

Conclusions, Outlook and Directions for Further Research

Legal services such as legal advice and representation play an essential role in protecting and realising human rights and are also a necessary condition of the rule of law and the administration of justice: Without legal services, none of these goals can be fully realised. Despite this significance, from the perspective of human rights law, how best to ensure legal services exist presents something of a conundrum. Human rights as traditionally understood in moral and legal theory are justified by reference to what they do for the rights holder. That traditional position can easily explain rights to receive legal services on the part of clients, but struggles significantly to explain why issues concerning those who provide legal services should be a matter of lawyers' human rights: When lawyers act on behalf of clients, their role is not to further their own interests, but those of the client and the general public interest in legal services as a constituent element of the rule of law. This questions whether rights accorded to clients and lawyers are really the most convincing way of protecting legal services. More fundamentally, it questions the idea that the Convention for the Protection of Human Rights and Fundamental Freedoms (to use the European Convention on Human Rights' full name) should be read exclusively from the perspective of *rights*.

Conceptually, rights are closely linked to what in moral philosophy are termed 'directed duties': obligations on someone (here: the State) to do something (here: respect, protect and fulfil Convention rights, interpreted more specifically in each given case) *owed to* (directed towards) *a concrete rights holder*. As the flipside of the 'right', this latter element of 'directedness' is, for human rights, traditionally justified by reference to certain characteristics or interests of the rights holder (with a wide variety of different criteria in the details). Human rights, as traditionally understood, therefore protect the rights holder's private interests (the well-being of an identifiable individual). This makes it difficult to combine a rights-based analysis of the position of lawyers, who act primarily in the interests of others, with traditional understandings of human rights.

Protection of legal services, despite being a central task of any human rights instrument, is thus difficult to explain convincingly by means of

rights and corresponding directed duties. The present study therefore proposes a broader reading of the duties the Convention imposes on States. In moral philosophy as in law, directed duties are not the only kind of obligation. Instead, there are also *undirected* duties: obligations on someone (here: the State) to do something (here: respect, protect and fulfil Convention rights) that are not owed to identifiable individuals. Unlike directed duties, these undirected duties do not necessarily correspond to rights on the part of someone else; as a result, they are not necessarily linked to private interests, but can easily reflect public interests ('those individual interests which all members of a community have in common'²³⁴⁴). In domestic constitutional law and in public international law, such duties are so commonplace they are hardly noticed, as, for example, regarding legal obligations concerning the way the State must be organised; however, in the context of the European Convention on Human Rights, such undirected duties have been largely neglected.

On the basis of this broader vision of the State's duties under the Convention, protection of legal services under the European Convention on Human Rights can be conceptualised as the result of two different obligations on the State: the directed duties flowing from the applicant's rights in each given case and an undirected duty on the State to ensure legal services. While the former are grounded in the applicant's private interests, the latter is not: Instead, it is grounded in the public interest in legal services as a prerequisite of human rights protection, the rule of law and the administration of justice.

These directed and undirected duties can interact in different ways. They can be in a state of disconnect, where only the applicant's private interests or only the public interest in legal services are involved. They can be in harmony, where both the applicant's private interests and the public interest in legal services militate for the same result. Finally, they can be in conflict: The applicant's private interests may be opposed to the public interest in legal services.

This idea of a directed and an undirected duty interacting with each other can explain the Court's case law without changing its results and is therefore a suitable substitute for the current approach based only on rights and corresponding directed duties. Instead of attempting to capture public interests in a conceptual tool designed for private ones, a more promising

²³⁴⁴ Virginia Held, *The Public Interest and Individual Interests* (Basic Books 1970) 99 and Chapter One, 65ff.

approach is to continue to use rights, with their inherent link to the right holder's individual concerns, to protect private interests and instead protect public interests via undirected duties on the State. Use of an undirected duty to protect public interests thus has a number of advantages: Beyond adding explanatory value, it also clarifies that the State is under a legally binding obligation above and beyond the individual case to ensure that legal services exist.

The present study has focused on the protection of legal services under the European Convention on Human Rights and has taken this as a model case to discuss the idea of directed and undirected duties flowing from human rights instruments. However, its findings have implications for a number of other areas. As a general rule, almost all of the areas concerned are significantly under-researched, leaving many questions open.

Specifically as regards legal services, it is noteworthy how little research exists on the international law of legal services. With a few notable exceptions,²³⁴⁵ the law of legal services is treated almost exclusively as a matter of domestic law, which belies the many areas identified above where international law imposes obligations on States. Indeed, it is particularly noteworthy that eg the relationship between different organisations claiming to represent lawyers at the regional and global levels has not received greater attention, given that many of these non-governmental actors interact closely with international organisations and appear to wield considerable influence.²³⁴⁶

Moreover, there is much to suggest that the findings of the study are not limited to legal services under the European Convention, but in principle transferable both to other areas of Convention law and to other human rights instruments, opening avenues for further research.

In terms of Convention law, perhaps the most obvious potential area to transfer the study's findings to is that of the media, the example typically cited in the debate on role-bearer rights in moral philosophy.²³⁴⁷ However, the idea of justifying the exercise of rights by reference to what they do for others is arguably a common feature of all types of human rights defence, which means that the study's findings may have application even beyond legal services and the media. Moreover, the examples listed in Chapter Seven

2345 David Collins, *The Public International Law of Trade in Legal Services* (CUP 2018) springs to mind, but, as the title indicates, is limited to international economic law.

2346 Chapter One, 39ff.

2347 See Chapter Eight, 419ff.

en,²³⁴⁸ where the Convention effectively binds States on certain questions of their organisational, sometimes even constitutional (as regards, for example, democracy, separation of powers or the rules on the judiciary) law, all merit further exploration. The idea of undirected duties on the State may be a fruitful further avenue of inquiry here, particularly since it remains to be seen how the Court will react to the ongoing Polish rule-of-law crisis, which shows particularly clearly the shortcomings of an approach centred only on rights. Given that the Court has recently introduced the idea of 'institutional requirements'²³⁴⁹ under Art. 6 § 1, language more reminiscent of constitutional organisational law,²³⁵⁰ there is much to suggest that questions surrounding the focus on rights merit further study,²³⁵¹ as the Court is forced to venture further into domestic constitutional law in an attempt to secure the Convention rights. Undirected duties related to State organisational law mean that the Convention may have 'constitutional' features in a far wider sense than previously understood, going beyond merely protecting individual rights to impose broader obligations in the public interest.

Finally, there does not, at present, appear to be anything in the analysis proposed here that is specific to the European Convention on Human Rights. Instead, the idea that international human rights treaties – despite their name – create not only directed duties corresponding to rights, but also undirected duties on States, in principle seems generalisable. Presumably, not only the European Convention creates an obligation on States to eg ensure legal services and a judiciary conforming to certain minimum standards, but similar obligations can also be derived from other human rights instruments both regional and global. This means that by ratifying such treaties, States undertake not only to respect, protect and fulfil the rights of individuals, but also make certain commitments of an organisational nature, such as maintaining separation of powers and an independent judiciary. In fact, a similar effect may also derive from domestic human rights instruments, where, in many jurisdictions, there is as yet

2348 Chapter Seven, 365ff.

2349 *Guðmundur Andri Ástráðsson v Iceland* [GC] App no 26374/18 01 December 2020), para 218, 233ff.

2350 See Chapter Seven, text to n 1788ff.

2351 Noting that things may be in flow see also Mathieu Leloup and David Kosař, 'Sometimes Even Easy Rule of Law Cases Make Bad Law' (2022) 18 European Constitutional Law Review 753, 768, discussed in Chapter Seven at n 1792.

no debate on undirected duties flowing from human-rights provisions.²³⁵² Given the general disconnect between the literature in moral philosophy on undirected duties and legal human rights scholarship, this may equally be a promising avenue for further inquiry.

2352 See Chapter Seven, 387ff.

