the test, problems arise when the 'rights' side is interpreted in light of public interests in the way systemic understandings propose.

(a) *Suitability*

Under the 'suitability' limb of the proportionality test as understood by the Court, any measure interfering with Convention rights must be suitable to further one of the legitimate aims set out in the Convention, eg in the second paragraphs of Arts 8 – 11.

For an individualistic conception of human rights, the purpose of this requirement is clear. Although in the Court's practice the interpretation of these aims is broad,[2108] the limitation of possible justifications for interference with private interests contained in the 'legitimate aim' limb has the important function of elevating protection for private interests by clarifying that interference with human rights is only possible for reasons carrying

2105 Noting explicitly that the 'interests to be weighed … are both public in nature' see, from the media case law, eg *Stoll v Switzerland [GC]* App no 69698/01 (ECtHR, 10 December 2007), para 116 (discussed in Chapter Six at 337).

2106 There are variations in how conscientiously the Court applies proportionality analysis, although it consistently pays at least lip-service to it.

2107 Robert Alexy, 'Constitutional Rights, Balancing and Rationality' (2003) 16 Ratio Juris 131, 135. This section draws on Alexy's account of proportionality as 'representative of legal scholars' efforts to theorize proportionality', Yun-chien Chang and Xin Dai, 'The Limited Usefulness of the Proportionality Principle' (2021) 19 International Journal of Constitutional Law 1110, 1110.

2108 Rivers (n 2103) 195. Indeed, cases where there is no legitimate aim are often dealt with via Art. 18, Grabenwarter and Pabel (n 1977), § 18, paras 13, 28.

a certain minimum weight[2109] and is thus subject to stricter requirements than State action that does not interfere with human rights. 'The arguments and the evidence for overriding the right have to be stronger than the arguments and evidence just to outweigh any trivial interest'.[2110] In the context of constitutional rights, this has been phrased as '[c]onstitutional rights always trump any consideration except for considerations which [also] enjoy constitutional status'.[2111] In that sense, the 'legitimate aim' limb acts as a kind of rough filter limiting the aims 'able to compete with the right on the balancing stage'.[2112] This privileges the exercise of human rights. The lopsided nature of the Court's test is justified because it is only the State which is limited to pursuing aims classed as 'legitimate'; individuals have the freedom to act for whichever aim they choose, indeed to define their own aims, though they must, of course, stay within the limits of their human rights. Protecting the human rights of individuals, on an individualistic conception, is not derivative of the aims the individuals pursue; human beings are protected simply because they are intrinsically valuable, valuable per se.

For a systemic conception, however, this asymmetry is far harder to justify. Where both the interference *and* the human right itself are justified by reference to public interests, it seems difficult to explain why the test of 'legitimate aim' should only be applied to one of them, but not the other. This is all the more so since Arts 8 – 11 § 2 contain an admittedly broad, but nonetheless closed list of public interests classed as 'legitimate'. Why, when weighing between several different *public* interests, should the Court restrict the number of considerations to be adduced against one of them by means of the lists in Arts 8 – 11 § 2? Doing so essentially amounts to 'upgrading' one of many public interests by restricting the number of considerations that may be offered as reasons for limiting its fulfilment, thus partially removing it from the political fray by granting an additional

2109 'Only sufficiently important public objectives are permitted to limit the enjoyment of rights', Rivers (n 2103) 179, which constitutes 'a very crude balancing exercise between rights and public interests at the highest level of generality', ibid 196.

2110 Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (n 1979) 1140.

2111 Matthias Klatt and Moritz Meister, 'Proportionality - a Benefit to Human Rights? Remarks on the I-CON Controversy' (2012) 10 International Journal of Constitutional Law 687, 690. At 704 this understanding is transferred to the ECHR, where '[t]he state is thus not free to identify the legitimate aim freely'.

2112 Ibid 691.

protection that is not easy to justify. This kind of 'elevat[ion] above the ordinary goods'[2113] created by the reduced number of permissible justifications for interferences seems at odds with the generally open structure of weighing between different public interests, where usually *any* relevant consideration can be adduced.[2114]

Instead, if one does follow a systemic conception of the Convention rights, it seems more consistent to abandon the lopsided structure of the proportionality test and require that the exercise of the human right *also* be justified as pursuing a legitimate aim, ie as truly being in a public interest.[2115] This means applying the suitability test both to the interference *and* to the right. In fact, a close analysis of the Court's case law in those cases where it follows a systemic conception shows that this may be what it is doing, even if it avoids the terms 'suitability' to further a 'legitimate aim' in its assessment of the applicant's activities. Nonetheless, in essence the Court applies the requirement of 'suitability to further a legitimate aim' not only to the interference, but also to the rights holders side.

For example, in the case law on the media, the Court has scrutinised whether the exercise of freedom of expression is 'capable of contributing to a debate in a democratic society'[2116] and thus pursues the purpose of 'journalistic reporting on political issues and other matters of public concern'[2117] as a criterion for the level of protection it will grant. Where the applicants do not pursue such a legitimate aim, their level of protection will be reduced.[2118] For lawyers, the Court has also assessed whether they were acting as lawyers,[2119] whether their activities served the defence of

2113 Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (n 1979) 1139.

2114 Note that focusing instead on undirected duties permits for such more open weighing, given that it removes the priority for specific public interests that happen to resemble positions protected by rights.

2115 This question is similar to the one discussed in relation to scope *ratione materiae*, see 435ff.

2116 *Axel Springer AG v Germany [GC]* (n 2023), para 91, discussed in Chapter Six at 311.

2117 cf eg *NIT SRL v Moldova [GC]* (n 2018), para 178, discussed in Chapter Six at 312ff.

2118 See eg *Man and others v Romania (dec)* App no 39273/07 (ECtHR, 19 November 2019), discussed in Chapter Six at 321.

2119 cf the cases listed in Chapter Five at 225.

their clients,[2120] and has even gone as far as recently criticising a domestic court for not establishing whether the applicant's activities pursued this purpose.[2121] This is at the very least similar to the 'legitimate aim' test applied under the first limb of the proportionality test, but is an additional justificatory requirement applied not to the interference, but to the exercise of the right.

Requiring, in this way, that not only the restriction on the right, but *the exercise of the right itself* serve a legitimate aim marks a significant departure from proportionality analysis as traditionally understood in both human rights law and the Court's case law. In particular, it departs from the classic vision that only the State is under a justificatory burden and instead introduces an additional restrictive criterion imposing justificatory requirements on the human-rights holder, who must now explain why their activity is worth protecting.

The problem with this systemic approach is that, even leaving aside the question of whether justificatory requirements should be applied to human-rights holders, it is clearly not the approach embraced by the Convention. The Convention text contains standards only for testing whether the interference furthers a legitimate aim, but not for testing whether the rights holder's activities further such an aim, in line with the premise identified above that the Convention is generally based on an individualistic understanding of human rights. Arts 8 – 11 § 2 contain lists of legitimate aims for *restricting* Convention rights, but the Convention does not contain any indication as to the 'legitimate aims' that may justify the *exercise* of Convention rights – presumably because the exercise of Convention rights is not in need of justification.

(b) *Necessity*

The second limb of the proportionality test in the Court's case law, 'necessity', seems equally difficult to apply if both the human right and the

2120 cf eg *LP and Carvalho v Portugal* App no 24845/13; 49103/15 (ECtHR, 08 October 2019), para 65, as well as more generally regarding lawyers' statements outside the courtroom Chapter Three, 170ff.

2121 *Čeferin v Slovenia* App no 40975/08 (ECtHR, 16 January 2018), para 62, where the Court criticised that 'none of the [domestic] courts explored the relation of the impugned statements to the facts of the case'.

interference are justified by reference to public interests.[2122] Necessity is typically understood in human rights law to mean that of several equally effective means of furthering the legitimate aim, the interference chosen must be the one that causes the least detriment to the human right. This is easy to explain on an individualistic grounding of human rights: While individual interests may in certain cases have to yield to public ones, that can certainly not be justified if, in reality, there was a way of satisfying the public interest that would have been less burdensome to the rights holder. '[C]ollective goals may restrict individual rights, but only if it is absolutely necessary for the promotion of the collective goal'.[2123]

If one applies a systemic conception, however, it is not clear how to apply the test of necessity. The fact that such conceptions interpret both the human right *and* the interference by reference to a public interest is in tension with the rule-exception relationship that the Court's test of necessity assumes, which ultimately flows from the individualistic assumption that the exercise of human rights is inherently valuable and does not need justification, while State interference can be justified only derivatively. As a result, on a systemic conception, it is not clear why only the interference, as opposed to the exercise of the human right, should be assessed as to its 'necessity'. Instead, one could just as well insist that the *exercise* of the human right has to be necessary to further a legitimate public-interest aim.

On a close reading of the Court's case law, the Court actually does this, applying the necessity criterion to the applicant's exercise of Convention rights and abandoning the traditional asymmetrical character of the necessity test. For example, in *Nikula*, it highlighted that 'it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument'.[2124] From this quote, it is immediately apparent that 'the relevance and usefulness of a defence argument', ie whether certain statements were *necessary* to protect the client's position, is in principle a criterion. It may be subject to a reduced standard of review, but whether a statement was necessary to further the legitimate aim of the client's defence is a criterion for the level of human rights protection accorded.

2122 Noting the general difficulty of applying necessity as a criterion where there are more than two principles in play Alexy, 'Constitutional Rights, Balancing and Rationality' (n 2107) 136.

2123 Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (n 1893) 101.

2124 *Nikula v Finland* (n 2027), para 54.

In essence, this adds 'necessity' as a further criterion to the applicant's exercise of their freedom of expression, a criterion not contained in Art. 10 § 1. That this point is anything but trivial is immediately apparent from the Court's case law on lawyers' freedom of expression outside the courtroom: Where the Court has focused on the fact that judicial remedies were still available to the applicant,[2125] this essentially amounts to a finding that statements outside judicial proceedings were not *necessary*. In the Court's view, judicial remedies would have been an equally suitable but milder means of pursuing the legitimate aim of the client's defence, although the Court does not typically establish explicitly that this is the case and, in particular, does not examine the 'equally suitable' limb.[2126]

(c) *Balancing*

Finally, it is not clear how to perform a balancing exercise according to a systemic conception of human rights. This is not only because balancing, in the Court's case law, 'starts with the presumption that rights enjoy priority over public interests',[2127] which is difficult to reconcile with rights *interpreted in light of* public interests.[2128] It is also because interpreting both sides of the scale in terms of public interests fudges what is being balanced and how.

Balancing in the context of proportionality in human rights law is an operation that consists of three steps.[2129]

> The first stage involves establishing the degree of non-satisfaction of or detriment to the first principle. This is followed by a second stage in which the

2125 cf eg *Schöpfer v Switzerland* App no 56/1997/840/1046 (ECtHR, 20 May 1998) as well as the other cases discussed in Chapter Three, 170ff.

2126 As has been highlighted above, such 'equal suitability' could, for example, be lacking in situations where there are systemic problems in a State's justice system which make judicial proceedings an ineffective means of defence.

2127 Başak Çalı, 'Balancing Test: European Court of Human Rights (ECtHR)', *Max Planck Encyclopedia of International Procedural Law* (2018) 15.

2128 See also, for media freedoms, Florian Oppitz, *Theorien der Meinungsfreiheit: Eine vergleichende Untersuchung richterlicher Grundrechtsdogmatik* (Nomos 2018) 158, noting that if both the right and the interference are justified by reference to democracy, there is no longer a clear benchmark against which the interference can be measured.

2129 Robert Alexy, 'On Balancing and Subsumption: A Structural Comparison' (2003) 16 Ratio Juris 433, 436ff.

> importance of satisfying the competing principle is established. Finally, in the third stage it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.[2130]

'The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.[2131] Severe interferences with one principle will therefore only be permissible to attain a high degree of realisation of the other.[2132]

Balancing in human rights law is thus premised on two points of reference which are then weighed against each other.[2133] The 'test requires a balancing of the benefits gained by the public and the harm caused to the constitutional right through the use of the means selected by law to obtain the proper purpose'.[2134] On an individualistic conception of human rights, these two points of reference are the private interests of the rights holder on the one hand and the public interest in the legitimate aim on the other.[2135]

While this, despite the constant criticism levelled at proportionality and particularly at balancing,[2136] is relatively clear, a systemic conception of human rights significantly blurs this exercise. On such a conception, the 'human rights' side, rather than reflecting only private interests and being weighed against public interests, itself already includes references to public interests. Since the importance of the private interest and the importance of the public one are not necessarily the same, this makes the point of reference for the purposes of balancing between the human right and the interference unclear. Which is decisive – the severity of the interference with the rights holder's private interest or with the public interest adduced to justify their rights?

This problem is visible, for example, if one conceptualises freedom of expression, in line with a systemic understanding of human rights, as justified by both the private interests of the human-rights holder and public interests in certain types of speech. The private interest and the public one

2130 Ibid 436ff.
2131 Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) 102.
2132 Questions regarding epistemic discretion (cf ibid 414ff) are explicitly excluded from the present assessment.
2133 See also the account in ibid 401ff.
2134 Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (CUP 2012) 340.
2135 Focusing on weighing of private versus public interests eg Stern, 'Die Hauptprinzipien des Grundrechtssystems des Grundgesetzes' (n 2081), para 159.
2136 See n 2100.

on the 'rights' side will not necessarily pull in the same direction. It may be very important to an individual to express themselves on a point that makes no contribution to a public interest, for example where there is no contribution to public debate. Conversely, there are also forms of expression that may be very important to the public interest, but in which the individual has little or no private interest – as, for example, when lawyers speak in defence of another human-rights holder.[2137] In these cases, which of the interests is decisive to determining 'the degree of non-satisfaction of or detriment' – the human-rights holder's interest in performing the activity, that of other human-rights holders in the activity being performed, or a broader public interest such as eg the rule of law? If a defence attorney is lightly admonished not to pursue a line of questioning which, in fact, is the client's most promising defence, is the interference to be weighed by reference to the lawyer's rights (at best light severity), the client's rights (very severe)[2138] or the public interest in fair judicial proceedings (perhaps also very severe?)?

These problems are anything but academic. As has been shown, the Court will often rhetorically emphasise the importance to the client's position when determining the protection of the rights of lawyers.[2139] However, in other constellations it then limits which considerations it will include in its analysis. For example, in situations where a State is alleged to have violated its obligation under Art. 34 not to hinder individual applications to the Court, the Court does not allow the client to rely on their right to apply to Strasbourg unhindered at all if their lawyer has complained to the Court in their own name.[2140] In cases raised under the substantive Convention rights, by contrast, the Court does not decline scope, but instead simply reaches the same outcome regardless of whether the client or lawyer complain.[2141] This is problematic because, if the applicant's rights are

2137 See 423ff. Indeed, Raz has also noted this for freedom of political expression, since 'most people participate in public expression rarely if at all' and 'many other interests most people have are much more valuable to them than their interest in [freedom of public expression]', Raz, 'Free Expression and Personal Identification' (n 1955) 147.

2138 Leaving aside the fact that Art. 6 ECHR as traditionally understood is not open to proportionality balancing.

2139 cf eg the *Nikula* (n 2027) dictum, discussed in detail in Chapter Five, 227ff.

2140 See Chapter Three, 194, and eg *Hilal Mammadov v Azerbaijan* App no 81553/12 (ECtHR, 04 February 2016), para 119.

2141 cf eg *Tuğluk and others v Turkey (dec)* App no 30687/05 (ECtHR, 04 September 2018), discussed in Chapter Three, 180ff.

to continue to have significance as a point of reference, one cannot simply refrain from a balancing exercise just because an assessment has been or will be conducted by reference to *someone else's* human rights. While it is understandable that the Court may be trying to avoid dealing with similar issues twice, this does mark a significant inconsistency in which positions it will interpret into the 'rights' side for the purposes of the balancing exercise.

While an individualistic understanding thus provides comparatively clear standards, the balancing exercise required by the Court's proportionality analysis becomes significantly more difficult to apply where the 'rights' position is interpreted as reflecting public interests under a systemic reading of human rights. On such an interpretation, weighing is no longer structured as an exercise between two points, but between all sorts of aspects, thus becoming multidimensional without clear standards. Here, there is a significant risk that the applicant's rights will be reduced without the relatively clear standards which proportionality balancing typically provides in the Court's case law. While individualistic conceptions do not suffer from these problems – they can distinguish clearly between private interests as the first principle and public interests as the second –, systemic conceptions find it far more difficult to perform a rational balancing exercise because it is clear neither what exactly is balanced nor how the relative weights are determined.

4. Procedural implications

Finally, the procedural law of the Convention also appears premised on an individualistic conception of human rights. As Peters puts it,

> [w]here the enjoyment of a right is the default rule and starting point of the legal assessment of a conflictual situation, the burden of explanation, justification, and proof shifts to the government. … [E]njoyment of the right is the fallback position. It is not the attainment of the public interest goal but the interference with the right which demands explanation, justification, and proof.[2142]

This is an analysis which equally underpins the Convention: In principle, it is enough for the applicant to establish interference with the scope of a human right because these are protected per se; once this is done, it

2142 Peters, 'A Plea for Proportionality: A Reply to Yun-chien Chang and Xin Dai' (n 1979) 1139ff.

is for the State to attempt to justify the interference.[2143] This position can be easily explained by reference to the separation that individualistic conceptions of human rights make between intrinsically valuable individuals and the derivatively valuable State: only the latter is subject to justificatory burdens, while the human-rights holder never needs to justify why they are exercising their human rights (though there may be situations where their rights can be limited).

Systemic conceptions, conversely, cannot explain this point as easily because they do not necessarily comport a rule-exception relationship as between several different public interests. The justificatory burden is thus less clearly assigned. This point is not merely theoretical; as shown in the preceding parts of this section, the Court does, particularly in the case law on media freedoms, require that applicants justify themselves.

IV. Why does the Court draw on systemic conceptions?

A systemic conception of the Convention rights, ie one that does not limit the justifications for these rights to the protection of the rights holder, thus leads to significant tension with the Convention text and most of the Court's case law, which usually seem to understand the Convention rights as justified primarily by reference to the position of the rights holder. So why has the Court nonetheless embraced systemic conceptions of human rights in some areas?

There are two main possible (and perhaps complementary) explanations for this. The first (1.) is that the Court, focusing on incremental development of its case law, has not noticed that systemic conceptions sit uneasily with doctrines that are premised on an individualistic conception of human rights. The second (2.) is that the Court is trying to broaden the scope of the Convention and expand the public-interest obligations imposed on States; given that at present it lacks the category of undirected duties, it does so by altering its interpretation of rights.

2143 Jens Meyer-Ladewig and Björn Ebert, 'EMRK Artikel 38 Prüfung der Rechtssache' in Jens Meyer-Ladewig, Martin Nettesheim and Stefan von Raumer (eds), *Europäische Menschenrechtskonvention* (4th edn, Nomos 2017), para 19. This point is even more convincing if, in line with eg Forst (n 1912) 712, one sees human rights as having 'a common ground in one basic moral right, the *right to justification*' (emphasis in original).

1. Systemic conceptions as a coincidental by-product of case law evolution

The first potential explanation for the Court's use of systemic conceptions is perhaps slightly underwhelming in its simplicity: The Court has just failed to notice that these conceptions are not obviously compatible with the rest of its case law. In fact, this seems rather plausible. The Court does not engage with theoretical questions such as these, and as this chapter has shown, the issue is difficult to unpick even for lawyers not bogged down in the busy day-to-day workings of one of Europe's highest courts.[2144] While there does now seem to be some awareness of the issue, that is mainly limited to comparatively recent dissenting opinions challenging established case law.[2145] In the rest of its case law, the Court shows no visible awareness of the difficulties of combining individualistic and systemic conceptions. Indeed, *Handyside* itself simply listed both private and public interests as justifying freedom of expression[2146] without highlighting that these propose different standards for determining the outcomes of cases.[2147]

This explanation – that the development of systemic conceptions of the Convention rights is largely historical coincidence – moreover holds particularly well for the case law on lawyers. From the case law assessed for the present study, it appears that up until the late 1990s, the Court dealt with cases involving legal services exclusively from the perspective of the rights of the client, which is unproblematic on an individualistic conception of human rights that sees those rights as protecting interests of the rights holder. The protection granted to the applicant client under Art. 6[2148] or Art. 8[2149] in such cases can easily be explained by reference

2144 Particularly since this shift appears to have taken place around the time when Protocol 11 triggered a significant increase in the Court's workload, see below.

2145 See eg *Brisc v Romania* (n 2092) with a Dissenting Opinion by Judge Kūris, joined by Judge Yudkivska; *Croatian Radio-Television v Croatia* (n 2072) with a Joint Partly Dissenting Opinion by Judges Paczolay, Wojtyczek and Poláčková.

2146 'Freedom of expression constitutes one of the essential foundations [of a democratic society], one of the basic conditions for its progress and for the development of every man', *Handyside v UK [Plenary]* (n 2018), para 49.

2147 Note also that the debate on the nature of moral human rights and, in particular, on role-bearer rights is considerably younger, beginning, in essence, from the late 1970s and 1990s onwards respectively.

2148 eg *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980); *Campbell and Fell v UK* App no 7819/77; 7878/77 (ECtHR, 28 June 1984).

2149 *Schönenberger and Durmaz v Switzerland* App no 11368/85 (ECtHR, 20 June 1988).

to the applicant's own interests. Simultaneously, the early cases in which lawyers applied to the Court all involved situations which can be easily classed as relating to the lawyer's own private interests.[2150] Again, this can be explained without any problems on an individualistic reading of the Convention rights.

By comparison, the problematic systemic conception discussed above – the interpretation of the *lawyer's* rights to protect the *client's* interests – appears to have arisen only from the late 1990s, ie relatively recently. The first case in which a lawyer invoked the protection of the Convention rights for their representative activities appears to be *Schöpfer v Switzerland* (1998),[2151] which (as discussed in Chapter Three[2152]) involved a lawyer who was fined for giving an incendiary press conference instead of pursuing further judicial remedies. The Court's discussion of the question of the scope of the Convention rights is short enough to be easily reproduced in full: 'The penalty in issue incontestably amounted to "interference" with the applicant's exercise of his freedom of expression'.[2153] Nowhere did the Court or the Parties discuss that, in fact, the applicant lawyer had not been acting in his own private interests, but in that of his client, and that applying the Convention rights here thus constituted a significant shift away from the Court's traditional individualistic understanding that the Convention rights protect the position of the rights holder.[2154]

Moreover, even when the Court later began applying the Convention rights to representative activities by lawyers in judicial proceedings, there was no discussion of this shift away from individualistic understandings of the Convention rights. Instead, in *Nikula v Finland* (2002), which seems to be the first of these cases chronologically, the Court simply noted that '[t]he participants in the proceedings agreed that the applicant's conviction amounted to an interference with the exercise of her right to freedom of

2150 *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983); *H v Belgium* (n 2090); *Schönenberger and Durmaz v Switzerland* (n 2149); *Ezelin v France* App no 11800/85 (ECtHR, 26 April 1991); *Casado Coca v Spain* App no 15450/89 (ECtHR, 24 February 1994).

2151 *Schöpfer v Switzerland* (n 2125).

2152 171ff.

2153 *Schöpfer v Switzerland* (n 2125), para 24.

2154 One possible explanatory factor is that the Court, even on its new systemic conception, did not find a violation of the Convention. This would presumably also have been the result of an individualistic conception, which would likely have held that the scope of the Convention rights was not engaged.

expression. The Court sees no reason to conclude otherwise'.[2155] There was no further discussion of the point in subsequent cases, although of late there does appear to be some increasing awareness that applying the Convention rights to protect *public* interests can be problematic,[2156] as evidenced, for example, by the judgment in *OOO Memo v Russia* (2022) denying a human right to reputation to State bodies.[2157]

2. Systemic conceptions as an attempt to expand the State's duties

A different or complementary explanation is that the Court is trying to expand the public-interest obligations imposed on States. This explanation is closely linked to the fact the Court at present appears only to recognise directed duties corresponding to rights.[2158] As a result of this limitation, when the Court tries to expand the State's *duties*, it has to interpret *rights* more broadly.

Perhaps a particularly obvious example are the cases where the Court uses human rights to deal with matters that Judges Paczolay, Wojtyczek and Poláčková, in their recent joint partly dissenting opinion in *Croatian Radio-Television v Croatia* (2023),[2159] described not as 'rights and freedoms anchored in human dignity', but as 'principles of State organisation, empowerments granted to State bodies [or] relations between various State bodies'.[2160] Given that the Court has not, to date, developed doctrines regarding the undirected duties imposed on States by the Convention, it

2155 *Nikula v Finland* (n 2027), para 30. *Nikula* also appears to be in tension with the more recent case law in *OOO Memo v Russia* (n 1974), given that in *Nikula* the Court accepted that the 'interference in any case pursued the legitimate aim of protecting the reputation and rights' of a prosecutor acting in that function (*Nikula v Finland* (n 2027), para 38).

2156 See n 2145.

2157 *OOO Memo v Russia* (n 1974).

2158 On this see Chapter Seven.

2159 *Croatian Radio-Television v Croatia* (n 2072).

2160 Ibid 40. See also the Joint Dissenting Opinion of Judges Wojtyczek and Poláčková in *Rogalski v Poland* (n 2066), para 3, where they highlight that '[t]he protection which Article 10 extends to advocates acting on behalf of their clients exists first and foremost to serve the interests of those clients. Advocates' freedom of speech is therefore limited in that they are bound by the interests of their clients and by the instructions those clients give. An advocate representing a client is speaking on behalf of that client and for the purpose of effectively defending the client's – not his or her own – interests'.

appears committed to framing questions such as the rights of public-service broadcasters or of members of parliament in terms of 'human rights' if it does not want to reject such applications as inadmissible.

In this regard, systemic understandings may be an attempt by the Court to find a way of discussing the public interests (or rights of other individuals) which States must protect under the Convention. A systemic conception allows the Court to keep discussing rights, but broaden the ambit of its assessment and examine factors other than the position of the applicant, particularly the position of other individuals (such as where it uses combinations of rights to provide and receive certain services)[2161] or the general public interest in a certain activity. An individualistic understanding cannot do this; such a conception would need to complement rights with a doctrine of undirected duties.

One example of this public-interest focus is the way the Court uses systemic conceptions to move away from the applicant's situation in isolation and put it in a broader context. A model case is *Aliyev v Azerbaijan* (2018). Here, the Court explicitly highlighted that 'the applicant's situation cannot be viewed in isolation'.[2162] Instead, it focused on 'the totality of the … circumstances … and the general situation concerning human-rights activists in the country'.[2163]

A similar desire to move away from the position of individual rights holders is, moreover, evident for legal services in overarching terms such as 'the central role of the legal profession'.[2164] These groups do not appear to be holders of Convention rights, meaning that it is unclear – if the Court's approach remains focused on rights – how this case law is best assessed and to what extent it is binding on States. Substantially the same problem appears for the Court's case law highlighting that 'professional associations of lawyers play a fundamental role in ensuring the protection of human rights and must therefore be able to act independently' and that 'self-regulation of the legal profession [is] paramount'.[2165] Whether one

2161 cf for legal services Chapter Nine, 460ff; for the media, see Chapter Six, 341ff.

2162 *Aliyev v Azerbaijan* (n 1977), para 214.

2163 Ibid, para 215.

2164 *Elçi and others v Turkey* (n 2015), para 669, discussed in detail in Chapter Five, 240ff.

2165 *Jankauskas v Lithuania (No 2)* App no 50446/09 (ECtHR, 27 June 2017), para 78; *Hajibeyli and Aliyev v Azerbaijan* App no 6477/08; 10414/08 (ECtHR, 19 April 2018), para 60; *Namazov v Azerbaijan* (n 2026), para 46; *Bagirov v Azerbaijan* (n 2063), para 78.

applies an individualistic or a systemic conception, such case law is difficult to explain from the perspective of rights.

The Court's desire to escape the limited framing of an individualistic conception of human rights is understandable given that the broader factors mentioned above ultimately have a significant impact on the enjoyment of human rights. However, it is less clear that the problem here is really the *individualistic* conception of human rights. Instead, the problem causing the Court's limited perspective in these cases is that it does not, as yet, have a doctrine of undirected duties, which forces it to focus on rights and the corresponding directed duties. The problem with this is that human rights, given their close conceptual link to private interests, are not necessarily well-suited to protect *public* interests. Instead, such public interests are best protected via undirected duties, as will be shown – returning to the example of legal services – in the following chapter.

V. Conclusion: Individualistic and systemic conceptions of human rights

As shown in this chapter, the key difficulty underlying the Court's case law as regards activities that touch on both private and public interests is that the Court mixes different, potentially incompatible, conceptions of human rights. Most of moral human rights theory, as well as Convention law, is premised on an *individualistic* conception of human rights that sees human rights as justified by what they do for the rights holder, regardless of whether this serves or disserves people other than the holder. In certain areas, however, the Court instead follows a systemic conception of human rights, where rights are justified (also) by whether they serve or disserve people other than the holder, which is far less supported in both moral human rights theory and in Convention law. The problem with this is that mixing doctrines based on an individualistic conception with a systemic one leads to inconsistencies in the Court's case law, since most of the Court's case law has been developed by an individualistic reading of the Convention rights. The reason for this shift may be that the Court is looking for a tool to better reflect duties on States that are grounded in public, rather than private, interests. The next chapter shows that this aim could be achieved by means of a combination of rights and undirected duties. The study's final chapter shows why this is preferable.