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EUROPEAN UNIVERSITY INSTITUTE

Department of Political and Social Sciences

**The Sediment of Reason:  
Basic Rights in Germany and Great Britain**

by

**Ben Crum**

Thesis submitted for assessment with  
a view to obtaining the Degree of Doctor of the  
European University Institute

Florence, April 1997

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*"Puisque la haine, la sottise, le délire ont des effets durables,  
je ne voyais pas pourquoi la lucidité, la justice, la bienveillance n'auraient pas les leurs."*

*"Il faut l'avouer, je crois peu aux lois.  
Trop dures, on les enfreint, et avec raison.  
Trop compliquées, l'ingéniosité humaine trouve facilement à se glisser  
entre les mailles de cette nasse traînante et fragile.  
Le respect des lois antiques correspond à ce qu'a de plus profond la pitié humaine;  
il sert aussi d'oreiller à l'inertie des juges."*

*Hadrian in: Marguerite Yourcenar Mémoires d'Hadrien.  
Paris: Librairie Plon (1951): pp. 103 & 119.*



## Preface

Early 1992 I applied to the European University Institute in Florence, Italy, with a research proposal entitled "Possibilities for an alignment of critical political parties in Europe". This proposal was strongly motivated by a concern about the absence of "some shared political principles that can unite a significant number of citizens who are critical about the present order". My ambitions were high. I intended to reconstruct the notion of ideology after the demise of "real existing socialism" and to drench myself in current West European political debates in search of promising ideas that might come to fill the ideological vacuum that I perceived.

Little of this proposal survived the first year after I had been accepted in Florence. The concept of ideology turned out to be rather broad and abstract, and I decided instead to focus on the more concrete idea of rights. One may say that framing certain political issues in terms of rights is possibly the most successful ideological achievement of Western liberalism. Moreover, understanding the conditions under which such framing can become successful may also provide clues as to whether this strategy can be extended into new political spheres.

What rights achieve, I thought, was best analysed by looking at actual cases in which they were applied. In the second year I spent most of my time going through legal material, analysing cases and arguments. For that work I had to familiarise myself with legal practice and doctrine in Germany and Great-Britain, the two countries I had chosen to study. I found myself greatly impressed by the lucidity and wealth of the arguments relied on in actual legal and political practice. For some time I even came to doubt whether there was any sense in analysing from a more theoretical position arguments that were often deeply engaged and embedded.

However, coming back to theory in the summer of 1995, I became strongly convinced that, though a political theorist should consider an issue from all possible angles, in the end his distinctive role is to define his own position and to lay it out as clearly and consistently as possible; to provide out certain clear principles in the midst

of often disorientating political realities. Early in 1996 I decided upon the final plan of the thesis, which was the most straightforward one I had ever thought up, and over the following months the chapters emerged one by one.

The European University Institute provided a unique setting for a project like this. Transplanting its researchers from their natural habitat, it provides its own microcosm with its own glories and tragedies but in which an unprecedented importance can be given to one's research. Research at the institute comes with the valuable fringe benefits of a unique pan-European atmosphere against the beautiful Tuscan background. It also served as a springboard for a three-month stay, sponsored by the EU-Erasmus programme, at the Humboldt Universität in Berlin during spring 1995, and for a research mission to London in December of the same year. These trips not only allowed me access to some important research material, they also strengthened my impression of the specific cultural contexts in which the debates I studied took place.

Most important in carrying through one's academic work are the people one gets in touch with. In this respect as well I was remarkably lucky in Florence. Throughout the three years my research was heavily influenced by Steven Lukes, my main supervisor, as he consistently forced me to focus my ideas. Of almost equal importance to my work were the exchanges with Klaus Eder and, later, Karl-Heinz Ladeur who provided valuable sociological and legal counter-points to the dominant theoretical line of my thesis. Conversations in the first year with Árpád Szakolczai and Clifford Geertz opened my mind to some less conventional approaches to social science. Outside of Italy I met with Günther Frankenberg, Eric Barendt and Julian Lonbay who as lawyers helped me to understand the different legal practices and made me feel more secure in writing about issues in which they are much greater specialists than I will ever be.

Life in Florence was above all enriched by fellow-researchers who not only constitute the backbone of the academic body but also ensure that one somehow knows oneself to be at home in the place. Some of them even succeeded in being at the same time dedicated friends and astute critics. In particular Adrian Favell, Vladimir Gradev,

Jens Kellerhof, and Rory O'Connell have at different points helped in developing my thinking. Dan Oakey deserves special mention as we have been working side by side from the start, witnessing each other's highs and lows. What is more, he has worked through the whole of this thesis to ensure the readability of my English. This is also the place to thank Luigi Compagnoni for giving me an Italian home and for teaching me the most precious lesson of these years: how to make home-made pizza.

Some of the material used in Chapter 3 was presented in the workshop on the right to free speech at the 17th World Conference of the International Association for Philosophy of Law and Social Philosophy (IVR) in Bologna, June 1995. A paper including material from Chapter 4 was presented at the workshop on "Procedural Justice" in Oñati, Spain, in April 1996, and at the 28th Conference of the German Association for Sociology in Dresden, October 1996. The support Professor Klaus Röhl and Stefan Machura gave to this latter paper has also benefited this thesis. Finally, I have to acknowledge the financial support I received throughout my time in Florence from Dr. Hendrik Muller's Vaterlandsch Fonds which made life easier as it enabled me to buy a laptop computer and make some useful zigzags across Europe.

Amsterdam, December 1996.





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## A THEORY OF BASIC RIGHTS

The concept of rights is the most characteristic concept of liberal democratic discourse. People use rights to lend force to their political claims. The essence of the use of rights is, I believe, that in employing the language of rights, an actor claims that there is a recognisable norm according to which a claim she raises is to have primacy over conflicting claims. This understanding of rights may appear rather naive to sceptics who regard the use of rights as nothing more than a rhetorical device to give credibility to a claim in one's interest. Rights talk, they may say echoing Jeremy Bentham's disqualification of "natural rights", is "so much flat assertion" (Bentham quoted in Jones 1994: 5). In our own times, the sceptical view has been restated by Richard Rorty, who writes that

"to say certain people have certain rights is merely to say that we should treat them in certain ways. It is not to give a reason for treating them in those ways" (Rorty 1985: 32, italics in original, underlining added B.C.)

Against Bentham and Rorty I argue in this thesis for a conception of rights in which the presence of reasons by which one's claim can be upheld is presupposed in the very invocation of a right. When someone invokes a right, she displays a commitment to consider her claim in its social context, to abstract from it, to regard other's claims with which it conflicts, and to venture on the search for a valid norm on the basis of which the conflict of claims can be justly adjudicated. This notion that rights are not merely a rhetorical vehicle for one's personal interests but derive from socially validated norms, can, for example, be found in the writing of that classical liberal John Stuart Mill, in a wording that makes a marked contrast with Rorty's:

"When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education or opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it. If we desire to

prove that anything does not belong to him by right, we think this done as soon as it is admitted that society ought not to take measures for securing it to him, but should leave it to chance, or to his own exertions" (Mill 1863: 189).

In this thesis the focus is on those rights that have come to lie at the basis of liberal democracy, and I therefore refer to them as basic rights.<sup>1</sup> The recognition of basic rights within a political community is often affirmed by the adoption of a Bill of Rights. However, although a Bill of Rights may serve to codify and reinforce the recognition of basic rights, basic rights should not be identified with such laws. A basic right may well operate as a valid political norm without having been codified in law. To appreciate this point consider for instance the status of the basic right to free speech in Great Britain which though limited, undoubtedly enjoys considerable force as a political reason even though a Bill of Rights (or any other statute) emphatically affirming such a right is notably absent. *Vice versa*, not all rights contained in a Bill of Rights need to be basic rights. I hesitate, for example, to regard the assurance of 'privacy of letters' (*Briefgeheimnis*) in Article 10 of the German Basic Law as a basic right.<sup>2</sup>

Rather than relying on any catalogue provided by a particular Bill of Rights, the kind of norms involved in basic rights are perhaps best illustrated along the lines set out by T.H. Marshall in his famous essay on "Citizenship and Social Class" (Marshall 1950).<sup>3</sup> Marshall distinguishes between civil, political and social rights. Civil rights are the rights "necessary for individual freedom - liberty of the person, freedom of speech, thought and faith, the rights to own property and to conclude valid contracts, and the right to justice". Typical political rights are "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body". Finally, social rights "range from the right to a modicum of economic welfare and security to the right to share to the full in the social

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<sup>1</sup> Let me note already that I distinguish basic rights from human rights. A third concept often used to categorise rights is "fundamental rights". This latter concept can in my conceptual scheme be reserved to refer to the two categories human and basic rights together.

<sup>2</sup> I return to these issues in the final section of this chapter.

<sup>3</sup> Marshall talks about the "the rights of citizenship" to which lawyers have objected (Ferrajoli 1994), which is one reason why I prefer to speak about basic rights.

heritage and to live the life of a civilised being according to the standards prevailing in society" (Marshall 1950: 8).

The concept of rights in general, and basic rights in particular, has often been subject to vehement critique. Such critiques are motivated in the first place by the fact that rights serve to uphold duties that are never likely to be welcomed. No one, however, will dispute that every viable community requires its members to succumb to certain duties. The central question then becomes whether the use of the concept of rights serves to ensure that the imposition of duties is subject to standards of reason and justice, or whether it serves only as a rhetorical device invoking the illusion of such standards with the mere aim of advancing the interests of some to the detriment of those of others. Against the latter, negative view, I aim in this thesis to make as good a case as possible to demonstrate how basic rights can actually serve the standards of reason and justice.

Critics of rights can be separated roughly into a right-wing and a left-wing camp. On the right wing it has been argued since Edmund Burke's *Reflections on the Revolution in France* (1790) that the concept of rights serves mainly to inflate political argument by introducing an infinite number of claims into the political realm without their merits being subject to substantial scrutiny, and without considering the viability of their political administration. In our times these same arguments are used on the political right to oppose the recognition of social rights. These critics perceive substantive grounds against recognising any social needs and social obligations to provide for them, and hold the preservation of the welfare state apparatus to be unfeasible (cf. Murray 1984; Mead 1986). Similar arguments can again be used against even "newer" rights, for example environmental rights: the interests involved are ultimately regarded to have little substantive merit and provision for them is not judged politically feasible.

For a long time the left wing critique of rights was focused on one particular right, the right to private property. Socialists argued that presenting private property as a right was merely a rhetorical "sham" by which the propertied classes sought to justify

the supremacy of their interests over those of the proletariat (cf. Marx in Waldron 1987; Lukes 1985: Chs. 3 & 4). While in our own times the socialist critique of the right to private property has fallen almost silent, similar arguments are now employed on the left wing to assert that rights serve to maintain the cultural supremacy of a dominant culture over subjected minority cultures. Rights can be taken to sustain the supremacy of males over females (privacy rights), of heterosexuals over gays (family rights), and of whites over blacks. What is at stake in these arguments can well be illustrated with the classical right to free speech. The right to free speech, left wing critics may argue, serves to uphold male claims to pornography against women's opposition, and to protect publications hurtful and defamatory to ethnic and religious minorities. Again, these basic rights are nothing but rhetorical "shams" by which the illusion of reason and justice is attached to established power relations.

There are genuine concerns underlying both the right and left wing critique of rights. Nevertheless, I believe that these critiques are misfocused. When they aim at the concept of rights, they fail to appreciate some of the essential virtues of this concept. Above all, rights facilitate self-assertion (of one's personal interests, one's personal dignity) in the public realm (cf. Tushnet 1989: 417 ff.; Waldron 1993e). Joel Feinberg grasps this virtue of rights when he writes:

"To have a [right] is to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in performative and propositional claiming. The activity of claiming, finally, as much as any other thing makes for self-respect and respect for others, gives a sense to the notion of personal dignity, and distinguishes this otherwise morally flawed world (...)" (Feinberg 1980: 155; [slightly amended to harmonise his use of 'rights' and 'claims' to mine, BC]; cf. Melden 1977: 25).

The same virtues are also recognised by Duncan Kennedy, who as a foreman of the Critical Legal Studies movement may in many respects be taken to have inspired the current strand of the left wing critique of rights:

"Embedded in the rights notion is a liberating accomplishment of our culture: the affirmation of free human subjectivity against the constraints of group life, along with the paradoxical countervision of a group life that creates and nurtures individuals capable of freedom" (Kennedy quoted by Michelman 1986: 93).

It is undeniable, though, that rights may be, and often have been, invoked to justify the unjustifiable. Critics on the right have a point in arguing that rights are often too easily invoked in cases that lack obvious merit. Equally, critics on the left are correct in arguing that the insistence on established rights may serve to suppress genuine demands. However, the conclusion following from such criticisms is not to abandon the concept of rights but to work on a clear and coherent conception that can eschew such abuses. An adequate conception of rights has to provide clear criteria for delineating genuine rights from mere rhetorical usage and to demonstrate how the merits of the claims supported by rights must time and time again be tested against conflicting demands.

In recent years there has been a growing conviction among social theorists that rights should not be conceived as mere personal assets - "things", property - but rather that they should be understood as relations, embedded within social contexts. Frank Michelman presents this argument in a crisp and clear way:

"A right, after all, is neither a gun nor a one-man show. It is a relationship and a social practice, and in both those essential aspects it is seemingly an expression of connectedness. Rights are public propositions, involving obligations to others as well as entitlements against them. In appearance, at least, they are a form of social cooperation" (Michelman 1986: 91; Sandel 1982; Minow 1987; 1990; Tushnet 1989; Held 1989; Glendon 1991; Habermas 1992: 116 ff.; Somers 1993; 1994).

The recognition of the relational nature of rights is, I think, a first, crucial premise from which any contemporary theory of rights has to start. Hence, it also underlies the two central arguments around which this thesis is constructed: the public good argument justifying basic rights and the argument for rights as reasons.

The public good argument submits that the best justification for basic rights is that each of them facilitates the preservation of a certain public good which serves the common interest of all members of the political community. Thus I argue that people's willingness to succumb to such rights as the right to private property and the right to free speech does not so much rest on, for instance, their respect of other's human dignity (whatever exactly that may imply), but rather on the recognition of their shared

interests in the preservation of such common goods as the market economy and an open culture respectively.

The argument for rights as reasons challenges certain entrenched absolutist and legalist understandings of basic rights. These latter understandings take basic rights as fully defending a certain range of actions from any political challenge. The argument for rights as reasons, on the other hand, starts by emphasising the need to recognise the full range of interests behind claims supported by rights but concedes that these interests have nevertheless always to be balanced against conflicting demands and that this balancing cannot proceed in a fully mechanistic manner but has as its bottom-line the requirement of judgement.

In the next two sections these two arguments are presented at full length and compared with competing theories. The final section concludes this chapter by outlining the central methodological ideas that inform this thesis as a whole. Thus the way is prepared for the following chapters in which the theoretical ideas presented in this chapter will be tested in the more specific, empirical contexts of three particular basic rights: the right to private property, the right to free speech, and the right to education.

## **I) JUSTIFYING BASIC RIGHTS**

Basic rights require justification because they serve to bind people to duties. In this section I ask why would people recognise rights as having this power, why would they recognise the force of basic rights to bind them? Implied in this general question are more specific questions like: Which rights are basic rights and which are not? How are basic rights to be weighed when in a particular case they happen to collide with other considerations, including other basic rights?

Thus formulated, these questions emphasise the ultimate implications that rights have: they impose duties. This emphasis leads me to strongly deviate from the way in which the question of justification of norms (like basic rights) is most commonly approached in what I will refer to as philosophical (or, as one may say, "metaphysical")



deductive arguments, or to use an appropriate German expression *Letztbegründung* (ultimate justification). Philosophical deductive arguments start (and spend most of their time) by seeking to establish a fundamental value that for some reason or another is taken to be beyond contestation by anybody. Such a value may, for instance, be found in human dignity, liberty, equality, or democracy. Whatever the exact value, it is characteristically extremely abstract. The second step in the argument is to deduce a system of basic rights that, in a way, is then taken to be already implied in the fundamental value.

Leaving aside the general problems with abstract arguments, philosophical deductive arguments leave, I think, two major problems unresolved: indeterminacy and motivation. It is one thing to identify a fundamental value, it is quite another to determine a specific system of basic rights. Undoubtedly our cherished rights can find support in many fundamental values, but I hold that philosophical deductive approaches are not determinate enough to answer the kind of questions for which the issue of justification is raised in the first place. It often turns out that any value can be taken to justify any basic right in some way. Taken by themselves, values such as liberty and equality are too abstract and contain too little information to determine the exact weight they give to particular rights and, hence, are also unsuited to provide a basis for arbitration when basic rights collide with other considerations (cf. Dworkin 1977: Ch. 12).

The second problem that haunts philosophical deductive justifications is the problem of motivation. It is one thing to make an argument for a system of basic rights, it is quite another to establish that people will be bound to follow this argument in their actual actions. The problem here concerns the relation between reason and will. If anyone has come close to demonstrating that (good) will is inherently implicated in practical reason it is Immanuel Kant (1785). However, Kant's heroic efforts aside, philosophical deductive arguments generally appear to proceed on the assumption that reason will by itself compel will.

Philosophical deductive arguments gain credibility to the extent that they can account for the basic rights that are actually upheld in liberal democracies. Basic rights are invoked to uphold duties and unwillingness to succumb to these rights is met with sanctions, legal or otherwise. Any attempt to justify basic rights thus arrives mainly as an *a posteriori*, the rights are already upheld with or without it. The function of justifications is thus to demonstrate to those on whom the norms involved are imposed that these are not haphazard but rest on good reasons which can be recognised even by those bearing their costs.

In this section I review a number of justifications for basic rights that have moved beyond the philosophical deductive approach. All of these turn out to be liable to serious criticism. Instead I propose the public good argument that holds that basic rights are best justified by arguments that demonstrate how they serve the preservation of certain public goods. I argue that this public good argument is superior to alternative justifications proposed for basic rights. Even though it may not overcome fully the problems of indeterminacy and motivation, it offers relatively clear answers to them. Whether a right qualifies as a basic right can be determined by looking whether we can identify a public good serving the common interest of all which corresponds to it. The problem of motivation is overcome as each actor involved can be shown to be motivated by the interest she shares in the public good.

### Human Rights and Basic Rights

I) Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune.

II) Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression.

III) La principe de toute souveraineté réside essentiellement dans la nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément."<sup>4</sup>

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<sup>4</sup> "I) Men are born and always continue free and equal in respect of their rights. Civil distinctions, therefore, can only be founded on utility.

II) The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security, and resistance of oppression.

Thus run the first three articles of the *Déclaration des Droits de l'Homme et du Citoyen* formulated on 26 August 1789 by the *Assemblée nationale*, representing the French people.

The title of the Declaration allows for two interpretations: either it refers to one set of rights that may be taken to apply equally to man in general and to citizens in particular, or it refers to two distinct sets of rights, one of which would apply to all human beings while the other would be for citizens only. Following Thomas Paine, a simple and clear distinction can be made maintained between the rights of man and the rights of citizens. The rights of man, we are to understand, are natural and imprescriptable; they are human rights that "appertain to man in right of his existence". The rights of citizens in contrast "appertain to man in right of his being a member of society" (Paine 1791: 68). Nevertheless the Declaration suggests a close relation between the two classes of rights, as Article III reads "the end of all political associations is the preservation of the natural and imprescriptable rights of man". Thomas Paine affirms this intrinsic relation when he observes that "[e]very civil right has for its foundation, some natural right pre-existing in the individual, but to the enjoyment of which his individual power is not, in all cases, sufficiently competent". In this sub-section I argue contrary to the *Déclaration des Droits de l'Homme et du Citoyen* that there are certain important distinctions to be maintained between the rights of man - or human rights as I will refer to them - and the rights that individuals come to enjoy by virtue of their membership in a particular political association - in short basic rights - , not merely in terms of the range of subjects to which they apply but in particular in the very terms of their justification.

Let us first consider what we take human rights to be. Human rights appertain to human beings in virtue of their existence. Thus the core value at stake here could be identified as human dignity: human rights are to ensure that every human being can enjoy a dignified life. What kind of rights does this require? The ones that obviously

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III) The nation is essentially the source of all sovereignty: nor can any individual or any body of men, be entitled to any authority which is not expressly derived from it."

come to mind are those that are to ensure that the dignity of one's life is not violated without reason. Rights that ensure this are such rights as the right to life (first and foremost), the right not to be subject to torture, the Habeas Corpus right forbidding imprisonment without reason, the right to freedom of thought. We may refer to these rights as 'Amnesty International rights' in homage to the international organisation that most consistently and vigorously campaigns against the violations of these rights.

However, the continued need for Amnesty International's activities also serves to underline that so far there is no authoritative political institution which can guarantee the protection of human rights. As Edmund Burke already caustically observed when he reflected upon the French Declaration, the universality, naturalness and imprescriptibleness of human rights amount to very little when they are not recognised by the state under which one lives. This is particularly illustrated by stateless people, people who have lost the protection of their native state without having been recognised as citizens in any other state (refugees). Notwithstanding the French Declaration and the Universal Declaration of Human Rights put forth by the United Nations in 1948, "it turned out that the moment human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them" (Arendt 1968: 292). To enjoy human rights effectively, one has to enjoy them as a citizen.

Indeed it may be the foremost merit of liberal democracies that citizens under them know their human rights to be secure. However, citizens of liberal democracies enjoy a far wider range of rights with emphases that deviate markedly from the priorities identified for human rights. The rights of the citizen include classical civil rights, such as the right to association, the right to free speech and the right to property. Furthermore, citizens also enjoy rights to political participation, such as the right to vote. Finally, they benefit from social rights, such as right to welfare benefits, the right to health care and the right to education. Many of these rights already featured in the *Déclaration des Droits de l'Homme et du Citoyen* (as well as in the Universal

Declaration of Human Rights), but do they qualify as human rights as well as rights of citizens?

Obviously these latter rights raise political objections that are unlikely to be raised against the human rights identified earlier. It is almost unthinkable that someone should seriously object to human rights, such as the right not to be subject to torture. This is different in the case of basic rights. Most notably, basic social rights continue to be challenged in lively political debates, but even well-established civil rights, such as the right to free speech, may every now and then come into dispute. As deeply entrenched as these rights may be in liberal democracies, objections against them do not automatically impinge the universal value of human dignity.

Drawing on the First Amendment to the U.S. Constitution, consider for example what may well be the prototypical basic right: the right to free speech. Echoing widely held views Joseph Raz writes:

"Freedom of expression is among the foundation stones of all political democracies. The right to free expression serves to protect the interest of those who have it and who may wish to use it to express their views."

Then, changing gears, Raz suddenly catches us by surprise:

"Politicians, journalists, writers, etc., excepted, their right of free expression means little in the life of most people. It rightly means less to them than their success in their chosen occupation, the fortunes of their marriages, or the state of repair of their homes" (Raz 1992: 137).

On a later occasion he re-asserts this view:

"many other interests most people have are much more valuable to them than their interest in this freedom. Yet it is the freedom to express oneself publicly, rather than the more valuable interests, which enjoys special protection" (Raz 1994b: 2).

Is this so, is it really true that the status given to the right to free speech is completely out of proportion with the value of our interest in it?

One might argue that this appraisal of individuals' interests in the right to free speech is situated at much too superficial a level and that if one were to appraise individuals' real interests one would find that the interest in expressing oneself is actually a prime individual interest (cf. Raz 1994b: 2). In their everyday concerns, people probably worry more about the state of repair of their house than about their

freedom of expression. This, however, also applies to human rights, such as one's right not to be tortured. People can allow themselves such quietude on these issues because they know the protection to be there, the true magnitude of the interests involved would soon reveal itself if this protection were suddenly to disappear.

The crucial point of Raz's argument is, however, that the system of established basic rights cannot simply be deduced from a certain conception of human dignity. Clearly some of the most immediate preconditions for people's dignity, like food for instance, have not been met by corresponding basic rights. This suggests that the distinctive protection basic rights give to certain claims depends more on particular political considerations than on a moral conception of people's primary needs.

In the rest of this section I survey four major attempts to justify the status of basic rights in liberal democracies: one focusing on the ideal of liberty; a second on the ideal of procedural equality; a third on the ideal of democracy; and finally the attempt to retain these different values in equal measure (cf. Böckenforde 1974). Though I do believe that these approaches are valuable in articulating the values to which we adhere in liberal democracies, I reject all four of them in favour of an account that I think is superior as it relies not merely on a certain set of values but on a more realist, political analysis of the interplay between interests in liberal democracies. This account pursues Joseph Raz's answer to the puzzle of the disproportionality between the status of basic rights and the interests they protect. He writes:

"The protection of many of the most cherished civil and political rights in liberal democracies is justified by the fact that they serve the common or general good. Their importance to the common good, rather than their contribution to the well-being of the right-holder, justifies the high regard in which such rights are held" (Raz 1992: 135).<sup>5</sup>

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<sup>5</sup> Raz inserts as a not insignificant, but tentative footnote after the first sentence of this quotation: "Arguably the same is true of all rights, though the importance to the common good of protecting them varies from case to case".

Note also that here Raz's view suggests the need to revise the argument by which he claimed some years earlier that a focus in rights cannot accommodate certain important interests in collective goods such as "living in a prosperous, cultured, tolerant and beautiful environment". There he asserted that "it is unlikely that individuals have basic rights to collective goods" (Raz 1986: 198/9; cf. Waldron 1993d). This assertion may literally still be upheld, as well as one can well argue that not all desirable collective goods can be fully secured by way of rights alone. Nevertheless Raz's recent arguments suggest that basic rights may serve the preservation of collective goods.

This insight leads into the public good argument for basic rights that I will pursue throughout this thesis.

### Liberty and Liberalism

Undeniably, liberty is a core value in all liberal democracies. Of course, there are many different conceptions of liberty that all claim to best meet the importance attached to this value, ranging from liberty as license to the republican conception of liberty as political autonomy. In this sub-section I consider a conception of liberty that turns around the ability to choose or, to formulate it negatively, to not being bound in one's actions. More specifically, in a classical strand of liberalism this liberty is first and foremost defined relative to the state: one enjoys one's liberty to the extent that one's actions are not bound by the state. Basic rights may be justified on the basis of this conception of liberty as they serve to demarcate a private sphere in which the individual is sovereign and not subject to any state authority.

The conception of liberty defined in opposition to the state goes at least back to Thomas Hobbes's *Leviathan*. Hobbes regarded liberty as essentially the residue of choices of action that the Leviathan would leave individuals: "The Greatest Liberty of Subjects dependeth on the Silence of the Law" (Hobbes: 1651: Ch. XXI). Notably, however, Hobbes used this definition in a purely analytical way. He was little concerned with the question whether the Leviathan was to leave individuals more or less liberty (which has led many of his critics to object to his theory as lacking a principled defence against totalitarian power).

It was the first great liberal, John Locke, who employed a similar conception of liberty against the state but, relying on a much stronger notion of natural law than Hobbes, turned it into a fundamental value by which government is to be evaluated. Locke specified liberty to correspond to property, to the private sphere in which one can be one's own sovereign, broadly encapsulating, as the famous phrase goes, "Lives, Liberties and Estates". What is more, while Hobbes accounted for the exercise of state power for the mere sake of the single right to self-preservation, Locke argued that the

crucial function of state power was to respect the whole range of liberties that constituted the private sphere (Hobbes: 1651: Ch. XVII; Locke 1690: §§14, 90/1, 123/4).

Locke's conception of liberty against the state was an important source of inspiration for the 1789 *Déclaration des Droits de l'Homme et du Citoyen* and probably even more so for the 1788 U.S. Declaration of Independence. Its theoretical conception received what may be its most authoritative rendering by John Stuart Mill when he wrote in this passage from *On Liberty*:

"there is a sphere of action in which society, as distinguished from the individual has, if any, only an indirect interest; (...) This, then is the appropriate region of human liberty" (Mill 1859: 16)

The value of this kind of liberty has consistently been re-affirmed in this century by political thinkers who have emphasised that the protected sphere of liberty provides a barrier against totalitarian violations of human dignity. Against this background, Isaiah Berlin characterises this tradition of liberal thinking by two, interrelated principles:

"first, that no power, but only rights, can be regarded as absolute, so that all men, whatever power governs them, have an absolute right to refuse to behave inhumanly; and, second, that there are frontiers, not artificially drawn, within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of what it is to be a normal human being" (Berlin 1958: 165).

To summarise, for the liberals referred to, basic rights are justified as they serve to delineate a sphere of absolute individual freedom from political interference. From this position follows a rather specific catalogue of rights. On the first page of this catalogue stand the right to life, reflecting the right to self-preservation as given particular importance by Hobbes and Locke, and, as a close second, stands the right to liberty of conscience, the "inward domain" where, if anywhere, the individual is only responsible to herself (cf. Mill 1859: 16). Closely behind these rights come classical civil liberties such as freedom of religious practice, free speech, free association, and the freedom to enter into contracts. Finally, often left implicit but specifically thematised by some liberals, such as Locke and Friedrich Hayek, and corresponding to



the weight given to this right in actual liberal societies, comes the right to private property.

Without doubt these rights represent some of the major achievements of liberal democracy, and the essential ideological contribution the strand of liberalism sketched here has made to their preservation is beyond dispute. However, the mere emphasis on individual liberty from the state falls far short of constituting a comprehensive political theory, let alone a comprehensive theory of basic rights. As keen as these liberals may be to delineate state power, none of them disputes its essential value. They recognise that state power is functional in securing liberty as it is required to prohibit individual trespasses against another's sphere of liberty. Though the boundaries of the sphere of liberty may pre-date the origins of state power, their preservation is essentially dependent upon it. What is more, however "natural" the boundaries of individual spheres may be, when authoritative decisions have to be taken to preserve them, political questions are raised that often cannot be answered by "natural", absolute rules. How absolute are, for instance, one's freedom to publish defamatory lies or one's freedom to contract a contract-killer?

I do not want to quarrel with the basic insight of liberalism: individual's liberty pre-empts all use of state power, hence state power requires strong justification - what Joel Feinberg has characterised as "the presumptive case for liberty" (Feinberg 1984: 9). The value of liberty provides one set of reasons for which state power can be justified - to preserve individual's liberty - but when left at that, liberalism risks a blindness in the face of other situations in which state power may be justified to interfere in social relations. Most specifically it fails to address social needs and interests in political autonomy. I submit that basic rights can be justified to serve these values but to establish their political viability we have to move beyond libertarian liberalism.

### Contractarianism and Reciprocity

The second argument for the justification of basic rights that I consider is the contractarian argument. Above we already encountered the classical contractarians Hobbes and Locke. However, the distinctive feature of the contractarian tradition as I will deal with it here is that basic rights originate in the very constitution of the state, instead of lacking any normative ground whatsoever (Hobbes) or being grounded in natural law, pre-dating the state (Locke). Thus the contractarian approach does not consider its basic political values to be preserved in opposition to the state, but through the state as constituted by a contract of free and equal citizens.

As John Rawls has nicely set out, contract theories consist of two parts: "(1) an interpretation of the initial situation and the problem of choice posed there, and (2) a set of principles which, it is argued, would be agreed to" (Rawls 1971: 15). Although Rawls adds that "[o]ne may accept the first part of the theory (or some variant thereof), but not the other, or conversely", clearly the point of contract theory is that through their interaction the two parts mutually support each other. Rawls himself affirms as much by stating that his contractarian theory is to work towards a "reflective equilibrium" in which the theoretical construction of the initial situation is brought in harmony with the moral positions to which we subscribe (Rawls 1971: 20, 48-51). Indeed, the contractarian approach shows its strength to the extent that it confirms and lends analytical coherency to some of our major political convictions, for example the catalogue of basic rights.

The key to contractarian theories is the way they define the initial choice-situation. This choice-situation need not reflect any specific historical configuration, rather it is to define a situation in which all sources of power inequalities between actors are erased and, hence, in which the only way they can bind each other is by means of rational agreement. The basis of such agreement is essentially found in the idea of reciprocity that is central to any conception of contract (cf. Sandel 1982: Ch. 3).

Reciprocity is a rather complex notion. Its essence is caught by the maxim "treat others as you expect them to treat you". Reciprocity thus presupposes an idea of

equality, at least the absence of power inequalities for which actors could treat others in ways that they themselves would not want to be treated in (cf. Rawls 1971: §77). Reciprocity presupposes, moreover, one's ability to move beyond one's immediate self-interest and to recognise other's positions and the claims they can reasonably raise as one engages with them. Rawls recognises the importance of the idea of reciprocity to motivate actors beyond their immediate self-interests as he identifies it with the reasonableness he expects from any liberal citizen, but he also emphasises that there are distinct limits to the extent to which reciprocity can issue into mutual recognition and sympathy: "the idea of reciprocity lies between the idea of impartiality, which is altruistic (being moved by the general good), and the idea of mutual advantage understood as every one's being advantaged with respect to each person's present or expected future situation as things are" (Rawls 1993: 16/7, 50).

The strongest statement of the idea of reciprocity is probably Immanuel Kant's formulation of the Categorical Imperative as "act only on the basis of those maxims of which you can at the same time will that they become a general law" (Kant 1785: 51). Kant recognised that under actual social conditions people might fail the required detachment to employ the Categorical Imperative virtuously, he therefore complemented it with a conception of the Kingdom of Ends in which the differences between people that might occasion the abuse of the Categorical Imperative were erased:

"[Given that only laws determine the ends according to their general validity,] it is possible, when one abstracts from the individual differences between rational beings, and similarly from all the content of their private ends, to conceive of a totality of all ends (including those of rational beings as ends in themselves as well as the personal ends that every one may have for oneself) in systematic relationships, i.e. a Kingdom of Ends, that is possible according to the principles given" (Kant 1785: 66).

However, the Kingdom of Ends remains an highly abstract construct the contents of which even Kant himself fell short of determining.

In his political writings Kant endeavoured to provide a more concrete specification of the conditions under which the basic norms governing a political community of free, equal, and rational citizens are to be determined by relying on the

principles of liberty, equality, and autonomy.<sup>6</sup> The principle of liberty serves to secure that citizens can enter into the political contract without having to give up their own distinctive way of life. The principle of equality derives from the original equality of citizens and requires that all norms are to apply equally to them all. Finally, autonomy requires that all members of society should be recognised as citizens in the specific sense of being autonomous participants in the process of legislation (Kant 1793: 362 ff.).

Following from these conditions, Kant's catalogue of basic rights includes civil rights that define a private sphere of liberty, political voting rights by which citizens exercise their political autonomy, and a right to equal opportunities which guarantees their equality. This indeed appears to be a highly agreeable outcome, even if one acknowledges that Kant attributed less value to social rights than many people nowadays would do. He emphasises that equal rights can easily coexist with inequality among individuals in terms of wealth, physical and mental abilities, pleasure, and authority. The prime political burden of his advocacy of equality is against inheritable status inequality, certainly not in favour of redistributive measures and social rights (Kant 1793: 364).

In recent times the Kantian contractarian project has been brought centre-stage in political philosophy by the work of John Rawls.<sup>7</sup> Rawls has gone much further than Kant in specifying the conditions under which citizens would make the most rational choices concerning the basic principles governing their society. For that aim he conceives of an hypothetical "original position" that is to define a point of view that

<sup>6</sup> Admittedly I present a very partial reading of Kant's political theory in focusing on its contractarian side. As suggestive as his writings are, it remains a subject of wide-ranging dispute what the precise content of Kant's political theory was, because he never wrote a comprehensive account of it. Instead scholars move back and forth from his philosophical writings on practical reason and morality and his shorter political essays. Appealing readings of Kant now often emphasise the relation he works out between justification and the idea of publicity, a good example is O'Neill (1989). This reading presents Kant more as a forerunner of the discourse-ethical approach reviewed in the next sub-section than as a contractarian. While this alternative reading opens prospects to move beyond the idea of reciprocity and to deal better with social plurality, I do not think that as a conception of impartiality (or formal neutrality) it succeeds in justifying a substantive system of basic rights.

<sup>7</sup> Rawls is not alone in pursuing the Kantian contractarian project, but his statement is beyond any doubt the most comprehensive. Distinctive works by other political philosophers that are closely related to Rawls's are Dworkin (1977: esp. Chs. 6 & 7) and Scanlon (1982).

eliminates "bargaining advantages that inevitably arise within the background institutions of any society from cumulative social, historical, and natural tendencies" (Rawls 1993: 23).

In the original position one finds oneself behind a "veil of ignorance" that covers up all knowledge by which one might differentiate one's own position in the world from that of others; behind the veil of ignorance a person does not know

"his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this [...] the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong" (Rawls 1971: 137; cf. Rawls 1993: 23).

On the other hand, the parties in the original position enjoy full knowledge and understanding of the principles that govern society, politics, economics and human psychology; "Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice" (Rawls 1971: 137). Rawls submits further that they share an appreciation of certain "primary goods": goods such as self-respect, rights and liberties, powers and opportunities, income and wealth that are known to be of value in pursuing any kind of life (Rawls 1971: §15).

Once the original position is defined, the question then becomes what principles of justice rational actors would choose in it to govern their society. Rawls submits that the principles that people can agree upon if they imagine themselves in the original positions can be summarised as follows:

- "a. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all [...]
- b. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society" (Rawls 1993: 6; cf. Rawls 1971: 302).

These two principles suggest a catalogue of basic rights that reflects Kant's to a large extent. The first principle emphasises the value of liberty in general, and of the civil liberties in particular. Rawls then goes on to endorse the principle of equality of opportunity. In the final phrase, however, distinguishing himself from Kant, he takes a notable strong stand on inequalities of social and economic goods: the principles governing a just society require that the least advantaged should be guaranteed a share in the social and economic advantages enjoyed by others.

The general critique launched at contractarian approaches is that the way they define their initial choice-situation is already biased towards a particular set of principles that emerges as a result; these principles are already pre-figured in the definition of the original choice-situation (e.g. Walzer 1990). Thus the starting-point of contractarian theories falls short of the impartiality that is claimed for it. Feminists, for instance, have taken issue with Rawls's original position for privileging 'male virtues' like rationality and independence over their female counterparts like feeling and attachment (Gilligan 1982; cf. Young 1990: 101). Indeed, it is obvious that both Kant's and Rawls's philosophy remain distinctly indebted to the particular historical context in which they work. Kant's reluctance to adopt a strong conception of social rights certainly reflected his own contingent social context. Rawls's analysis appears to be similarly bounded by the political context of the post-war welfare state. Already less than thirty years after its publication, one can find political claims being raised that cannot be fully accommodated within Rawls's original framework, in particular claims to recognition of distinctive cultural practices (Kymlicka 1989; 1995; Young 1990; Fraser 1995).

Nevertheless the contractarian framework contains in itself means by which this kind of critique can be met. There is an open and continuing discussion on what personal and social knowledge should be left out of the choice-situation to eliminate potential inequalities of power, and what has to be explicitly recognised to yield socially relevant outcomes. In the first place, the formulation of the initial choice-situation can to a large extent be opened up to revision. Rawls's list of primary goods

may for example be amended to put less emphasis on wealth and more on cultural identity or social attachment (cf. Kymlicka 1989). Moreover, it has to be recognised that the principles adopted in the initial choice-situation do not reflect the choices of one monolithic, super-rational chooser, but that they are to be reconcilable with a range of different social positions (that may well be mutually exclusive) in respect of which the choosing actors lack the knowledge in which one they will end up. As Susan Okin puts it: "In the absence of knowledge about their own particular characteristics, those in the original position cannot think from the position of *nobody* (as Rawls's desire for simplicity might suggest); they must think from the position of *everybody*, in the sense of *each in turn*" (Okin 1989: 244; cf. Benhabib 1986: 332-343; 1992c: 158 ff.). Thus read, the contractarian approach is not inherently bound to any particular identity but can, by recognising differences, contribute to the constitution of valid principles that can mediate between them. To use an expression that Rawls has relied upon of late, the aim is to constitute an "overlapping consensus" (Rawls 1993).

However, the revisability of the contractarian approach is ultimately limited, as it is bound to the idea of reciprocity. One's willingness to subject oneself to the terms of the contract, the principles of justice, relies on the idea of reciprocity. As already mentioned, reciprocity presupposes the capacity to recognise others' positions and the claims they are likely to raise as one engages with them. On the basis of this recognition, in a pluralist society principles are conceivable that mediate between actors who have divergent interests. However, as is explicitly recognised by Rawls, reciprocity requires "that each benefits along with others", and that the motivational force it provides is to be distinguished from being motivated by a conception of the general, or common, good (Rawls 1993: 16, 50).

Here the question arises whether reciprocity suffices by itself to justify and uphold the liberal catalogue of basic rights. Much indicates that it falls far short from doing so. As far as civil liberties are concerned in Rawls's theory of justice, reciprocity is taken to be secured since all persons enjoy an equal claim to a fully adequate scheme of equal basic rights and liberties. In later work he adds to this the condition that the fair

value of this scheme needs to be secured for all citizens by providing them with equal and fair opportunities to political participation (Rawls 1993: §VIII.7; cf. 1971: §§36/7).

However, in actual political affairs norms (principles, rights and liberties) generally serve to benefit one person's interest at the cost of another's, and, except for traffic rules, the demands they impose are often not fairly balanced out. Consider, for instance, the right to free speech. Some social positions have reason to object against a full-blown right to free speech as it imposes high costs upon them, while they find relatively little benefit in it. Pious religious groups and minority cultures, for example, may feel intimidated by the confrontation of a public sphere in which little respect is paid for their distinctive minority convictions and in which hostile voices are even free to make themselves heard. Regarding these social positions it is not enough simply to affirm that they have an equal share in the formal enjoyment of the right to free speech, and not even that they have the opportunities to present their views in the political sphere. The question is whether these positions can be accommodated from the start within the terms of the social contract given that it imposes severe costs upon them.

Notably, Rawls never gets around to a full-blown justification of the basic right to free speech. One may easily take it to be an essential component of the scheme of basic liberties, but the only related right he explicitly seeks to justify is the liberty of conscience. This justification relies to a large extent on a particular conception of the person that is characterised by the great value attributed to self-respect, the capacity to have a personal conception of the good life and the capacity to pursue one's ends rationally; but also by its being "unencumbered", not being bound to any one else nor vulnerable to any one (cf. Sandel 1982; 1984). Rawls employs the liberty of conscience to deduce from it a right to free political speech, a right against intervention in speech for reasons of state (Rawls 1993: §§VIII.10/11), but this argument not only falls short of providing a full justification for the right to free speech, it even loses touch with the contractarian argument and remains strikingly inconclusive.

The contractarian approach undeniably provides a helpful framework to think through our political convictions and to increase their analytical coherency. However,



the contract-metaphor on which it draws and the corresponding motivational mechanism of reciprocity also define its limits. A reciprocal relationship requires that the parties involved actually have a share to some extent in each other's interests. In pluralist societies it can no longer be presupposed that such relationships extend throughout the whole of society, and thus they cannot provide a basis for basic rights. While the contractarian approach does not preclude the justification of basic rights, by itself it falls short of providing an equivocal determination of their substance.

### Discourse Ethics and Democracy

We might say that while the libertarians seek to derive the system of rights from the value of liberty and the contractarians start from the value of equality or reciprocity, the third approach I now turn to puts the value of democracy in the centre.<sup>8</sup> Any theory of democracy faces the paradox that all stipulations made to define the content of democracy are in principle open to rejection by actual democratic practice. If democracy is about giving to all a voice in political decision-making, what then about the democratic decision to silence certain parties? Or, to make the case stronger, what if parties democratically choose to silence themselves? And what about the democratic decision to abolish democracy (the famous Weimar example that forever haunts modern liberal politics)? In short, can a theory of democracy claim to honour democracy in the abstract and stipulate certain decisions it must yield, thereby disqualifying some of its potential outcomes *a priori*? And, finally to get to the point, can a theory of democracy stipulate a system of basic rights that is set apart from normal democratic decision-making?

<sup>8</sup> This characterisation of the three approaches exaggerates the extent to which they are clearly delineable from each other. In particular the reciprocal, contractarian approach and the democratic, discourse-ethical approach are often combined by philosophers. The work of Rawls and Habermas and the ways in which they show themselves congenial to and even influenced by each other well exemplify this. My aim is, however, to discuss specific strands of argument that, though they may well be combined with others, are consistent and complete in themselves. For that aim Rawls's argument exemplifies particularly well the features of the contractarian argument of reciprocity, while Habermas's argument fully lays out the discourse-ethical argument that yields a strong conception of democracy.

Nowadays the most sophisticated normative accounts of democracy follow the program of discourse ethics the basic principles of which have been formulated by the German philosophers Karl-Otto Apel and Jürgen Habermas.<sup>9</sup> The basic answer that discourse ethics gives to the questions raised is that the principles defining democracy can be determined to the extent that their rejection by any actor participating in democratic practice would involve her in a "performative contradiction", by doing so she would reject the very principles that make her action meaningful. Discourse ethics submits that any meaningful, "communicative", action requires the validity of certain principles to be meaningful in the first place (Habermas 1981; 1982; 1983a). Crucial to these presuppositions is, for instance, the commitment of the actor to be understood by those with whom she is communicating and her willingness to justify her actions with reasons if required.

The investigation of the principles presupposed in communicative action can be specified for specific kinds of action. A first step towards determining the principles presupposed by democratic action is to recognise democratic action as practical action concerning the determination of norms. Habermas defines the basic principle governing such action as the "discourse-principle":

"Just those norms for action are valid to which all those possibly affected could agree as participants in rational discourses" (Habermas 1992: 138; cf. 1983a; 1991).

The discourse-principle embodies the ideal to which actors participating in normative action appeal and on which their interventions are to be assessed.

Democratic action, as opposed to moral action, leads to legal norms (laws) that are made binding by state action. Laws are distinguished from norms in general by certain specific features: they are general in that they abstract from any actors in particular, similarly they are neutral in that they also abstract from individual motivations and evaluate actions only on their "external" consequences. The

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<sup>9</sup> In the following I restrict myself to reviewing Habermas's work since he is the one who has been most engaged in debates concerning political questions in general and democracy and basic rights in particular.

confrontation of the specific form of law with the discourse-principle leads to the principle of democracy by which the validity of legal norms can be assessed:

"only those laws may claim legitimate validity that can meet the assent of all consociates in a discursive lawmaking process that has been justly constituted" (Habermas 1992: 141).

From this point there are two ways in which the content of the system of basic rights can be determined which have been distinguished by Robert Alexy as a "direct" and an "indirect" way. Alexy writes:

"A direct justification [of a system of rights] takes place if it can be shown that certain rights are valid independently of actually carrying through real discourses, solely on the basis of discourse theory. Such rights are discursively necessary (...). Their non-validity is discursively impossible (...)" (Alexy 1996: 221).

In other words, according to the direct approach, the content of the system of basic rights is contained in the very pre-conditions for democratic discourses. The direct approach thus stands for a philosophical deduction of basic rights from the fundamental principles of discursive interaction. The indirect approach, on the other hand, would identify the system of basic rights by referring to the rights yielded by actual discourses that meet the normative requirements of discourse ethics. One might want to say that the direct approach determines the system of basic rights *a priori* while the indirect approach does so only *a posteriori* (Alexy 1996: 222n16).

The democratic paradox reappears here, of course, if it turns out that the outcome of actual discourses violates the very principles that were deemed *a priori* necessary for its very constitution. The question is how a possible gap between the stipulated discursive preconditions and our actual experience of democracy is to be closed. Considering this problem, Simone Chambers argues forcefully that discourse ethics cannot outrun actual democratic practices by stipulating "directly" justified rights as guarantees against such violations. She writes: "The discursive preconditions cannot appropriately be represented in the language of rights, nor can their long-term preservation be secured by way of legal institutions." Instead she argues that "Eventually, a right is constituted through processes of argumentation that demand, justify and uphold it" (Chambers 1993: 181/2; cf. Waldron 1993f). Conceived in this

way discourse ethics aims for something very similar to the "reflective equilibrium" pursued by Rawls.

However, the position argued by Chambers does not appear to satisfy most of the leading lights of discourse ethics. True to the "critical" Frankfurter tradition from which discourse ethics has emerged, they are not content to restrict their analysis to the mere following of the outcomes of actual democratic practices with *a posteriori* reconstructions. Instead, they apply more "direct" approaches to determine what rights can be justified as part of the system of basic rights. Such an approach can, moreover, be motivated by invoking the discourse ethical insight that since any actual democracy cannot but fall short of the ideal of a rational discourse equally open to all, (critical) theory has to move beyond it in invigorating a continuous concern to optimise the socio-political conditions that condition political decision-making.

For one, Alexy submits that "[t]o the directly justified rights belong essentially those which are necessary for delimiting and developing the rights in the process of political opinion- and will-formation in a correct and legitimate way," and he suggest that these rights would include civil rights to personal freedom, as well as rights that are to ensure that one can participate autonomously in the political process: political freedoms (opinion, assembly, press); the right to vote generally, freely, equally and secretly; and also basic social rights, "like the right to the basic means of living" (Alexy 1996: 227; cf. Alexy 1985; Nino 1991a).

Alexy's article deals with basic rights in an admittedly rough, incomplete and preliminary fashion, but it neatly and concisely lays out the basic ideas guiding the discourse-ethical approach to basic rights, its potential and its shortcomings in providing a justification for a system of basic rights. One of its major shortcomings has probably been most acutely diagnosed by Albrecht Wellmer, who writes:

"as far as I can see, the universalist demand of equal human rights does not follow directly - in any transparent sense of 'following' - from a priori principles of rational discourse. (...) But then there must be additional conditions of the possible rationality of a democratic consensus, which, like the metaprinciples of rational discourse themselves, cannot derive their validity from a democratic consensus" (Wellmer 1990: 244; cf. Wellmer 1986: 184 ff.).

In other words, discourse ethics may well fall short of justifying any substantive system of basic rights. A second shortcoming, however, appears to be that to the extent that discourse ethics can be taken to directly justify certain basic rights, it seems to put a disproportional emphasis on rights of political participation at the cost of well-established civil rights. Habermas himself recognises this danger as he warns against "a functionalisation of *all* basic rights for the democratic process" (Habermas 1992: 504; cf. Böckenforde 1974: §4; Alexy 1994: 236).

Andrew Arato and Jean Cohen have proposed that both these dangers can be avoided if the "constitutive principles of [democratic] discussion" central to discourse ethics are complemented with the recognition of the independent value of autonomy. The value of autonomy serves to justify a system of civil rights that secures a sphere of 'negative liberty' besides the political rights that can be derived from the axioms of discourse ethics:

"the principles of symmetric reciprocity comprise the metanorms of practical dialogue, while core aspects of the principle of autonomy constitute the metanorm underlying the conception of the individual who is to participate in such a dialogue. Accordingly, there is a sense in which an important dimension of rights involves negative liberty and personality rights that do not flow directly from discourse ethics" (Arato & Cohen 1992: 399).

Recognising the problem at stake but obviously not satisfied with this solution, Habermas has in turn sought to demonstrate that the value of personal autonomy underlying civil rights can, in contradiction to Arato and Cohen's position, be integrated in a discourse-theoretical justification of the system of basic rights. While he recognises, on the one hand, that basic rights serve to secure the private autonomy of individuals, he regards this as only one aspect of a larger process in which rights simultaneously constitute the political autonomy of individuals as citizens in a political community. Citizens draw on the sphere of private autonomy delineated by basic rights for the apt exercise of their political autonomy and thus "the system of basic rights puts private and public autonomy in a relation of mutual presupposition" (Habermas 1992: 162).

Having thus stretched the political content of discourse ethics, Habermas sets out a catalogue of five categories of basic rights that can be derived from it. In the first place, he follows Kant and Rawls in endorsing a right of each person to the maximum personal liberty compatible with the equal liberty of all others, so that a private sphere is secured in which one can freely act without affecting other persons (cf. Kant 1793: 363; Rawls 1971). Secondly, he follows Hannah Arendt in stipulating that each individual has a right to political membership, "a right to have rights", a right to be a recognised member of a political community in which one can have one's rights recognised (cf. Arendt 1951: 290 ff.). From this follows, thirdly, the right to justice that serves to secure the constitution of law, the rule of law, and the ability of all citizens to have the law enforced by way of appeal to courts. Fourthly, for the political order to remain effective and adaptive to social change, rights to political participation are needed by which all citizens are granted equal opportunities in contributing to the process of public opinion formation. Finally, so that these aforementioned rights do not remain merely formal opportunities that some citizens may actually be unable to put to effect, social rights are required to secure for all at least a minimum level of resources for living (Habermas 1992: 155 ff.).<sup>10</sup>

Earlier I identified the two major critiques to which discourse-ethical accounts of basic rights are liable: first the critique that discourse ethics is underdetermined in that it does not by itself provide a definite justification for one particular system of basic rights, and secondly the critique anticipated by Habermas himself that discourse ethics tends to a view in which all basic rights are assessed solely on their functionality

<sup>10</sup> Literally Habermas defines the five categories as follows:

- (1) Basic rights which result from the politically autonomous elaboration of the right to the most extensive equal subjective liberties to act;
- (2) Basic rights that derive from the politically autonomous elaboration of the status as a member in a legal association;
- (3) Basic rights that are derived from the capacity to action against the law and the politically autonomous elaboration of the need for protection against it.
- (4) Basic rights to equal opportunities to participation in the processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they make legitimate law.
- (5) Basic rights to the granting of living conditions which are socially, technologically, and ecologically secured to the extent necessary for equal chances to utilise the former rights under given circumstances (Habermas 1992: 155 ff.).

for the democratic process. The question now is whether Habermas's recent explication of a discourse-ethical theory of basic rights overcomes these criticisms.

In a way Habermas concedes the under-determination of discourse ethics relative to any particular system of basic rights. In identifying the five categories of basic rights he stresses that these categories do not define one specific catalogue of basic rights for which universal validity can be claimed. Each of these categories is to be specified through reflective processes of "politically autonomous elaboration" so that they are determined on the basis of the specific features of the social context at hand (Habermas 1992: 163). This way Habermas can still sustain a critical value of his account without claiming universal and absolutely determinate validity. Systems of basic rights may be of very different kinds but they require that all five categories set out by Habermas are, in some way or another, appropriate to the specific context, provided for. Thus Habermas's account, while falling short of offering a positive, conclusive recipe for a system of basic rights, provides a negative test: if some categories of rights are not provided for, the system of basic rights lacks justification.

While Habermas has thus in principle a neat and balanced answer to the first criticism, his response, or rather responses, to the second challenges are far less equivocal. Overall Habermas's recent work pleads for a "procedural understanding" of the law in modern democratic states. In a procedural understanding, laws are not regarded as fixed and definite means towards the social good, but only as institutional attainments in an ongoing social learning process which should always be amendable if democratically raised claims provide substantive reasons to do so. Clearly the procedural understanding of the law gives particular emphasis to political participation rights:

"rights can only be 'enjoyed', if one exercises them. In the end individual self-determination constitutes itself in the exercise of rights that derive from legitimately established norms. Henceforth can the equal distribution of rights not be severed from that public autonomy that citizens can only exercise in concert, as they participate in the practice of legislation" (Habermas 1992: 505; cf. Alexy 1994).

Habermas can get away with this particular emphasis on political rights by claiming that those rights that enable individuals to political participation can simultaneously be taken to serve the aim of securing their private autonomy, delineating their private spheres. However, this claim is put in doubt by the fact that in setting out his catalogue of rights Habermas does indeed distinguish rights to political participation from the right of each person to the maximum personal liberty. What is more, pursuing his eclecticism by adding the further categories of a right to political membership, a right to justice and social rights, the internal coherency of the discourse-ethical account of basic rights is severely challenged. Though the validity of each of these categories is appealing, Habermas does not succeed in demonstrating how they are necessarily and coherently implied in either the premises of discourse ethics or in an enlarged conception of (private and public) autonomy.

At this point Wellmer's critique of the under-determination of discourse ethics comes back into view. If discourse ethics is to avoid the position in which it claims a direct, *a priori* justification of merely the political participation rights, it requires additional arguments. Such arguments may in the first place be found in a meta-ethical conception of universal human dignity from which a system of human rights may issue. If, however, discourse ethics is to determine any basic rights beyond these universal human rights, it has to allow that the procedural shell it provides is substantiated with sociological and political considerations that come out of actual historical traditions (Chambers 1993). The accounts of rights provided by Arato and Cohen, and Habermas suffer from the fact that the insistence on the universality of the basic principles of discourse ethics hinders a full acknowledgement of the particularities of the specific, liberal democratic context that they eventually refer to. Instead, I think, a more persuasive and determinate account of basic rights can be given by adopting the basic premises of discourse ethics to develop an "indirect" reconstruction of the conception of basic rights that is set emphatically within the distinctive context of modern liberal democracies.



### Plural Justifications

Before setting out the particular kind of argument which I take to provide the best justification for basic rights, I want to briefly consider the distinctive and rather popular approach to the problem that is satisfied simply to recognise that there exists a plurality of distinct justifications.<sup>11</sup> Essentially this approach holds that political norms, such as those provided by basic rights, cannot be traced back to one, single justificatory argument but that they rely inherently on multiple arguments. Thus the right to free speech, for example, can be seen to be rooted in the value of respect to human dignity, but also in the recognition of an individual's ('negative') liberty, and furthermore to derive from the necessary preconditions of a viable democracy (cf. Schauer 1982). These different justificatory arguments reflect, in a way, the diversity of world views in society. Basic rights can be upheld as justified norms exactly because they can draw on each of these different arguments in turn.

The appeal of this "pluralist" justificatory strategy lies to a large extent in its lack of abstraction, its "realism". We know modern societies to be pluralist and to harbour many divergent world views. That these world views may converge on certain principles appears very much a matter of fortuitous accident. This much can be observed in the world. What cannot be observed in the world is whether one justificatory argument has greater inherent validity than another. Such an assessment requires a leap of abstraction to a higher level. However, such a leap is hard to conceive, and any claim to it is always open to the suspicion that it merely claims a privileged position to justify the domination of one world view over another.

<sup>11</sup> My critique of the pluralist approach to the justification of norms parallels in some essential respects John Rawls's critique of what he calls "intuitionism": "the doctrine that there is an irreducible family of first principles which have to be weighed against one another by asking ourselves which balance, in our considered judgement, is the most just" (Rawls 1971: 34). The crucial difference between these two critiques is that my concern is with the justification of norms, while Rawls's intuitionism concerns individual decisions. Berlin (1958: esp. § VIII) may be read as a classical example of the "pluralist" strategy as he seems to argue that fundamental liberties can be justified by the multiplicity of different ends that men may have. Regarding the justification of specific basic rights, value-pluralism is explicitly advocated by Frederick Schauer in his account of free speech (Schauer 1982) and Lawrence Becker in his treatment of private property (Becker 1977).

I do not want to quarrel with these basic contentions: modern societies harbour many different world views that provide different reasons to adhere to certain principles, and indeed any claim to transcend this plurality may simply be a means to bring about the domination of one world view. However, I think that the plural strategy of justification can be shown to fall short of providing satisfactory answers to the questions that prompt the justification of norms, and that in remaining satisfied with an insufficient answer it runs the risk of facilitating the very dangers it expressly abhors. I specifically want to argue that for the effective upholding of a norm, it is not enough for there to be a general agreement on its mere formulation but that its effective interpretation requires also a widely shared agreement on its justificatory basis. What is more, if such an agreement is lacking, agreement on the mere formulation of a norm may even serve to excuse the imposition of the interpretation endorsed by some upon the interpretation held by others.

Consider in greater detail the example of the right to free speech. In a standard philosophical work on this right, Frederick Schauer argues for a "pluralist" position in which no single justificatory argument is taken to be absolutely superior to all others (Schauer 1982). Schauer reviews arguments justifying the right to free speech on the basis of estimates of utility, truth and democracy, the value of self-expression, self-development and autonomy, and, finally, the disutility of government regulation.<sup>12</sup> Each of these arguments is found to fall short of providing a comprehensive, "independent" justification for free speech, but at the same time Schauer concedes each of them a grain of truth and submits that they have to be regarded together to fully account for the right to free speech as each of them serves to justify this norm in certain contexts to certain people. Notably, though relying on a less comprehensive catalogue of values than Schauer, the German Federal Constitutional Court in actually upholding the right to free speech sees no harm in invoking alternatively the value of human

<sup>12</sup> I review these arguments on their substantive merits in Chapter III, Sections I and II.

dignity and the value of self-government to guide its decisions (e.g. BVerfGE 7,198 at 208; cf. Herzog 1994 and my discussion in Section 3.IV below).<sup>13</sup>

I want to argue that this "pluralist" approach leaves more questions open than it solves when it comes to employing norms in political action. Though most inhabitants of liberal democracies generally recognise speech to be free, the right to free speech is exactly invoked to adjudicate those instances in which speech is contested. Compare the examples of personally hurtful satire and public disclosure of government secrets. Both these instances of speech would be covered by the right to free speech. However, the protection of these acts might vary considerably depending on the kind of argument by which this right is taken to be justified. If the protection of speech is taken to derive from the value of individual self-expression then satire will probably enjoy strong protection but far less personal, "expressive" value will be attached to the disclosure of government secrets. If, on the other hand, the right is taken to be justified for the value of self-government then the satire is of relative minor relevance, while the disclosure of government secrets may indeed enjoy special protection as it is conducive to the self-governing powers of the democracy.

So what does a "pluralist" do when confronted with such a case? Most likely she will focus on the justificatory argument that is most relevant in the particular context, and thus rely on the value of self-expression in the satire case and on the case of democratic self-government in the governmental secrets case. However, the claimants before court may well argue that they recognise the right to free speech for other justificatory arguments and that they cannot accept the interpretation adopted by the court. The "pluralist" may then answer that self-expression and democratic self-government are both widely accepted values in our societies, and that together they

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<sup>13</sup> The reliance the German Federal Constitutional Court puts on a melange of values and the ways in which it seeks to reconcile these among each other has given rise to a wide debate about the doctrine of "the balancing of values" (*Werteabwägung*). This approach is discussed by Alexy (1985: §3.III.2) and Böckenförde (1974) who identifies its roots in the work of the early twentieth century legal philosopher Rudolf Smend. Recently, "the balancing of values" has come under sharp attack of Jürgen Habermas (1992: Ch. VI) who relies in turn on the work of Klaus Günther (1988).

provide the basis for a consistent and comprehensive application of the right to free speech.

These examples bring two problems of the "pluralist" approach to light. First, the choice between justificatory arguments cannot be avoided. That choice cannot simply be reduced to the adherence of the norm agreed upon, since the implications of a norm vary according to the arguments employed to justify it. Secondly, if no single argument is identified to justify a norm, it can be stretched to become virtually absolute; in those cases in which some arguments would attribute less force to the norm, others can be relied upon to uphold it.

Against the "pluralist" answer to the question of justification, I argue that the formulation of a single comprehensive justificatory argument cannot be avoided when norms are to be applied, and that arguments are conceivable that are not inherently related to a particular world view but can be recognised from a wide range of social positions. A further advantage of this position is that it can provide relatively straightforward guidance to determine the limits of basic rights.

### Basic Rights as Constituting Public Goods

Basic rights, I want to maintain, are best justified by arguments that demonstrate how they serve to constitute and preserve certain public goods. The public good argument does not provide a single justification for all basic rights; its content differs in each case. However, it provides a single framework through which the status of these rights in liberal democracies can be accounted for and their practical implications can be understood.

### Public Goods Defined

Drawing on the theory of public goods developed by economists, public goods can be defined by their "indivisibility" or "non-individualisability", in contrast with private goods that are "divisible" or "individualisable".<sup>14</sup> Essentially "indivisibility" implies

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<sup>14</sup> The foundational work for the economic theory of public goods has been done by Richard Musgrave (1959), Paul Samuelson (1954), and James Buchanan (1968; cf. 1975: Ch.

that the benefits derived from a good cannot be made to correspond to individual ownership claims. Economists commonly distinguish between two ways in which "indivisibility" becomes manifest, "non-rivalry" and "non-excludability". A good is non-rivalrous to the extent that multiple individuals can benefit from it without significantly affecting the value of each other's enjoyment. This feature can be illustrated with the classical example of a public good, a bridge: once there is a bridge across a river for one person, following persons do not require their own bridge as they can just as well enjoy the bridge already in place. Of course eventually there are limits to the capacity of the bridge in meeting the claims of an infinite number of people, but the basic point of non-rivalry is that up to a certain point many individuals can benefit from a good without their enjoyment reducing the value of the enjoyment by others.

While "non-rivalry" implies that a good can be simultaneously enjoyed by multiple actors, the feature of "non-excludability" indicates that the nature of a good is such that the good must be simultaneously enjoyed by multiple actors, as it is impossible, or at least difficult, to exclude others from its enjoyment. Compare the example of the bridge with the example of clean air. Benefits from the bridge are excludable as one can regulate individuals crossing it. Clean air, in contrast, is much less excludable; once it has been made available, it is very hard to see how individuals might be restrained from enjoying its benefits. Again excludability is in the end a matter of degree: it is harder to preclude the enjoyment of some goods once available than that of others, for any good there are probably ways imaginable, if not practicable, to control their enjoyment.

The "indivisibility" of public goods raises particular problems for their provision through voluntary exchange. As the benefits derived from a public good cannot be adequately represented by a single set of individual ownership claims, expected benefits will be insufficiently expressed on the market as effective demand. Even if the provision of a public good may be warranted as efficient (when there is a sufficient

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3). I very much rely on the instructive statement of this theory by John Head (1974, esp. Ch. 8). For another helpful introduction, see Ng (1979: Ch. 8). Compare also Steiner (1977).

demand to cover its costs), as long as the demand is expressed by individual actors on the market, it is unlikely to be supplied. For example, while all individuals interested in a bridge would together be willing to pay enough for the costs of its construction, as long as they are not organised, no single actor is in a position to negotiate the deal with a construction firm. A problem following from this is that when it comes to the costs of a public good required for its provision, each individual actor is tempted to act as a "free-rider", sharing fully in the ("non-excludable") benefits of the good while leaving it to others to bear its costs. State action can overcome these shortcomings of the market. The state can register demand for goods through other means than market behaviour (such as votes and consultation), it can mediate between individual consumers to organise their demand, and it can forego free-riding by obliging individuals to contribute to the provision of public goods.

Examples of public goods constituted by basic rights are "the market economy" that is secured by the right to private property and "an open culture" that is secured by the right to free speech. The market economy and an open culture are "non-rivalrous", one can share in their benefits without thereby reducing the value of the enjoyment of others. Similarly, these goods are to a significant degree "non-excludable". Once they are in place in society, it is extremely difficult to exclude people from enjoying their benefits.

The public goods constituted by rights are, however, of a rather distinctive kind. They do not merely allow for shared enjoyment, they require it. These public goods are only constituted in the co-ordination of individual actions. In contrast with the paradigmatic examples of public goods employed by economists that are material goods, the public goods constituted by basic rights are institutions that become manifest only in the actions of people; they "can only be produced by the cooperation of all or most members of the group" (Waldron 1993d: 348; cf. Raz 1986: 198 f.).<sup>15</sup>

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<sup>15</sup> Waldron's argument results in the proposal to distinguish as a sub-class of public goods "communal goods" that people can only enjoy "to the extent that they are participant members of a group to which the benefit of the good accrues at a collective level" (Waldron 1993d: 355). The public goods constituted by basic rights qualify by this definition as communal goods as they do secure a benefit "at a collective level", what I will call an "institutional effect".

The public goods constituted by rights are viable because people recognise the way in which they serve their interests. However, in line with the economic conception of public goods, securing the public goods constituted by rights is problematical. First, there is the problem of original conception. No single individual can by herself constitute the kind of public goods constituted by basic rights. They require collective action. However, collective action becomes viable only to the extent that some collective means for co-ordination are already available (cf. Olson 1965). The state can, for instance, facilitate collective action, but it itself also appears as a product of such action. Similarly, means by which individuals can co-ordinate their actions, such as language, routines, rules, institutions, themselves presuppose some kind of collective action. That collective action is nevertheless viable derives from two factors. First of all from the fact that collective action is ingrained in the nature of human beings as they constitute themselves not merely by themselves but in interaction with others. Thus we acquire, for instance, the means of social co-ordination in the family and subsequently we can employ these in ever-widening social circles. The second factor that makes collective action viable is that it can be imposed by force and once force has served to establish some structures for collective action they can facilitate collective action for other purposes. This development is well illustrated by the development of the modern state. Only within the framework established by the autocratic, absolutist state did the (democratic) conception of basic rights and the public goods they constitute become viable.<sup>16</sup>

Nevertheless I prefer to continue to refer to "public goods" rather than "communal goods" as I want to stress the requirement to make these goods as tangible as possible by clearly defining them and by breaking them down to distinct components.

<sup>16</sup> My account of the historical origins of basic rights remains extremely cursory. A full treatment would require detailed historical analysis that would also specifically distinguish between different geographical contexts. Something of this kind can be found in the writings of Margaret Somers on the origins of citizenship in England (Somers 1993; 1994). For France and the United States such accounts would focus on the great eighteenth century revolutions. For countries like Germany and Italy the focus would in turn be on the construction of the unitary states in the nineteenth century and the winded roads to democracy that led into the twentieth century (cf. Eder 1985). Obviously these stories are widely divergent. I submit, however, that they all go to support the thesis that the presence of a unitary state is a necessary (though not sufficient) precondition for the conception of basic rights and the preservation of the corresponding public goods.

However, it is one thing to account for the origination of the public goods constituted by basic rights, a second range of problems is raised when it comes to their preservation. As is well known from the economic theory of public goods, when it comes to the costs the provision of a public good requires, each individual actor is tempted to act as a "free-rider", sharing fully in the ("non-excludable") benefits of the good while leaving it to others to bear the costs. The costs required for the public goods constituted by basic rights are not of a monetary kind, they are above all duties to exercise certain actions or to refrain from them. The "costs" of the right to private property are, for instance, the duties not to touch without permission upon goods that fall under other's property. A "free-rider", like a thief, can fail to heed these duties and nevertheless enjoy all the benefits of the public good of the market economy, in keeping his own property and even in reselling his stolen goods. In accordance with the general economic theory of public goods, free-riding on the public goods constituted by basic rights can be overcome, or at least controlled, by the state. The state can define the duties to which basic rights oblige citizens and retribute their violations with authoritative punishment.

### **The Structure of the Public Good Argument**

According to the economists' use, a public good need not necessarily be good but may just as well be bad, as, for example, air pollution, or bad and confusing road lighting. However, when it comes to the question of justification, and in particular the justification of the imposition of costs and duties for the sake of the preservation of a public good, it needs to be shown that the public good involved serves certain interests. I think this can be done in the case of all basic rights and that by doing so we get to the best arguments available for them.

The key to a positive balance that the public goods constituted by basic rights secure between benefits and costs lies in the experience of security that they guarantee to all. Basically basic rights are norms that guarantee individual's claims to a specific range of actions to be secure. For example, the right to private property guarantees this



security to actions regarding the goods under one's property, the right to free speech guarantees this security to acts of expression.

Of course, security in any action does not by itself lay the foundation for a basic right, this security needs to be shown to be of a distinctive value. As a first step, individuals have to be shown to have a personal interest in exercising these actions. There is no sense to a right if no one will ever insist in having met the claims it protects. Thus this condition is necessary for any right to be meaningful in practice, but it is not sufficient to warrant a basic right.

A second step is that the actions protected can be seen to serve the interests of others as well. For instance, I may take pleasure in baking a pizza, and you may have an interest in my doing, since as I will let you share in that pizza. I will refer to the people that can be identified to benefit from another's action being secure as "third party beneficiaries". Regarding them as "third parties" highlights that their interests only come in after the interests of the primary actor and secondary actors, who have a direct interest in the action not taking place. (A secondary actor may, for instance, share the kitchen with the primary actor and require the flour to bake a pizza for his friends).

The distinctive feature of basic rights is, however, that beyond serving the personal interests of actors and third parties, they have an overall institutional effect by constituting a context in which a whole distinctive configuration of action is conceivable, for example a public good like the market economy or an open culture. The benefits of these public goods go beyond identifiable third party beneficiaries, they bind all members of society in one fabric of interactions in which third party beneficiaries become in turn actors who benefit other third parties in turn, so that, ultimately, all figure both as actors and beneficiaries. The essential role basic rights serve in securing these public goods and the great social value that these turn out to have, provide their justification.

The distinction between rights, such as human rights, that are justified for the distinctive value of the individual interests they protect, and basic rights that are justified by the public good argument is well brought out by applying a hypothetical

test suggested by Joseph Raz (1992: 137). Consider the choice between living in a society in which a right would be generally recognised but for the exclusion of oneself, and living in a society in which only one oneself would enjoy the right but no one of the other members. In the case of human rights, such as the right not to be tortured, it is clear that one's own life would be more pleasant in the latter society than in the former. In the case of basic rights, however, there are good reasons to expect that life in the former society would be more pleasant as one would expect to benefit indirectly from the advantages the recognition of the basic right would bring to society as a whole, advantages one could not even reap if one were the only one to enjoy the right. What is the value of free speech if one is the only one enjoying it? How limited is the value of property or education if one cannot use these goods in interaction with others who are equally secure in their enjoyment of them?

#### Basic Rights, Public Goods, and Justification

For the public good argument to succeed in justifying basic rights, it has to be shown that the public goods constituted by these rights do not merely serve the interests of a particular social group, but interests that can be shown to be common to all, or nearly all, members of modern societies. In particular one may demand it to be shown that the interests served by these public goods transcend particular economic and cultural identities.

What is at stake in this kind of challenge is not the factual question of whether basic rights do indeed have the institutional effect whereby they come to constitute a public good. What is at stake is whether this public good is desirable in itself or whether some people may have reason to object to it. One might, for instance, argue that the right to private property and the market economy it sustains, serves only the interests of the propertied classes, the bourgeoisie. I would deny this and argue that the right to private property serves to secure people's willingness to give the utmost care to goods and that all members of society enjoy the benefits of this through the market economy. Alternatively, one might argue that the open culture secured through the right

to free speech serves the interests of a profane and ironic majority culture at the costs of more sensitive minorities. Without denying the kind of tensions suggested, I would answer that all members of society share a basic interest in an open culture in which they feel secure to express their own views and can freely inform themselves of the views of others.

The public goods constituted by basic rights are not inherent to particular world views, but transcend these since they define a normative context in which individuals from different backgrounds can feel secure in interacting with each other, recognising the claims they can sustain, as well as the duties to which they are bound towards each other. Thus basic rights are political phenomena and not ethical ones.

This is not to say, however, that the public goods constituted by basic rights are neutral, they are not.<sup>17</sup> This can be shown in the first place by considering interests that would indeed be against these public goods. One can imagine a world view that rejects the public good of an open culture constituted by the right to free speech, in favour of a closed, monistic culture. Similarly, one might imagine a world view that opposes the public good of the market economy for a communist economy in which the ownership of goods is left open to discretion, according to needs, autocratic allocation, or force. I do not want to disqualify these world views as unreasonable, but I recognise that there is little place for them in liberal societies and among the whole range of world views they harbour.

In all likelihood these marginal world views are best served by granting them autonomy in as much as possible isolation from the rest of society so that they are not exposed to the public goods nor allowed to disrupt these by their disregard of the duties they require. In any case, I do think that such world views that harbour an unqualified abhorrence of public goods like the market economy and the open culture are extremely marginal in modern societies. As pervasive as the differences may be between the great

<sup>17</sup> This argument is particularly meant to address the criticisms that theorists of different backgrounds have launched against the idea of neutrality (political independence, impartiality) as generally cherished in liberal political philosophy (Raz 1986: Part II; 1990a; Sandel 1982; 1996: Part I; Young 1990: Ch. 4).

majority of identities and world views in modern societies, I submit that these identities can find each other in the common interests in the public goods constituted by basic rights.

Maybe less dramatically but more acutely, one recognises that the public goods constituted by basic rights are not neutral when they actually oblige one to respect another's claims even if one does not share an interest in them or may even have an interest which conflicts with them. The public goods constituted by basic rights define benefits that serve one's interests as well as imposing duties that limit the pursuit of one's interests. One may seek to justify these duties by affirming that they are required for the sake of a particular conception of the good. Alternatively, one may invoke the libertarian creed that one is bound to the "negative" duty not to interfere with the affairs of others, or the reciprocal argument that one has to accept those duties towards others that one expects them to respect towards oneself. However, the public good argument does not rely on a particular conception of the good, nor on a strong affirmation of "negative duties" nor on pure reciprocity between those bound under basic rights. The public good argument to justify basic rights, and the duties they imply, requires that a strong case can be made to each individual that the benefits she derives from the preservation of the public good outweigh the costs of the duties it imposes upon her. This does not exclude the possibility that some may enjoy an exceptional amount of benefits from the public good in question while the duties it imposes weigh much heavier on others, only that both of them can in the end recognise that the basic right has overall worked to each individual's advantage.

The public good justification of basic rights provides a general framework that transcends the rigid historical distinctions reified by the libertarian argument. At the same time it is not liable to the critiques of vacuity and indeterminacy (unlike contractarianism and discourse ethics) as it requires for each basic right a substantive argument built around an identifiable public good. What is more, the public good argument provides a comprehensive framework that can accommodate a wide range of different interests and values whilst imposing a definite order upon them. This aspect of

its superiority over the other theories of the justification of basic rights is elaborated further in the next section as we turn to the question of application.

## **II) APPLYING BASIC RIGHTS**

In this section I deal with a range of questions concerning basic rights that are not yet fully answered when the grounds for the justification of such rights have been identified. These questions concern not the justification of basic rights but their application. The idea that the role of norms in morality and politics is best conceived by distinguishing between two levels, norm-justification and norm-application, is rather widespread and is, for instance, reflected in the distinction between legislation (justifying and determining laws) and adjudication (applying laws).

In recent times the distinction between the justification and application of norms has been particularly developed in the work of Jürgen Habermas and Klaus Günther (Habermas 1992; Günther 1988; 1992; cf. Hare 1981). The insight I owe to Habermas and Günther is that questions of justification cannot be reduced to questions of applications, nor vice versa. However, I do believe that the arguments we rely on in dealing with both sets of questions are much more interrelated than they are willing to admit. I have already argued in the section above against Habermas that no substantive system of norms can be justified by relying solely on procedural ideas such as universalisability, neutrality and impartiality, or by deductive reasoning from foundational principles. Rather it is an essential part of the justification of norms that we anticipate what their consequences will be when applied. In turn I argue in this section that when dealing with questions of application we can rely to a significant extent on the specific grounds on which we take the norms involved to be justified. In short, though there is an indisputable sense in which norms have to be determined and justified independently and before they can be applied in any particular case, Albrecht Wellmer rightly challenges Habermas and Günther by arguing that the validity of norms is in the end bound by "the validity of moral judgements that can be - *not*

*grounded, but - expressed through these norms*" (Wellmer 1986: 204 ff. [emphasis added]); Alexy 1993)

Turning now to questions of application involving basic rights, one might still want to maintain that once basic rights are justified and determined, it is rather self-evident how they are to be applied: if a case belongs to the category they define then they apply, if not then not. However, things are not that simple since the formulation of basic rights is always underdetermined relative to the cases to which they are to be applied. To get from norms to a decision in a concrete case, we have to go through a process of application. The question to be addressed in this section is how are we to conceive of the role of basic rights in processes of application by which actual decisions are determined?

A particularly important aspect of this question concerns the "limits of basic rights" (cf. Alexy 1985: Ch. 6). One may be inclined to think of them as absolute rights. However, there are few, if any, absolute rights (cf. Gewirth 1981), and I believe that certainly no basic right (as defined by the public good argument) can be taken as an absolute. This is also recognised by the way in which basic rights have been defined in constitutions. Often their recognition is immediately followed by a second paragraph that defines certain "limits" that can be imposed upon them. A typical example is provided by Article 5 of the German Basic Law:

5.1 Everyone shall have the right to freely express and disseminate his opinion in speech, writing and pictures and freely to inform himself from generally accessible sources. The freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

5.2 These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honour.

While the basic right to free speech is firmly recognised in paragraph 5.1, paragraph 5.2 straightaway lists a set of interests which are acknowledged to raise considerations that may have to be balanced against the basic right. Perhaps even more striking is the way in which the Basic Law affirms in one paragraph the basic right to private property and reclaims the possibility to limit it:

14.1 Property and the right of inheritance shall be guaranteed. Their content and limits shall be determined by statute.

Once it is recognised that basic rights are limited, the question arises how these "limits" are to be determined in application procedures. The danger looms, of course, that once basic rights are recognised to have limits, their force can be disputed in every case and eventually they may become void. How are we to ensure that rights will be maintained on more than an *ad hoc* basis, how can their force be secured if they are not maintained as absolutes?

I start this section by considering utilitarianism as the approach to decision-making that intuitively may appear as the most straightforward one. According to utilitarianism, moral and political decisions are to be taken on the balance of interests: those claims dominate that yield as their consequences the maximum sum of welfare experienced by all individuals involved. In a way utilitarianism appears as the default approach in moral and political decision-making; if rights were to run void, plain utilitarianism would remain. While I believe that the premises of utilitarianism better reflect some of our basic intuitions in moral and political decision-making than is often granted, I also recognise the force of the main criticisms launched against it. If, however, rights could be accommodated within a utilitarian framework these criticisms would lose much of their force.

In the following two sub-sections I consider two strategies which offer rather straightforward and simple solutions to the questions of application. In the first approach - rights as side-constraints - rights are simply taken as absolutes protecting certain defined interests from all possible considerations that might conflict with them. The second approach is the legal formalist one that conceives of rights as rules that can fully delineate the range of cases to which they apply. Both of these approaches I take to be deficient.

In the remaining sub-sections I search for an alternative conception of basic rights in application. I first take the lead of Ronald Dworkin's criticism of the legal formalist conception of rights as rules and his suggestive proposal to conceive of rights

as "trumps". However, Dworkin's ideas are more suggestive than satisfying. Relying on work done by Joseph Raz I try to develop a more precise theory of basic rights in application by regarding them as reasons.

### Utilitarianism

The most obvious way in which conflicts of claims can be adjudicated on a reasonable basis is by weighing them against each other. There is a common sense notion that some claims are more important than others. This is the premise of utilitarianism and as well-known as the objections of utilitarian procedures may be, it is probably the approach most adopted in dealing with conflicts of claims. Consider the example of the packed bus in which you have a seat when an old woman comes in. Both of you have reasons to raise a claim to the seat but obviously her claim is weightier so that you ought to stand up for her. Just as well utilitarian arguments figure prominently in more sophisticated political arguments. Take the exemplary argument employed by a British inspector who had to decide between a proposal of the local authorities for the construction of a by-pass and an alternative scheme put forward by the land-owners whose land was to be purchased:

"there are no factors which individually or together outweigh the disadvantages of extra cost and delay which would result from the adoption of the objectors' alternative route."  
(quoted in *de Rothschild and another v. Secretary of State for Transport and another*, [1988] 1 EGLR 67 at 68)

Following Amartya Sen and Bernard Williams (1982b: 3/4) we can define utilitarianism by three features. First of all, utilitarianism is consequentialist, "actions are to be chosen on the basis of the states of affairs which are their consequences". The second feature we may call welfarism: utilitarianism bases social decision-making on one single factor: utility, or, in alternative formulations, pleasure, welfare, or well-being. Finally, utilitarianism presumes sum-ranking, that is that the utility of different people can simply be added up. Thus, in short, utilitarianism is the position that favours those moral and political decisions which yield as their consequences the maximum sum of welfare experienced by all individuals involved.



The basic presuppositions on which utilitarianism rests are not particularly far-fetched. They can be taken to obtain in many instances of actual decision-making, as in the examples I presented above. Nevertheless, when pressed, utilitarianism runs into quite some difficulties. To me the prime problem appears to lie in the idea of welfarism. Essentially, the problem is that no single concept has been determined that is both analytically adequate in being objectively determinate, as well as subjectively satisfying, as fully reflecting people's judgements of value. Money suggests itself, for instance, as a useful and objectively determinate indicator of utility. But we can immediately think of things of value - from which we derive utility - that resist expression in monetary terms: friendship, freedom, personal respect - those things money just cannot buy. On the other hand, though to rely on our own, subjective experiences of utility simply will not do if we are to make any meaningful, comparative appraisals of utility.

A hard, objective conception of utility is a precondition for sum-ranking. Sum-ranking requires that individual experiences of utility can be expressed in terms that are commensurable and quantifiable. So far, however, standards for interpersonal comparisons of utility remain widely contested (cf. Elster & Roemer 1991). Utilitarians are haunted, moreover, by the possibility of utility monsters who would derive such extreme amounts of utility from having their desires served that they would dwarf any claims of people with average experiences. In any case, up until now no metric seems able to escape political contestability in deciding actual 'hard cases'.

A further objection against utilitarianism that has been classically formulated by John Rawls is that "Utilitarianism does not take seriously the distinction between persons" (Rawls 1971: 27). One might even add that utilitarianism does not take persons seriously in the first place, it only considers them as "sites" of utility, and abstracts from all their other features (Sen & Williams 1982b: 4). Rawls's crucial point is, however, that sum-ranking elides the distinctiveness of individuals. Invoking the Kantian maxim that we should treat our fellow rational beings not as means but solely

as ends, Rawls points out that in certain respects persons cannot be traded off against each other (cf. Kant 1785).

Finally, a particularly deep critique of utilitarianism focuses on its consequentialist character and holds that it severely reduces the range of sources for moral and political judgement. By focusing solely on utility attained in an end-state of affairs, utilitarianism fails to account for such moral resources as responsibility, integrity, and fidelity (Lyons 1965: Ch. V; Taylor 1982). Bernard Williams has put forward the famous example of Jim who, stuck in a South American town, is confronted with a group of twenty imprisoned protesters. They will be killed by the captain guarding them unless Jim accepts the honour of shooting one of them himself (Williams 1973: 98). Utilitarianism leaves little doubt that Jim should kill one protester, but consulting our moral intuitions we may have doubts whether that is unequivocally the right decision to take. We recognise that it would be a legitimate consideration of Jim to ask whether he himself could take on the personal responsibility for killing someone. Utilitarianism fails, however, to account for such a moral consideration.

Many of these criticisms could be overcome if utilitarianism could accommodate rights.<sup>18</sup> Rights may serve to avoid the excesses to which utilitarian calculations might lead. They may secure that each individual is in the end considered as a distinct, "separate" person, they may delineate a sphere in which action is based on the value of personal autonomy rather than on utility. However, a utilitarianism strictly applied is bound to conflict with such rights (Lyons 1984). Consider the classical example by which Amartya Sen demonstrates the impossibility of a "Paretian liberal" involving a conflict of interest between the intellectual Mary and the puritan Bill (Sen 1970). Mary would be interested to have access to books of disputed repute like D.H. Lawrence's *Lady Chatterly's Lover*. Bill, on the other hand, strongly objects against that

<sup>18</sup> Note that vice versa, critics who seek to dispense with rights are bound to fall back on a utilitarian position and thus face again the criticisms outlined above. A nice example of this is Stanley Fish's "post-modern" critique of the right to free speech in the United States that issues in a "contextualist" plea to "consider in every case what is at stake and what are the risks and gains of alternative courses of action" (Fish 1994: 111; see the discussion of Fish in chapter 3 below).

kind of book being available to his neighbours in the society in which he lives. According to a utilitarian approach, books like *Lady Chatterly's Lover* would have to be prohibited if Bill's disutility from these books being available happened to outweigh Mary's utility from enjoying them. In contrast, from a rights-oriented, liberal perspective one might argue that Mary has a right to freely choose whatever literature she wants to read and that this right serves to exclude *a priori* Bill's desires from the range of legitimate political options.

The utilitarian position Sen takes issue with has become known as "act-utilitarianism" because it requires the utilitarian calculus to be applied to every single decision to be taken. Thus act-utilitarianism will always favour exceptions to rules whenever they will maximise utility, leaving no place for rules or principles.

The alternative version of utilitarianism that is generally regarded to be more credible is "rule-utilitarianism". In rule-utilitarianism the utilitarian calculus is applied to the rules governing social interaction rather than to single acts. The question it asks is not which decision will yield most utility by itself, but which rules are most likely to yield maximal utility when generally applied. A rule-utilitarian framework may well accommodate rights as it can recognise them as rules that serve the maximisation of utility in the long run (Scanlon 1978; Sen 1985). If rule-utilitarianism succeeds in upholding a system of rights, the sting is taken out of the major objections generally raised against utilitarianism. Rights may serve to avoid the kind of excessive decisions that are often taken to issue from utilitarianism and to secure that each person is taken seriously as an individual.

However, rule-utilitarianism raises a distinctive problem of its own, which can be characterised as the danger of "rule worship"; the danger of following rules merely for their own sake while dispensing with any substantive judgement of the actual cases to which the rules are applied (Smart 1973; cf. Scanlon 1978). Alternatively, if a rule-utilitarian would be prepared to consider individual decisions then step by step she might be led back to act-utilitarianism. As J.C.C. Smart nicely summarises an argument by David Lyons:

"Suppose that an exception to a rule R produces the best possible consequences. Then this is evidence that the rule R should be modified so as to allow this exception. Thus we get a new rule of the form 'do R except in circumstances of the sort C'. That is whatever would lead the act-utilitarian to break a rule would lead the [...] rule-utilitarian to modify the rule" (Smart 1973: 10/1, relying on Lyons 1965).

As I have indicated at several points in this section, I think that there is a basic sense in which utilitarianism can account for and serve our moral and political judgements. As regards rights in particular, Thomas Scanlon has rightly observed that classical utilitarianism harbours the "uncontrovertible insight" that "rights themselves need to be justified somehow, and how other than by appeal to the human interests their recognition promotes and protects?" (Scanlon 1978: 93; cf. Scanlon 1982: 120). Like him, I think that rights can be accounted for by something like a rule-utilitarian account, and I submit that the public good argument I outlined in the former section can be read that way.<sup>19</sup> Still, there remains the challenge of the objection of "rule worship". In the following sub-sections I move, step by step, away from a conception of rights as rules. First, I will criticise a conception, "rights as side constraints", that diametrically opposes rights to utilitarianism. Having dismissed this position, I review various conceptions of rights, arguing that rights, once justified, are not entrenched rules which simply determine the decisions to be taken in individual cases, but rather are reasons that, though crucial guides in application discourses, still leave a whole range of questions to be dealt with.

### Rights as Side-Constraints

Utilitarian considerations need not necessarily conflict with rights, but they may do as the example of Mary and Bill showed. One rather persuasive and consistent way to deal with such conflict potential has been presented by Robert Nozick. Nozick's aversion to utilitarianism is underpinned by his commitment to "the Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the

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<sup>19</sup> Let me, however, emphasise that this political theory of rights does not commit me to a comprehensive rule-utilitarian morality. My objections to a rigid utilitarianism will become clearer in the final paragraph of this section.

achieving of other ends without their consent. Individuals are inviolable" (Nozick 1974: 31). "Rights", he continues, "reflect the fact of our separate existences. They reflect the fact that no moral balancing act can take place among us; there is no moral outweighing of one of our lives by others so as to lead to a greater overall *social* good" (Nozick 1974: 33). Clearly, this last statement is directly addressed against utilitarianism.

The conception of rights that Nozick advocates is expressly set out to avoid any balancing of the interests it protects by excluding them *a priori* from the range of political options available:

"Rights do not determine a social ordering but instead set the constraints within which a social choice is to be made, by excluding certain alternatives, fixing others, and so on. (If I have a right to choose to live in New York or Massachusetts, and I choose Massachusetts, then alternatives involving my living in New York are not appropriate objects to be entered in a social ordering.) (...) Rights (...) operate upon a social ordering to constrain the choice it can yield" (Nozick 1974: 166).

The question is whether we would be willing to (pre-)commit ourselves to the kind of rights advocated by Nozick. Consider first Nozick's own example, does Nozick's right to choose to live in New York or Massachusetts justify the *a priori* exclusion of all possible (social) reasons that might justify withholding his claim to live in Massachusetts from the range of political decision-making? What if, for instance, considerations of health care called for quarantine measures in Massachusetts and the restriction of traffic to and from the state, or what if the population of the state had increased beyond the carrying capacity of important public goods (e.g. clean air, filtered tap water) (cf. Sen 1981; 1985: 15)?

As a second example consider again Sen's story of Mary and Bill. If Mary's right to freely choose whatever literature she wants to read is taken as a side-constraint, Bill is unable to pursue his claim to withhold *Lady Chatterly's Lover* from her. But imagine that the book at stake is not a novel of disputed quality but a pamphlet calling upon the violent extermination of traditional puritans that Bill understandably perceives not merely as offensive but also as a direct threat to his own security. A utilitarian can appreciate that in this case Bill's reasons for objecting to Mary's unbridled curiosity

carry much more weight. However, when rights are regarded as side-constraints, Bill's objections will not even be considered, whatever their weight.

Nozick observes that the Kantian objections against utilitarianism, when fully followed through, impose an "impossibly stringent condition" on political decision-making (Nozick 1974: 31). His way round this is to limit the realm of rights as side-constraints to a restricted range of actions. Rights as side-constraints are primarily to exclude the use of aggression from the range of political options, and Nozick more specifically identifies rights to private property as serving that aim. As I argue more elaborately in the next chapter, once these rights are regarded as side-constraints, however urgent the needs of others to certain goods (e.g. food), the possibility that it may be justified to take them out of people's possession against their will cannot even be considered. Contrary to Nozick, this suggests that the excessive "stringency" of the side constraints answer to utilitarianism probably lies not so much in its width, but rather in the absoluteness with which it is pursued.

A slightly different argument for rights as side constraints has been set out by Robert Sugden. Sugden considers that "[a]fter allowing for likely systematic biases, and for the incentive effects of different procedures" actors might be willing to agree by contract that certain rights should be treated as binding constraints (Sugden 1993: 148). Although Sugden appears to insert the sentence between quotes as a mere aside, it contains the major reasons why individuals would ever accept rights as side constraints. Considering violations of the right to privacy Sugden introduces some vivid examples of what may constitute "likely systematic biases" and "incentive effects of different procedures":

"Private citizens may tend to overestimate dangers to their friends and underestimate the damages caused by breaking in to the houses of people they do not like. The police may tend to overestimate the effectiveness of their interventions. Or (...) a magistrate. Even if her judgements are completely unbiased, her having the discretion to authorize break-ins may create undesirable incentives for other people. For example, the police might start inventing spurious justifications (...) for other break-ins that happened to suit their purposes, and it might be hard for a magistrate to distinguish one case from the other. After taking account of the effects of such biases and incentives, we might judge that the

overall good of society would be better served by a simple prohibition on breaking in to innocent people's houses" (Sugden 1993: 142/3).

Rights as side constraints are thus justified to bind ourselves and others because we do not trust ourselves nor others to be capable of making the warranted judgements when needed, a line of argument similar to the one that led Ulysses to have himself tied to the mast when approaching the Sirens (Elster 1979).

However, on what basis can we make such decisions? How do we anticipate the likely behaviour of the actors involved? Can we discount the "likely systematic biases" and "incentive effects of different procedures" that the imposition of the side constraint will have in turn? Will not the right to privacy as a strict constraint, for instance, allow the flourishing of all kinds of nasty activities in the private sphere? As Sugden rightly insists "there is no Ideal Observer to appeal to" (Sugden 1993: 148). Exactly for this reason we may want to retain the liberty to consider reasons as they come and to weigh them on their merits instead of excluding some from the very start. Rights may well serve to caution the uses of the utilitarian balancing of interests but they do not discharge us from considering a whole range of claims concerning their merits.

### Rights as Rules

The application of basic rights would be rather unproblematical if, as rules, they precisely delineated the range of cases to which they apply from those to which they do not. Certainly, norms such as basic rights are not completely undetermined. There is, for instance, a generally shared understanding of what counts as a speech act that is covered by the basic right to free speech. It includes a letter to the editor published in a newspaper and excludes the blow a burglar delivers to his victim. Nevertheless concepts generally have fuzzy edges, or, to adopt a term of H.L.A Hart (1961: §VII.1), an "open texture". Does, for example, an inarticulate scream fall under speech, and what about ill-directed insults, sign-language, pornography, badges?

One might argue that rights, and legal rights in particular, have to be defined in such a way that they fully determine to which actions they apply and to which they do not. Such a "formalist" position has, for instance, been advocated by Jeremy Bentham:

"It is by creating duties and nothing else that the law can create rights. when the law gives you a right, what does it do? it makes me liable to punishment in case of my doing any of those acts which would have the effect of disturbing you in the exercise of that right" (Bentham 1782: 249).

For Bentham rights are conclusions of law that are established by defining a range of specific duties. There is no sense to rights if the range of corresponding duties is not specifically defined. Any use of the concept of rights in a general fashion, exemplified in Bentham's time by the 1789 *Déclaration des Droits de l'Homme et du Citoyen*, he eloquently dismissed as "rhetorical nonsense, - nonsense upon stilts", "terrorist language" and "anarchical fallacies" (Bentham in Waldron 1987: 53 & 46).

Bentham's concern lies in the first place with the efficiency of laws. What is the value of laws if it cannot be made completely clear beforehand what they require? How can they then guide people's behaviour? The indeterminacy of rights may facilitate the breaking of the basic principle underlying the rule of law, (*nulla poena sine lege*), people may find themselves being punished even though their knowledge of the law told them before that their actions were legal. If, for instance, the law is made up by such general principles as the right to free speech and the right to protection of personal dignity, one may think that the former right allows one to freely publish a sharp personal critique of one's opponent and then find oneself liable to punishment under the second right.

Nevertheless basic rights are generally recognised in legal systems without a full catalogue of the instances to which they are to apply. The point Bentham missed is that no norm can actually be made to refer to a fully delineated range of actions. Whatever the words we use they will always be open to disputes about their interpretation. However, there is no doubt that certain formulations of norms are much more precise and determinate than others. What then is the use of continuing to affirm a general basic right to free speech, instead of affirming a set of well-defined freedoms to express one's opinions on subjects of general importance, subject to a set of well-defined restrictions, for instance regarding the infliction of insult and harm upon people?



The main reasons why basic rights serve a crucial role in our understanding of the law and why they are only to a limited extent filled in by more precise provisions are twofold. First, the concrete cases that give rise to political or legal contestation will often elude the definitions of laws, however precise they are. Secondly, there are limits to the number of rules people will memorise to bind their actions by. In general they will rely much more on rules of thumb, like basic rights, and their common sense understandings of the situations in which they act.

As Joseph Raz has pointed out, the norms defined by basic rights can in principle be applied to an infinite number of cases:

"The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live.

A change of circumstances may lead to the creation of new duties based on the old right".

Hence, "there is no closed list of duties which correspond to the right" (Raz 1986: 171; cf. 1984). To this Neil MacCormick adds that "by using the terminology (in my view indispensable) of 'rights' the legislature can in short and simple words achieve complex legal protections" (MacCormick 1977: 206).

However, having dismissed the conception of rights as rules that can fully delineate the cases to which they apply, the sense of legal security that Bentham sought to secure appears to be put at risk. How can we rely on basic rights in assessing which claims and duties are justified? It remains to be demonstrated that even if the security promised by the conception of rights as rules is most likely unattainable in the real world, an alternative conception is possible that can nevertheless account for the security that is obviously required for citizens to rely upon them.<sup>20</sup>

<sup>20</sup> Notably, the basic thesis characterising the formalistic position regarding the application of norms as rules - that the range of cases to which norms apply can and has to be sharply delineated from those to which they do not apply - is central to one of the most sophisticated "post-positivistic" accounts of norm application: Klaus Günther's theory of application discourses (Günther 1988; 1992; cf. Habermas 1983a; 1992: Chs. V & VI). Günther's approach marks a significant advance as it develops a systematic distinction between the justification and the application of norms, and argues for a reappraisal of the importance of practical reasoning in applying norms. However, Günther's strong awareness of the dangers of indeterminacy of norms and of the tendency for balancing to slide into a mere ad hoc adjudicative practice, leads him to maintain two theses with which I take issue (cf. Wellmer 1986; Alexy 1985; 1993). First, he insists that valid moral and legal decisions can be fully determined by reference to the norms that can be justified and a complete assessment of the features of a case. Secondly, he consistently opposes balancing by arguing that on a complete assessment of the case it can always be determined to fall within the range covered by one

### Rights as Trumps

The most forceful, comprehensive and eloquent critic of the conception of rights as rules has been devised by Ronald Dworkin. Dworkin's basic claim is that

"when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards" (Dworkin 1977: 22).

Dworkin identifies several features that distinguish principles from rules. "Rules", he observes, "are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision" (Dworkin 1977: 24; Alexy 1985: Section 3.I). On the other hand, principles need not directly lead to a determinate answer even though the facts defined apply and the principle's validity is undisputed.

Basic rights may be regarded as principles in this sense. We may, for instance, recognise the basic right to free speech as a valid principle and recognise slander as speech and nevertheless doubt in certain cases whether one should be free to slander or liable to punishment instead. Thus, in line with the contrast I drew in the foregoing subsection between rules, that correspond to a delineable range of cases, and basic rights, that do not, Dworkin observes that a principle

"does not even purport to set out conditions that make its application necessary. Rather it states a reason that argues in one direction, but does not necessitate a particular decision" (Dworkin 1977: 26).

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norm alone. Thus within that range the norm can be applied as a rule. In contrast I have a much "softer" conception of norms. First of all, while Günther appears to presume the viability of a complete set of norms fully covering the realm of social action (like Kant's "Kingdom of Ends"), I take it that there is only a limited number of substantive norms that can be justified in actual societies, basic rights being probably the main ones in modern liberal democracies. Secondly, as I regard norms in general and basic rights in particular as reasons, I concede that in any case several norms may apply. Moreover, I think that balancing is integral to any practical argument, as I think is also testified to by common legal practice. Hence, the dangers of balancing cannot be warded off by simply dismissing it as an approach, but only by seeking to conceive of ways that can structure it and make it more reliable. Finally, I think that Günther, as a consequence of his consistent critique of "Aristotelianism", is bound to underestimate the importance of judgement, or *phronesis*, in application discourses.

Even though principles may not yield a determinate answer, Dworkin recognises that they carry "weight". In contrast to rules that either fully apply or not at all, principles have a certain weight or importance that can be balanced against other principles. Thus we can say that the weight of free speech has to be balanced against the weight of the principle of respecting personal honour. From this follows a further feature of principles: even when in one particular case they are dominated by another principle, they may still remain valid. In contrast, when rules conflict, only one of them can be valid, and once a rule is overruled, it can be rejected once and for all as invalid.

Besides distinguishing rights as principles from rights as rules, Dworkin also seeks to distinguish them from utilitarian considerations or, what he refers to as, "policies". Dworkin recognises normal political argument to proceed in a more or less utilitarian fashion: the interests (goals, policies) of the issue at hand are raised, the pro's and con's of different decisions are considered against each other, and eventually that decision is made which appears most advantageous overall. In contrast with this, he argues that legal argument as applied in the courts does not rely on utilitarian considerations at all, but only seeks to enforce established rights (Dworkin 1977: esp. 82 ff.). Pursuing this line of argument further, Dworkin eventually comes to define rights in opposition to utilitarian considerations:

"Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole."

This definition of rights as trumps is illustrated with an example: "If someone has a right to publish pornography, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did" (Dworkin 1984).

However forceful his critiques and as suggestive as the metaphor of rights as trumps is, Dworkin does not fully succeed in turning these ideas into a innovative, coherent conception of rights. On first sight, "taking rights seriously" appears to commit Dworkin to a position similar to the absolutist view of rights as side-constraints (cf. Hart 1979). Indeed, such an approach appears to inform Dworkin's analyses when rights are at stake that are dear to him as a liberal, such as the right to free speech.

However, Dworkin's rights thesis should be taken to apply far beyond his stock-list of rights featured by the great American liberal tradition. Indeed, so wide-ranging is his concept of rights that he himself has to acknowledge the danger that "the idea of rights as trumps may be used in such a way as to inflate the numbers of rights grotesquely and so make the appeal to a right banal" (Dworkin 1977: 365; cf. Raz 1978: 126). Dworkin seeks to avoid this danger by maintaining that "No alleged right is a right (on my account) unless it overrides at least a marginal case of a general collective justification". As he shows, this definition serves to disqualify at least one alleged right, "the right to a pistachio ice cream". However, rather than providing us with a distinctive insight, the triviality of this example brings the indefiniteness of the conception of rights as trumps into full light.

Given this proliferation of rights, Dworkin has to deviate from any absolutist conception of rights by recognising several grounds, including a utilitarian one, that may in turn trump rights (even though he stipulates that these can apply only if the case is a marginal case any way, that is if the case is not exactly of the kind the right originally seeks to protect):

"First, the Government might show that the values protected by the original right are not directly at stake in the marginal case, or at stake only in some attenuated form. Second, it might show that if the right is defined to include the marginal case, then some competing right, in the strong sense [...], would be abridged. Third, it might show that if the right were so defined, then the cost to society would not be simply incremental, but would be of a degree far beyond the cost paid to grant the original right, a degree great enough to justify whatever assault on dignity or equality might be involved" (Dworkin 1977: 200).

These are formulations of a strikingly general kind. The question is exactly under what conditions these grounds can be taken to maintain. Unfortunately, however, Dworkin's argument falters when it gets to such really "hard cases" in which there is no simple answer to which rights are at stake and how they bear upon the case. His conception of rights simply cannot answer questions like: which rights apply when?; when is a case is only a marginal one?; when do costs become unreasonably big? Faced with such

questions, the trump-metaphor turns out to be of limited substance and Dworkin's argumentation loses much of its clarity, finally becoming rather intuitive.<sup>21</sup>

### Rights as Reasons

I think that rights are best understood as reasons. This conception is suggested by the way Joseph Raz has defined rights:

"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" (Raz 1986: 166, emphasis added).<sup>22</sup>

Compared to side-constraints and rules, reasons are far less stringent. They are not absolute in necessitating duties. A reason provides only a *ground* for a duty "which, if not counteracted by conflicting considerations, justifies holding that other person to have a duty" (Raz 1986: 171; cf. Raz 1975; Waldron 1993c). Reasons, moreover, can be of varying weight, depending on the interests concerned.

However, contrary to Raz's definition, I would not identify these interests with the aspects of the personal well-being of the rights-bearer. The interest of the rights-bearer to hold another person under a duty is a necessary precondition for a right (it serves to secure *locus standi*), but the right may owe its force as much to other interests besides the well-being of the rights-bearer. Precisely this, I argue, is the case with basic rights. Dispensing with the parts of Raz's definition that I consider to be less relevant (though I do not disagree with them), I would reformulate his definition as:

'x has a right' if x has an interest in holding some other person(s) to be under a duty and a set of interests can be recognised as providing sufficient reason for justifying this claim.

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<sup>21</sup> My critique of Dworkin refers above all to Chapter 4, "Hard Cases" in *Taking Rights Seriously* (1977). Dworkin himself must have realised that this account left many questions open and his work on principles and legal interpretation issued in *Law's Empire* (1986a). I do not have the space here to embark upon a review of the latter book. Though it elaborates many of the points that were only cursorily stated in the first book, I do not think that beyond coining the appealing new catch-phrase "integrity" in legal interpretation, this work really succeeds in overcoming the objections mentioned.

<sup>22</sup> As Raz grants himself his definition of rights as validating claims is by no means innovative, but his theory is by far the most sophisticated, comprehensive and consistent available. For a start, his work bears the mark of his long-standing exchanges with Ronald Dworkin. Some of the crucial, distinctive features of Raz's definition were furthermore anticipated by Joel Feinberg (1980), who elaborates the relations between rights, claims and the act of claiming, and, as we will see below, by A. I. Melden (1977).

Notably the conception of rights as reasons allows a certain indeterminacy into their operation: whether the reasons given by the right dominate is conditional upon possible countervailing considerations that cannot be determined at the outset for all cases to which the right might apply. However, this indeterminacy does not imply that the decision whether a right dominates or not is up to whim. Rather such decisions have to be decided on the balance of reasons. In balancing, rights give an important advantage to some claims over others. Basic rights, I argue, have a distinctively heavy weight, and for accounting for that weight and for determining how it bears upon individual decisions we can rely on the public good argument set out in the former section.

However far basic rights and a well-elaborated theory of them may guide us in reaching political decisions, in the end each case has to be considered on its own merits. This sensitivity to the specific features of an individual case requires the faculty of "judgement". Though judgement eludes by definition any full, analytical description, I nevertheless try to outline its nature with some remarks in the final paragraph. First, however, I want to specify the distinction between rights as reasons on the one hand and claims and duties on the other. Instead of regarding rights as only reasons for claims, the two terms are often conflated. Theories of rights may, I think, be greatly clarified by defining how rights relate to claims as well as what keeps them apart.

### Reasons and Claims

Rights, I argue, are reasons to uphold a claim that obliges other people to a duty. Often, rights are conflated with the claims that derive from them.<sup>23</sup> I take claims to constitute the basic, single elements around which politics turns. Claims regard a particular act in which the claimant takes an interest. Such an action may be the act of taking possession of a certain good, of speaking, of moving etc.. Politics arises when claims conflict or, to use a technical term, when they are not "compossible" (Steiner 1994; Waldron 1993c:

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<sup>23</sup> This is in particular the case in the tradition of analytical jurisprudence that follows the classical work of W.N. Hohfeld (1919). In my view Hohfeld's analysis concerns claims rather than rights.

206). Paradigmatically we think of such conflicts as involving goods that are scarce and indivisible, so that only one claim can be upheld. Though the goods-paradigm serves to visualise the way claims may conflict, just as often conflicts of claims involve actions rather than goods. I may, for instance, claim to cross a road at a certain moment and find that claim contested by another's claim to drive along the same road; or I may claim to publicise a severe critique of someone's work facing the counter-claim of this critique not being published at all.

To uphold a claim requires that all raising a counter-claim be obliged to retract them. Thus every claim corresponds to a set of duties on others. The duties corresponding to claims can be analytically distinguished as being of two kinds. Either they are positive in which case they oblige others to the performance of a certain action, for instance to pay a certain amount of taxes. Alternatively, they are negative, putting others under the obligation to refrain from certain actions. In his classical work on fundamental legal relations W.H. Hohfeld identified the claim corresponding to a negative duty as a 'privilege' (also sometimes referred to as 'liberty', but cf. Thompson 1990: 50 ff.), while he retained the concept of 'claim'(-right) as corresponding to positive duties (Hohfeld 1919).<sup>24</sup>

By distinguishing rights from claims, two insights become apparent. First, one may make a claim without being able to invoke a right. As I said above, by invoking a right, an actor claims that there is a recognisable norm according to which her claim is to have primacy over its competitors. It is possible for an actor to make a claim without invoking a right. I may, for instance, claim a million dollars. However, asserting this claim immediately raises the question for reasons, why on earth should I have a million dollars? Answering this question brings us to rights as reasons that are to demonstrate that there is a recognisable norm according to which my claim is to be upheld.

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<sup>24</sup> I deviate from Hohfeld's conceptual scheme by employing the term 'negative duty' for what he calls a 'no-claim'. Hohfeld distinguished 'claim-rights' and 'privileges' further from 'powers' and 'immunities'. In my view these latter categories are of a different order (cf. Sumner 1987). Their manifestations are not as individualisable as claims and privileges since their recognition is by definition bound to persist over time and thus across different occasions.

Thus the distinction between claims and rights enables us to answer Bentham's dismissal of natural rights talk as "so much flat assertion" (Bentham quoted in Jones 1994: 5). Posing *claims*, we can answer, may indeed be nothing more than "flat assertion". However, by invoking *rights* we testify our belief that there is a recognised norm according to which our claim is to be upheld. This norm may be legal, may be moral, and may also be "natural" (if we regard certain norms to apply universally to humanity). Even if invoking rights need not immediately suffice to uphold our claim, it challenges our opponents to demonstrate that the norm invoked is not valid or to raise counter-considerations that outweigh the force of the norm in this case.

Here we get to the second insight implied by the distinction between rights and claims: one may be able to invoke a right and nevertheless fail to uphold one's claim. Political and legal philosophers have for a long time wrestled with the problem of how rights may persist as valid while the particular claims they uphold are withheld. Notably, if no distinction is drawn between rights and claims this problem reads as how rights may persist while rights are withheld. The classical solution to this problem was provided by W.D. Ross who suggested the notion of "*prima facie* rights". The problems this notion raises are well summarised by A.I. Melden:

"The use of 'prima facie' in connection with rights, paralleling that introduced by Ross for the case of duty, suggests, in fact, that rights are putative or apparent unless they succeed in their justificatory function. If, however, one does have a right, its status as a right is not compromised by the fact that in special circumstances it must give way or yield in the face of other competing considerations. To have a right is to stand in a moral relation with respect to some one or more persons, and that relation does not simply disappear when, in recognition of it along with other relevant considerations, it is deemed appropriate to infringe or to refuse to accord a person his right" (Melden 1977: 15; Martin & Nickel 1980: 173).

As Melden points out, the notion of "*prima facie* rights" suggests a strange vanishing trick: one enjoys rights, then they are withheld in certain instances, but nevertheless they persist. I believe that much clarification is gained when one recognises that rights operate as reasons that retain their validity throughout, but that they may in individual cases fall short of upholding the claims they support against contrary considerations.



This can already be shown by Melden's quote that ends with the still somewhat obscure conclusion that a right (relation) "does not simply disappear when (...) it is deemed appropriate to infringe or to refuse to accord a person his right". Instead, according to the distinction I advocate between rights as reasons and claims, one should read that a right "does not simply disappear when, in recognition of it along with other relevant considerations, it is deemed appropriate to infringe or to refuse to accord a person his claim (supported by that right)".

### Balancing with Basic Rights as Reasons

By arguing for rights as reasons that may fall short of upholding the claims they support, one is open to the challenge that rights thus conceived may well turn out to be empty. Rights as reasons run void if we have no means at all to delineate the cases in which they succeed in upholding claims from those in which they fall short of doing so. To decide one way or the other then becomes a matter of *ad hoc* decision-making in which rights may figure as rhetorical devices but cannot be said to play a substantive role. This challenge can be answered, however, if we can determine the weight of rights. The weight of rights can derive from many different considerations or values. My aim in this paragraph is to demonstrate how in the case of basic rights the weight they give to claims can be determined. Much of the groundwork for this argument has already been prepared by the public good argument which I take to provide the justificatory basis for basic rights.

In one respect basic rights can be shown to be of significant value even before their weight is determined. That is because, as recognised norms, they enable us to articulate our claims in the first place and to raise them before the public forum. How could one raise, for instance, a claim to freedom of speech if one would not know about that norm being recognisable as a basic right? How could one formulate a persuasive argument sustaining one's claim if one could not refer to the reasons entrenched in social norms? A basic right entitles one to a public hearing and the engagement of the state authority whenever another actor refuses to yield to a duty validated by the right.

In its bare essence, political conflict involves two claimants who raise conflicting claims. The courtroom serves well to illustrate this situation as it brings together a claimant and a defendant with their conflicting claims. Following the basic utilitarian approach such conflicts would have to be decided in favour of the claim with the highest weight. So we have two persons each with their own claims in which they take an interest, and the interest with the greatest weight wins.

The public good argument by which I take basic rights to be justified suggests that the picture of this situation has to be widened when one of the claimants invokes a basic right to support her claim. Certainly her personal interest in her claim has to be taken into account. Notably, this interest is, of course, essential in inducing the claimant to raise her claim in the first place and in giving her *locus standi* in court (cf. Waldron 1993d: 351). However, the public good argument serves to highlight that, when basic rights apply to a case, more interests than merely the interest of the claimant and the opposing one of her opponent are at stake, namely the interests of "third party beneficiaries" and a general societal interest in the preservation of the public good constituted by the basic right.

Consider the example of a conflict about the publication of a book between the author and an opponent (person or organisation) that regards this book as degrading towards his most deeply cherished beliefs. In its bare essence the personal interest of the author in having her book published confronts here the personal interest of her opponent in having his beliefs and feelings safeguarded. Clearly, a utilitarian approach that merely seeks to determine which of these two interests has the greatest weight in this conflict faces some difficult questions: how are these two interests to be weighed? can the interests involved be made commensurable? what feelings are to count? can emotional differences between the persons be accounted for?

Turning to basic rights does not help to solve these questions, but it does widen the range of interests to be considered on the side of the claim supported by these rights to such an extent that it becomes rather unlikely that the opposing personal interest will outweigh them. The basic right to free speech serves to point out that besides the

interest of the author at stake in the question whether a book is to be published or not, stand also the interests his public has, as a "third party beneficiary", in having the book published. Moreover, the basic right brings to light the impact that the refusal of the author's claim may have on the society-wide enjoyment of the public good involved, an open culture in which views can be freely disseminated. This public good is threatened as the incidental prohibition of speech will have "chilling effects" that will discourage other authors from invigorating the open culture.

Basic rights thus serve to secure that when certain claims (that they protect) are at stake in political conflict, the whole range of the interests involved is taken into account. They counter-balance the ways in which political, and especially, legal conflict is generally individualised in liberal democracies, focusing on a limited number of interests and ignoring the ways in which certain interests are socially interrelated. Finally, they serve make tangible interests that are might otherwise fail to be adequately expressed in the political and legal debates. This is often the case with "third party interests" that are inherently dependent on the prime actor. Readers, for instance, cannot generally raise a claim to a certain book because they cannot know what results will come out of the author's hands, and they will never be able to know that, once the book has been prohibited for them.

Clearly few opposing claims can hold their ground once they are confronted with the whole range of social interests that lie behind a claim supported by a basic right. Still, prudent decision-making should not rely on the mere number of interests on each side, but only on the balance of their substantive weight. Basic rights, we may say with adopting a metaphor of David Lyons (1984: 114), constitute an "argumentative threshold". This threshold severely reduces the likelihood that a conflicting claim can be put through, but still, the threshold is not insurmountable.

Following the structure of the public good argument, the height of the "threshold" can be determined in each individual case by analysing each of the three categories of interests. First of all, there is the personal interest of the speaker. This interest may be weighty, as when her human dignity is at stake, but it may also be

relatively slight. Secondly, "third party interests" have to be considered: which other people have a direct interest in the claim of the claimant being upheld and what is the weight of these interests? The "third party interests" may be many and rather important, for instance when the freedom of the daily press is at stake, but they may also be few and slight as in the case of some sub-culture magazine. Finally, some assessment can be made of the place of this claim in the context of the public good secured by the basic right involved. Private remarks are, for instance, less central to the public good of an open culture preserved by the freedom of speech as are political pamphlets. Taken together these three components determine the weight to be given to the claim supported by the basic right, and, as I will seek to demonstrate in the next chapters, their importance is reflected in many of the legal doctrines that are used in applying basic rights.

Thus when a claim finds support in a basic right, a heavy burden of argument is laid on the person who takes issue with it.<sup>25</sup> Notably, however, the presence of basic rights also has a significant impact on the structure of the arguments available to the opponents of claims backed up by basic rights. Typically around a recognised basic right a number of countervailing reasons become entrenched as well. Above we encountered some examples of such reasons entrenched in paragraph 5.II of the German Basic Law as weighing against the right to free speech. This paragraph holds the right to free speech is "subject to limitations in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honour". Other arguments that are widely recognised to have a certain force against the right to free speech rely on considerations of public morality, privacy or interests of the state. Even if these opposing reasons are not formulated as basic rights, or as rights of any kind, rational appraisal of them may nevertheless warrant a decision against the basic right. This, however, only after the full weight of the interests they protect has been considered.

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<sup>25</sup> Following this train of thought Bernard Schlink has proposed to regard basic rights as rules assigning the burden of argument (*Argumentationslastregeln*) (referred to in Alexy 1985: 90).

### Judgement

To argue that rights serve basically to guide the balancing of interests, appears to leave one eventually within an essentially utilitarian framework; a decision has to be taken by considering the weight of the interests involved, taking utmost care that all relevant interests are taken into account, and determining their overall sum. If only things were that simple! However, one basic problem with utilitarianism remains, and that is that there is no single criterion, like utility, welfare, or money, that is both analytically adequate in being objectively determinate and subjectively satisfying to rely on in weighing people's interests against each other. Rather these criteria vary depending on the particular conflict at hand. In contrast to the utilitarian approach that slights this problem by holding on to welfarism, it is brought into full focus by the notion of judgement. Judgement is the capacity to deal with cases in the terms appropriate to them.

Imagine, for example, a situation in which there is scarcity in resources for schooling so that a choice has to be made to allocate these either to the basic education of a poor, but talented and motivated student or to a spoiled, rich student who desires to have his knowledge of wines expanded. In terms of money the rich student easily outbids the poor student. Nor need the poor student receive more from the education than the rich student in terms of utility gains. However, in considering this example judgement may tell us that instead of relying on the criteria of money and utility, the decision would more appropriately be made in terms of need and merit. More generally, we can recognise that the appropriate criteria will vary according to the nature of the good at stake. Decisions concerning resources for education require, for example, different criteria than those concerning health care, luxury goods, or political power (cf. Walzer 1983; Taylor 1982).

Turning to the more specific problems of norm application, problems of this kind even remain when relevant criteria have been determined for a certain range of political action. When claims are in conflict, it generally turns out that there is not one

single norm that can authoritatively decide between them. Rather the claimants involved are likely to invoke various competing norms and to present contradictory interpretations of them.

The idea of judgement can be traced back as far as Aristotle's *Nicomachean Ethics*. In this book Aristotle recognised that the objects of practical and political affairs cannot be subjected to laws in the same way as natural objects can be accounted for by natural laws. The effectiveness of laws in the natural sciences depends on the universal and necessary constancy that natural objects can be presumed to have. In contrast, however, the objects of practical and political affairs appear of an infinite variety. Hence, Aristotle observed, practical wisdom (*phronesis*) requires, beyond scientific knowledge of laws (*techne*), the distinctive capacity of judgement. Judgement consists in the capacity to grasp the particulars of a given action or decision (Aristotle 1978: Book VI; cf. Gadamer 1960: 320 ff.; Wiggins 1975).

If, however, judgement is not susceptible to general rules, then one may suspect it to be completely elusive and subject to individual whim. Judgement may not be anything else than the direct expression of subjective valuations, merely a matter of taste. While Aristotle insisted that practical wisdom and the judgement it requires could not be reduced to art or aesthetic judgement any more than it could be reduced to scientific knowledge, modern political and legal theory has generally found little merit in the faculty of judgement. Laws are taken to dominate practical wisdom, and judgement has been relegated to the realm of taste and aesthetics. Utilitarianism can be regarded as representing this tendency, but it has received its authoritative manifestation in the work of Immanuel Kant whose *Critique of Practical Reason* (1788) is exclusively occupied with the determination of categorical laws for practical affairs while judgement has its place in the sharply delineated aesthetic realm covered by the third critique, the *Critique of Judgement* (1790).

In the latter book, Kant defines judgement as "the capacity to think the particular as included in the general" (Kant 1790: Intro. §IV). He distinguishes between judgements of two kinds. In "determinate judgements" the general is already given and

the particular can simply be subsumed under it. In contrast, in "reflective judgement" only the particular is given, and the general form under which it can be subsumed still has to be found. Considering this latter kind of judgements Kant encounters the distinctive problems already identified by Aristotle. This kind of judgement simply cannot be accounted for by law-like structures, as is well illustrated by an example of Hannah Arendt:

"If you say, 'What a beautiful rose!' you do not arrive at this judgement by first saying, 'All roses are beautiful, this flower is a rose, hence this rose is beautiful.'

Like Aristotle, Kant observes, furthermore, that judgement is not a technique that can easily be instructed but that it is rather "a peculiar talent which can be practised only and cannot be taught" (Kant quoted in Arendt 1982: 4).

Kant maintained a rather firm line between politics and legislation as actions subject to the imperatives of practical reason, on the one hand, and judgement as an activity having its appropriate place in the specific realm of aesthetics, on the other. Though the moral status of judgement remains for this reason problematical in Kant's writings, the most fascinating recent attempt to restore the faculty of judgement in the realm of practical reason has issued from a radical re-interpretation of them. In a set of provocative lectures that were never turned into a finished manuscript, Hannah Arendt has argued that Kant's *Critique of Judgement* can be read as laying the basis of a distinctive political philosophy. She suggested that some of the crucial passages Kant wrote on judgement were motivated by political concerns, but that he never succeeded (or dared) to develop them systematically. One may well dispute whether Arendt's reading is true to Kant's writing (Beiner 1982: 142; cf. Höffe 1990). In any case, however, it yields the richest account of judgement available so far.

Arendt faces head-on the central objection against judgement. Judgement, she recognises with Kant, is essentially based on the sense of taste, but can this sense then be relied on to provide a valid basis for moral and political decisions? In matters of taste one is directly affected without mediation of thought and reflection. One smells a rose, one eats oysters, and either likes or dislikes it; "there can be no dispute about right and wrong here. *De gustibus non disputandum est* - there can be no dispute about

matters of taste. No argument can persuade me to like oysters if I do not like them. In other words, the disturbing thing about matters of taste is that they are not communicable" (Arendt 1982: 66).

Relying on Kant, Arendt argues that while judging draws on a direct, taste-like experience, it can nevertheless be held against public standards of validity. She reaches this conclusion in two steps. First she points out that, contrary to what the argument about taste suggests, judgements are communicable in the sense that one can "give an account" of them, "not to prove, but to be able to say how one came to an opinion and for what reasons one formed it" (Arendt 1982: 41). Arendt emphasises in particular that this capacity relies in turn on "imagination" - "representative thinking": "the faculty of having present what is absent", "of perception in the absence of an object" (Kant). This capacity requires that for the sake of reflection one is able to distance oneself from an object, as well as at the same time keeping its direct sense-experience present to oneself (Arendt 1982: 66, 79 ff.). Thus imagination allows one to enjoy (to "taste") an experience directly but at the same time secures a certain distance from which one can reflect upon this experience.

At a second step Arendt draws on Kant to emphasise the extent to which our judgements are tied up in a social context. Social interaction is a pre-requirement for the development of judgement as it motivates each individual to seek to please other's tastes: "A man abandoned by himself on a desert island would adorn neither his hut nor his person ... [Man] is not contented with an object if he cannot feel satisfaction in it in common with others" (Kant 1790: §41; Arendt 1982: 67). What is more, as judgements rely on a social context, this context also provides standards by which judgements are assessed. According to Kant these standards are brought to bear upon judgements through a "*sensus communis*",

"a sense common to all (...), which in its reflection takes account (a priori) of the perception of everyone else, in order, as it were, to hold his judgement against the totality of human reason, and thereby to avoid the illusion that subjective and personal conditions - that one might all too easily take as objective - would have a negative influence upon the judgement" (Kant 1790: §40; Arendt 1982: 71).



The *sensus communis* provides one with a sense of public standards against which one's judgements can be tested, and enables one to distinguish better from worse judgements and to attune them. On this basis Arendt concludes:

"This *sensus communis* is what judgement appeals to in everyone, and it is this possible appeal that gives judgements their special validity. The ['direct' experience of] it-pleases-or-displeases-me, which as a feeling seems so utterly private and noncommunicative, is actually rooted in this community sense and is therefore open to communication once it has been transformed by reflection, which takes all others and their feelings into account" (Arendt 1982: 72).

Obviously this theory of judgement remains limited, as any theory of judgement may well be bound to be. Certainly, the *sensus communis* does not provide an objectively, determinate judgement in every case of conflict. The valuable point about Arendt's argument is, however, that it retains the 'direct', intuitive moment of judgement in politics that eludes any system of norms, while at the same time demonstrating how even this moment is inherently subject to public standards (cf. Benhabib 1992b: 132).

Instead of developing this theory of judgement further on the abstract level, I simply want to consider how Arendt's arguments might bear upon the application of basic rights. Consider the example of the conflict between a slum-dweller squatting a house that has been left unoccupied for some considerable time and its owner who invokes the right to private property to have the dweller removed. I do not think that the right answer to this conflict can be found simply by sticking to rights as rules. Instead I am more favourable to a balancing of the different interests involved. Following the public good argument justifying the basic right to private property, we may note that the claim of the owner derives its force not only from his personal interest in fully commanding his property, but also from the interests of those "third parties" who would be interested to enter into a transaction with the owner concerning the building in question, and finally from the "institutional" argument that to withhold the claim of the owner would have a negative impact upon the security owners in general enjoy in operating in the market economy and would undercut their optimal and efficient interaction. On the other hand, however, we may observe that the personal interest at stake of the dweller is of a rather fundamental nature.

I do not think that the primary task in seeking the right balance between these different considerations can be the utilitarian one of seeking to quantify the weight of the interests involved. Rather I would argue that the primary task would be to follow Arendt in trying to think in the place of the actors involved and that only by doing this can we find out exactly how the different interests involved are to be weighed against each other:

"Suppose I look at a specific slum dwelling and I perceive in this particular building the general notion which it does not exhibit directly, the notion of poverty and misery. I arrive at this notion by representing to myself how I would feel if I had to live there, that is, I try to think in the place of the slum-dweller. The judgement I shall come up with will by no means be the same as that of the inhabitants, whom time and hopelessness may have dulled to the outrage of their condition, but it will become for my further judging an outstanding example to which I refer .... Furthermore, while I take into account others when judging, this does not mean that I conform in my judgement to those of others, I still speak with my own voice and I do not count noses to arrive at what I think is right. But my judgement is no longer subjective either" (Arendt quoted by Beiner 1982: 107/8).

Judgement makes us imagine the misery of the slum-dweller, leading to the "common sense" recognition that what is appropriate here is consideration rather than scorn. Judgements of this kind are essential ingredients of any decision in which basic rights are applied. However, they cannot simply be derived from them. At most basic rights operate as public standards to which we can orient ourselves in judging and by which we can express our judgements.

### **III) RECONSTRUCTING BASIC RIGHTS**

The notion of judgement brings us to the limits of the impact basic rights can have on legal and political decision-making. In the former two sections I have first argued that basic rights are best justified by way of public good arguments and, secondly, that they are best regarded as reasons when applying them to actual, particular cases. Around these two arguments a distinctive conception of basic rights has, I think, taken shape. A conception that is, on the one hand, radically opposed to certain widespread conceptions of rights, such as the libertarian conception and the formalist conception of

rights as rules, but, on the other hand, is indebted to and reconcilable with many established views.

Such a predominantly theoretical exposition can, in my view, only to a limited extent demonstrate the implications of the conception of basic rights argued for. These can be made much more concrete by confronting this conception with actual cases of legal and political decision-making in which basic rights are invoked. In the following three chapters I focus on three rather different basic rights in turn: the right to private property, the right to free speech, and the right to education. Each of these rights raises a range of rather particular problems, and in the way each is upheld in actual modern liberal democracies. The right to private property appears to be subject to a incessant retreat from its traditional status at the heart of capitalist society to an easy and powerless prey for modern planning administration. The right to free speech in contrast appears almost sacrosanct in modern liberal democracies, so sacrosanct that objections against it (by minority groups) can hardly be recognised. Finally, the right to education raises a whole range of problems as it can only be meaningful when the state is willing actively to provide for it. Such activism remains markedly disputed in contemporary liberal democracies.

In each of these three chapters I will elaborate the specific arguments by which I take these basic rights to be justified. Reviewing various alternative arguments that have been defended, I will seek to demonstrate that in each case there is a superior public good argument by which the basic right in question can be justified. The biggest part of each chapter is, however, taken up by the close analysis of actual legal cases to which the basic rights apply. In each chapter I consider one recent case from Great Britain and one from Germany. Thus these sub-sections allow me to draw some interesting comparisons between the two cases but above all they should demonstrate how the theoretical framework set out in this chapter can be brought to bear upon actual decision-making.

In preparation of these three more empirical chapters I present in this section three more methodological arguments. First, I introduce the general framework in

which my analyses can be set by drawing on the idea of reconstructive social sciences proposed by Jürgen Habermas. Then I make some general remarks about the ways in which basic rights manifest themselves in actual societies, and in particular what differences there are in regarding them either as "moral" or as "legal rights". Finally, I owe the reader an account of the way I have selected the case-material to be presented.

### Political Theory as Reconstruction

According to a classical distinction there are two main lines of approach in social science analysis: logical positivism oriented towards explanation of social phenomena and hermeneutics oriented towards understanding (*Verstehen*) them. Following the line of logical positivism, a scientist delineates certain categories, identifies the phenomenon that suit these categories, looks for correlations between the categories, and eventually aims at formulating these correlations in rules or laws.<sup>26</sup> For example, one may take up the categories "capitalism" and "liberalism", then analyse all states on earth to identify whether they suit each of these categories, find that all "liberal" states are also "capitalist", and present the thesis that each liberal state has to be capitalist.

The hermeneutic approach, on the other hand, focuses on a particular phenomenon, tries to identify all its peculiarities, and eventually aims at formulating these peculiarities in a way that is accessible to outsiders but, above all, true to the original.<sup>27</sup> The hermeneutic scientist may, for instance, focus on a country like Italy and find the categories of "capitalism" and "liberalism" of little use in accounting for the findings that part of its transactions of goods are made in the market-place while an other significant part is mediated by the state and other bureaucratic organisations, and that, while a regularly elected parliament plays a central role in controlling political

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<sup>26</sup> Logical positivism is above all entrenched in the "common sense" with which social scientists engage in behaviourist and functionalist studies. Its philosophical underpinnings have probably been best set out by John Stuart Mill (1843).

<sup>27</sup> Jean Grondin (1991) has written an excellent introduction into the philosophy of hermeneutics. In the social sciences, hermeneutics is above all practised by anthropologists. The work of Clifford Geertz (1973) exemplifies this approach as well as raising many critical questions about it.

decision-making, significant political power is wielded by other public actors, such as the courts, public administrators, and even something like the Mafia.

No social scientific analysis is exclusively logical-positivistic or hermeneutic. In a way the two approaches presuppose each other as the logical positivist requires her categories to be meaningful in certain contexts and the hermeneutic analyst requires some kind of continuity or law-like behaviour to maintain the relevance of her account beyond the context of its particular object. However, contrasting these two lines of analysis brings to light a paradox as there appears to be a certain trade-off between them: positivism delineates its categories to achieve critical results but at the cost of neglecting the particularity of its object, hermeneutics remains true to its object but is of limited relevance as it lacks critical insights.

Instead of relying on the established premises of either logical positivism or hermeneutics, I want to pursue a third line of analysis that has been outlined by Jürgen Habermas and which he calls "reconstructive" (Habermas 1983b; cf. Hesse 1978). Reconstructive analysis is premised on the interaction of theoretical (or logical) and hermeneutic activities in social science research. It recognises that all empirical, hermeneutic analysis requires a certain theoretical framework that is presumed to be valid. This theory becomes of central concern in reconstructive analysis as it is taken as an hypothetical attempt to explicate the meaning people attribute to the social phenomena in question. Because reconstructive analysis thus draws its theoretical premises into the foreground, the empirical findings it yields appear more clearly informed by theory than in alternative approaches. It follows further that the findings cannot simply be taken to "test" the theory by either confirming or refuting it. However, as empirical findings are far from fully determined by the theoretical premises, they can nevertheless serve to "test" a reconstructive theory to the extent that "the various parts of the theory are complementary and fit into the same pattern". The theory may have to be revised if such a fit is not apparent or when parts of the theory turn out to be completely irrelevant to the findings (Habermas 1983b: 48).

Habermas rightly emphasises that "*all* rational reconstructions, like other types of knowledge, have only an hypothetical status". He continues:

"There is always the possibility that the reconstructions rest on a false choice of examples; that they are obscuring and distorting correct intuitions, or, even more frequently, that they are overgeneralising individual cases. For these reasons they require further corroboration. While this critique of all a priori and strong transcendental claims is certainly justified, it should not discourage attempts to put rational reconstructions of presumably basic competencies to the test, subjecting them to indirect verification by using them as inputs in empirical theories" (Habermas 1983b: 41)

The criticisms Habermas refers to would be valid if reconstructive theories were taken to reflect (to "correspond" to) the true nature of the objects to which they refer. Such a correspondence between theory and object is generally the ultimate standard for both logical positivistic and hermeneutic analyses. The criteria by which the validity of reconstructive theories can be assessed are, however, of a different kind. They concern, first, the internal coherency of the theory, and, secondly, the fit with empirical findings.

The "fit" of a reconstructive theory cannot be taken as correspondence to the true nature of the object, but rather as deriving from three cognitive functions that a "well-fitting" theory should fulfil. First, by providing an explicit account of a certain phenomenon, reconstructive theories provide a measuring rod whereby marginal cases can be critically assessed. Secondly, reconstructive theories may fulfil a constructive function when actors come to rely on the explicated insights they provide to regulate their actions. Ultimately, as reconstructive theories are found to remain valid under varying conditions, they can be taken to provide theoretical knowledge (assertions of universal validity or "truths").<sup>28</sup>

The theory of basic rights that I have outlined in this chapter can thus far be mainly assessed on its internal coherency. The actual legal and political cases to which I turn in the next chapters, will be used to demonstrate in great detail how this theory can be employed to fulfil all three cognitive functions.<sup>29</sup> The public good argument for

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<sup>28</sup> Note that these functions apply just as well to this account of reconstruction as it is itself a reconstructive theory of social science practice.

<sup>29</sup> Notably Habermas himself has recently outlined a theory of basic rights (Habermas 1992: esp. Ch. III). Though this theory is clearly informed by his account of reconstructive social science, I think it can in many respects be shown to be far from satisfactory. Above all,

basic rights fulfils, for instance, a critical function in demonstrating that the right to free speech and the right to education both fall into the category of *basic rights*, while the right not to be tortured falls within a different category, the category of *human rights*. The public good argument can fulfil a constructive function when it is recognised in legislative and adjudicative practices and taken to inform them. Finally, one might even regard this argument as a social truth (within the context of liberal democracies), for instance to the extent that it is by now almost beyond dispute that the right to private property serves the preservation of the public good of the market economy.

The claim for the specific reconstructive theory of basic rights that I submit - one that relies on the twin theses of the public good argument and the conception of rights as reasons - is thus at the same time both humble and extremely ambitious. It is humble in that I do not claim this theory to represent anything more than just one voice among many. It certainly is not the only feasible theory of basic rights nor does it full grasp their "true" nature. Other theories may be just as coherent and just as appropriate in accounting for basic rights, from certain viewpoints they may be even more appropriate. I think, for instance, of the libertarian theory of basic rights that certainly fits better in certain (historical) contexts, but which, I argue, has become outdated in modern liberal democracies and which these days can serve only the interests of certain political groups. Here the great ambitions behind this reconstructive theory of basic rights also become apparent as it is expressly presented as an social intervention that can fulfil critical, regulative and theoretical functions with distinct political implications.

### Basic Rights in the Public Sphere

Above I stipulated that by employing the language of rights an actor claims that there is a recognisable norm according to which her claim is to have primacy over its

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Habermas's theory of basic rights lacks the confrontation with empirical findings. As I argue in reviewing it in section I) above, it leans heavily on an almost logical positivistic approach by which basic rights are merely deduced from the philosophical framework of discourse ethics. A Habermasian account of basic rights that is truer to the premises of reconstructive theory by taking empirical findings more seriously is advocated by Simone Chambers (1993).

competitors. Furthermore, I specified that the norms entrenched as basic rights are best justified by arguments that demonstrate how they serve the preservation of certain public goods. However, these theses leave unspecified in what way basic rights are to be recognised. According to their mode of institutionalisation, a distinction is commonly drawn between moral rights and legal rights.<sup>30</sup> While legal rights invoke a positively identifiable law that is upheld by the state, moral rights invoke a moral norm that derives its force (merely) from a shared social practice and understanding.

As legal positivists have argued at great length, a legal order need in no way correspond to a moral order, as a consequence legal rights need not correspond to moral rights (nor *vice versa*) (e.g. Hart 1961: Ch. IX). Which norms are laws can be determined according to "external", formal criteria irrespective of their content. Laws are norms that are ultimately enforceable by relying on the use of violence. A community is thus united under a system of laws when the use of violence has effectively been monopolised by a single actor (Weber 1921). This actor constitutes the state. The state is in no way obliged to adhere to a coherent body of norms constituting a legal order. However, given that we can assume the sovereign to have certain coherent interests over time, certain norms are bound to become identifiable. Consider for instance the interests all sovereigns appear to have in making 'seditious libel' liable to punishment.

A legal order emerges to the extent that laws are made positive and public.<sup>31</sup>

The positivity of these laws is secured by adopting strict authoritative statements of

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<sup>30</sup> Some authors have introduced the category of "institutional rights" to stand besides moral and legal rights. One enjoys an institutional right by virtue of one's role in a certain organisation or institutional setting. Examples of institutional rights are, for instance, the right of a boss to put his subordinates on overtime or the right of students to fair assessment of their work. Institutional rights may be officially stipulated in institutional documents or be entrenched in institutional mores, while the institution itself commands a specific set of sanctions. The ultimate sanction of any institution is expulsion. Though institutional rights are not directly codified in laws, they are generally legitimated by the law that recognises the institution's power to impose its sanctions. Institutional rights reflect many traits of both legal and moral rights. Rather than considering institutional rights as a prototype for rights in general, I think that they can be accounted for in terms that can be derived from a careful examination of the relations between legal and moral rights (cf. Dworkin 1977: 101 ff.).

<sup>31</sup> I will not give a historical account of the pre-conditions under which law was turned into a positive and public body of norms. See Weber (1921), Unger (1976: Chs. 2 & 3), and Somers (1993; 1994).



them according to well-defined procedures. Thus legal norms that have been recognised in accordance with these procedures can be delineated from those norms that have not.<sup>32</sup> This way of delineating the law at the same time serves their publicity as it allows for their determinate and efficient communication throughout society so that every member of the political community can take notice of them. Together, positivity and publicness of the law allow for a certain degree of predictability of sovereign interventions and thus they can be recognised as the main pillars under the ideal of 'the rule of law'. Consider, for example, Friedrich Hayek's characterisation of 'the rule of law' as implying that:

"government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of that knowledge" (Hayek 1944 quoted in Raz 1979: 210; cf. Hayek 1960: Ch. 14; Raz 1990b).

The distinguishing trait of liberal democracies as legal and political systems is that the legitimacy of decision-making ultimately derives from no other source than the people's sovereignty. An implication of this is that laws in liberal democracies are taken to rest on popular consent. This in turn has as a consequence that there is in liberal democracies a marked convergence in the substance of moral and legal norms as they both draw on people's understanding of what norms can be justified to regulate their interactions (cf. Gaus 1994). However, the basic difference that moral norms and legal norms are ultimately upheld by different means - moral norms are not backed up by the legitimate use of violence while laws are - is reflected in certain substantial differences between the norms that fall in either sphere (cf. Habermas 1992: §III.II). Hence, even in liberal democracies not all moral norms need to issue in laws, nor do all laws need to reflect moral norms.

Moral norms often remain inconclusive as there is no authority to settle disputes about what counts as a norm and how they are to be interpreted. When there are no effective moral norms, the outcome of social conflicts will reflect the status quo of

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<sup>32</sup> This seems to me the basic premise that has to underlie any legal positivistic theory. As I read it, this is also the crucial point about the "sources thesis" advocated by Joseph Raz (1979: Ch. 3; 1985).

social force as stronger actors can simply side-step the claims of their opponents. Relative to morality, the virtue of the law is that it can give primacy to certain claims over others irrespective of the social status quo (cf. Raz 1993: §V). This defining feature of the law has two notable implications. First, from the perspective of the law every conflict of claims turns into a political choice that need not simply be left to the balance of social force but can be made subject to an authoritative decision. Even if the ('non-')decision is made not to apply the law to a conflict, a responsibility is taken in preserving the structure of social force (cf. Bachrach & Baratz 1962; Lukes 1974). Secondly, to the extent that legal decisions are imposed without them relying on full consensus, the law is a medium through which force is exercised.

Characteristically in liberal democracies the force intrinsic to the use of law has been recognised and is kept in check by the emphasis given to the value of liberty. Hence liberal democracies enshrine the primacy of the sphere of morality in dealing with conflicts of claims, and the employment of the law requires justification. As Joel Feinberg observes, liberalism relies on "the presumptive case for liberty": "liberty should be the norm; coercion always needs some special justification" (Feinberg 1984: 9). It follows that to the extent that liberal democratic politics cannot overcome with social conflict, it still comes with coercion and the use of force. However, to the extent that political decisions in liberal democracies rely on justification, they offer an alternative to the use of outright violence (cf. Mouffe 1993).<sup>33</sup>

With respect to rights, the relation between law and morality in liberal democracies implies that not all moral rights need to be legal rights, nor need all legal rights be moral rights. We may, for instance, recognise a moral right of a senior person to a seat in the bus but not establish it as a legal right. Alternatively one may have a legal right to be acquitted when the prosecution has made an administrative mistake while there is no fully corresponding moral right.

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<sup>33</sup> Thus people who lack a conception of the viability of normative agreement and justification can claim that force (or violence) is ubiquitous in the legal process (e.g. Derrida 1992).

In all liberal democracies legal provisions have been established that serve basic rights. Most distinctively they have become enshrined in Bills of Rights that stipulate them in general terms that can be widely invoked. Sometimes these formulations are directly applied in constitutional review, but often it is recognised that these general formulations alone cannot be relied upon to determine decisions. Instead they are taken to provide the background against which more specific laws are to be upheld and interpreted.

However, apart from their legal manifestations, basic rights are first and foremost entrenched in the moral norms citizens in all liberal democracies recognise to obtain (cf. Coleman 1993: 219 ff.). As Simone Chambers maintains:

"Eventually, a right is constituted through processes of argumentation that demand, justify and uphold it. (...) Rights can only be established to the extent that there are generally recognised grounds for which they should be established" (Chambers 1993: 182)

Even if the views citizens hold are not fully reflected in laws, they bear directly upon legal and political decision-making as they provide lines of interpretation of the different legal provisions. It is these moral views that are primarily at stake in the theory of basic rights that I propose. Thus contrary to the mainstream jurisprudential literature on rights, I attribute primacy to the moral conceptions citizens have of basic rights over their authoritative employment by specific political and legal institutions (cf. Häberle 1975).

This perspective also allows us to appreciate that similar moral conceptions may be maintained through very different institutional frameworks, different legal provisions, and different formulations. It even enables us to see that basic rights can be recognised and effective in liberal democracies that have not adopted a Bill of Rights, most notably Great Britain. As basic rights operate through a complex of legal provisions and moral views that give coherency to them, sense can be made of the common belief that British citizens can enjoy the right to free speech equally well as citizens of any other liberal democracy, as well as of the assertion, made in the House of Lords, that the freedom of speech is "one of the fundamental freedoms" *Telnikoff v. Matusevitch*, [1991] 4 All ER 817 at 826 (cf. Boyle 1982; Barendt 1987; 1993).

However, to argue that basic rights can be maintained in the absence of a Bill of Rights does not, of course, imply that the absence of such a legal document does not make a difference (cf. Waldron 1993g). Indeed I will return to this issue in the conclusion after having considered a number of case-studies from Britain.

Relying on the fundamental liberal democratic ideal of the people's sovereignty, I thus maintain that political and legal practices are embedded and conditioned by the moral conceptions held in society (cf. O'Connell 1996). As regards the law, I hold that its main function is to secure, when needed, authoritative implementation of the people's views. Furthermore, I believe that the law plays a crucial function in liberal democracies in facilitating the critical rationalisation of citizen's moral and political views. Through its positivity and publicity the law provides a public representation of these views that serves to secure their continuity as well as providing a clear focus-point for critique. Thus the law fulfils a necessary condition for the continuing rationalisation of conceptions of basic rights and provides the main medium in which they have become sedimented (cf. Ladeur 1994).

### Comparative Analysis

It is of course impossible to "test" the theory of basic rights I propose against all possible legal and political decisions in which basic rights are invoked. A selection has to be made and in the following chapters I present six cases. These cases are organised along two dimensions: they differ with regard to the basic right that is involved and the political system in which they figure. I consider three different basic rights: the right to private property, the right to free speech, and the right to education; in two political systems: Great Britain and Germany. Thus there is one case corresponding to each combination of basic right and political system. Several questions may be raised against this selection and I will consider what I consider to be the five main ones.

	Property (Ch.2)	Free Speech (Ch.3)	Education (Ch.4)
Germany	Kleingarten	Strauß v. Giordano	Freie Schule Kreuzberg
Great Britain	de Rothschild Ltd.	Telnikoff v. Matusevitch	Newham

Table 1.1: The six cases to be analysed distinguished along two dimensions.

Why these three rights? In his famous lecture on citizenship and social class, T.H. Marshall distinguished three categories of rights: civil, political and social rights. Civil rights are the rights "necessary for individual freedom - liberty of the person, freedom of speech, thought and faith, the rights to own property and to conclude valid contracts, and the right to justice". The typical political rights are "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body". Finally, social rights "range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in society" (Marshall 1950: 8).

There is a rough correspondence between the three basic rights I will consider - private property, free speech and education - and Marshall's categories, except that Marshall's category of political rights does not fit exactly with my conception of basic rights. In its general form, "the right to participate" might qualify as a basic right. In that form it would, moreover, to a large extent overlap with the right to free speech and other civil rights. However, regarding more particular rights to participate in elections, these appear to me rather as "institutional rights" that derive from a particular political structure familiar to us as the modern state, than as basic rights that have a moral force in the context of any liberal political community. The correspondence of the three rights selected with Marshall's categories may be maintained by regarding the right to free speech as a political civil right.

Marshall's analysis apart, there are some other reasons for choosing these three basic rights. First, the notion of individual rights has from its inception been closely

related to ownership (cf. Tuck 1979). Often the sphere of one's ownership has been identified with the sphere of private autonomy in which one was free to fully enjoy one's rights. As my account of the basic rights is opposed to such a libertarian view, the question is whether it can nevertheless account for the right to private property. Furthermore, the analysis of private property as a basic right may yield some valuable insights about the relation between liberal democracy and "capitalism". Secondly, the selection of the right to free speech probably needs little explanation. This right has, in virtue of the U.S. First Amendment, probably become *the* prototypical basic right. Finally, I wanted to consider a social or welfare right. Many of these rights remain much disputed, for instance, the right to a basic income. Besides the right to health care, the right to education appears to be one of the few social rights that have become (relatively) firmly entrenched in late-twentieth century liberal democracies.

Why not one political system? I could have drawn my cases from only one political system to demonstrate to what extent my theory of basic rights would elucidate the way basic rights were there employed and to consider whether legitimate criticisms could be raised when practices would not conform to the theory. However, for two reasons I decided to disperse my attention across more than one political system. First, focusing on solely one system might well have blunted the critical edge of my analysis as I would not have present any alternatives to the practices observed. It might have been too easy to amend the theory infinitely to accommodate the findings. With more than one political system (and having made sure that the systems are of a widely divergent nature and that they cover a wide spectrum of institutional differences), accommodations towards one system always have to be checked with the findings in the other system. Secondly, I submit that the theory of basic rights proposed here is of general relevance in all liberal democracies. I assume that the basic arguments - the public good argument and the conception of rights as reasons - can be validated across the different cultural contexts provided by liberal democracies all over the world. Even if this remains to be shown, selecting my cases from more than one political system

demonstrates that the theory is not inherently embedded within one national, cultural context.

Why not all liberal democracies? The basic answer to this question is simple: because limits in time and resources would not allow so. Nevertheless I certainly could have considered more than only two political systems. Against this challenge I hold that once two well-contrasting political systems have been selected, the advantages to be gained from adding more are outweighed by the effort required from the researcher as well as the reader to get an adequate understanding of the legal and political context in which these cases would be set. To make each case accessible requires, in fact, a considerable background understanding of the particulars of the political system involved. In presenting the cases below I have tried to keep the necessary technical information to a minimum and to integrate it as much as possible in the course of the accounts.<sup>34</sup> Even so the reader may in the cases presented below find that she lacks information about the political and legal context to grasp the vicissitudes of each case.

Why Britain and Germany? First of all, though I claim that my theory of basic rights is relevant for liberal democracies throughout the world, it is clearly written from a West European perspective. This is probably the main reason why I have excluded the political system that world-wide dominates liberal discourse, and constitutional debates in particular, the United States. Another reason for this is that when included in a comparative analysis of this kind, the presence of the United States might well dwarf any other liberal democracy in comparison. Indeed, it even turns out in the case of the basic right to free speech that certain constitutional debates simply cannot be considered without referring to the particular political history of the United States.

One may also object that as I adopt a West European perspective, I should not claim any relevance for my theory beyond that part of the continent, for instance as regards the relatively young liberal democracies in Eastern Europe and those on other

<sup>34</sup> A good general introduction to the German political system is von Beyme (1979). Hesse (1982) is particularly useful for understanding of the German Basic Law. The general workings of British law are accessibly set out by Harry Street (1985). For a detailed and comprehensive treatment of British public law, see Wade & Forsyth (1994).

continents, or I should at least have included a sample of these political systems. I simply admit that such an enterprise would be beyond my powers, and that indeed I am liable to a eurocentrism that is not sensitive to the particularities of politics beyond Western Europe. Without doubt the theory would have to be amended, and possibly parts of it would even have to be cut out, for it to be equally applicable to non-West European political systems. Nevertheless I do believe that the basic theses themselves can be attuned to the particularities of different cultural contexts and that on that basis greater or less relevance for them can be maintained for all liberal democracies throughout the world.

Within Western Europe the selection quickly focused on the more widely known political systems. These are generally those of the bigger countries and those that in many respects have also had an impact, as exemplars, on the development of other political systems. Then soon the choice boils down to the classical three: Great Britain, Germany and France. The main dividing line between these three political systems is the contrast between the common law system and the civil law system, with Britain on the one hand and Germany and France on the other. When it came to choose between the latter two countries, the researcher's resources in terms of knowledge, linguistic abilities and contacts decided in favour of Germany. Maybe the country of the *Déclaration des Droits de l'Homme et du Citoyen* should have been included in a study of basic rights. In any case I do believe that the alternative of introducing France as a third political system would have only marginally benefited the substance of the study but at a high price in its legibility.

Argued positively, the political systems of Germany and Great Britain pose a fascinating contrast. The British system appears firmly rooted in good old common sense, drenched in a classical liberal history that by now gives a singular traditional twist to legislative and adjudicative practices which remains manifest above all in the common law. In contrast the German system appears as a highly rationalised artifice that has time and time again been rebuilt from the drawing boards and is controlled by fully rationalistic mechanisms. As a consequence there is in Europe probably no greater



contrast in the way basic rights are applied than between Britain, that lacks a Bill of Rights and in which decision-making is embedded in a patchwork of statutes and precedents, and Germany, that has one of the most modern Basic Laws around, and which is, moreover, vigorously guarded by the activist Federal Constitutional Court.

To what extent are the cases representative? In the following chapters I focus with each basic right on one case only in each political system. Is this enough to give a fair impression of how these basic rights are handled? I believe I can assure it is. First of all, I have taken great care in choosing these cases and in ensuring that they did not involve extraordinary conflicts or extremely eccentric decisions. Indeed, the cases are taken to involve legal conflicts that might arise in any one's life; one should be able to imagine that one oneself might become engaged in conflicts of similar kinds. Furthermore, I think that the ways in which the cases selected have actually been dealt with in court do well reflect the main arguments one has to confront on the issues concerned within the respective legal systems.

A further aim was to deal with cases that raised similar issues and were thus to a certain extent comparable. The cases dealt with concerning the right to free speech and the right to education certainly raise some interesting points of comparison. In the case of the right to private property I was less successful in finding comparable material, since there is markedly little convergence in the basic concerns on which the legal debates in Britain and Germany focus in this sphere. Instead of being comparable, the cases eventually selected are complementary as they display a structural difference in the underlying conception of property.

Finally, it may still be objected that one cannot base an adequate account of a whole legal sphere on the basis of a single case. Instead one should review a whole range of cases to see what views obtain. My answer is, however, that such a focus on general characteristics of decisions would easily obscure the central question of how we can account for why a particular decision was reached in a particular case. To answer this question, one requires as complete an understanding as possible of a case (ideally approaching that of the judges involved), and such an understanding can only emerge, I

think, from a lengthy, in-depth analysis of a case. This is the kind of approach I take in presenting my cases.

To present such an analysis for several cases would soon add very little to the general understanding of the reader and become rather tedious. What is more, I do not think that multiple analysis are needed because it is in the nature of adjudication to secure that the decision of each single case reflects the decisions of all earlier cases. Each single decision is related to all others of a similar kind as it is subject to the same general statutes and as earlier decisions may, as precedents, be brought to bear upon it. Thus representativeness of single cases (exceptions apart, but I have taken care that the cases dealt with cannot be regarded as such) is secured by virtue of the very nature of the legal system.

## THE BASIC RIGHT TO PRIVATE PROPERTY

For a right with such a long history, the right to private property remains notably contested. Classical civil rights, such as the right to free speech, appear to be beyond contest in liberal societies, while current political debates generally concern (social) rights that have only been established in the last century. Of course, civil rights are sometimes the subject of legal conflict, but their normative foundations are hardly ever challenged. However, in the case of the good old right to private property, even though few simply reject it, many feel that there may be something vicious in its principled defence.

The institution of private property is often regarded as the necessary condition for a society to enter the dynamics of 'capitalism'. For this reason the issue of private property has been a focal point for much of the political debate in the last four centuries. Such debates could rarely be restricted to the right to private property as such, its simple justification and limits, but often resulted in the confrontation of complete ways of life, people's socio-economic interests, their political ideals and socio-cultural allegiances. Only lately, partly as a consequence of the demise of communism as both a practical and a theoretical enterprise, it may have become easier to deal with issues of private property in the particular terms they raise instead of overburdening them with the language of grand polemics. Notwithstanding the polarising theoretical exchanges, capitalist societies have in the meantime developed along notably 'mixed' lines which allow for a wide range of very different economic practices. Yet the right to private property remains a founding pillar of liberal democratic regimes. Thus to that extent, these societies are basically 'capitalist'.

The right to private property serves to uphold individuals' claims to certain goods by virtue of their ownership of them. In other words, once the right to private

property is recognised, one's ownership of a good allows one to uphold all possible claims in regard to it and reject all claims others might raise to it. This formulation relies on a strict distinction between the right to private property and ownership. We may even contrast these two terms with a third one: possession.<sup>35</sup> Possession I take to be the most concrete of the three terms. It means having direct physical command over a good. I possess, for instance, the clothes I wear and the ball in my hand. Correspondingly, possession in land equals its occupation. Ownership means having a title to a good, or rather to have the supreme title to it. This title in a good persists even while its possession may change. Thus, for instance, I own my jacket even though it is being worn by a friend to whom I have lent it. Similarly, while in a ball game different people possess the ball in turn, its ownership remains stable. Ownership of a good needs to be marked, otherwise it may well be lost when somebody else takes possession of it. This is especially important for ownership of land since land can serve as a container for other goods. For this reason the ownership of land (and of houses) is generally subject to official registering (cf. Lawson 1958).

Often the right to private property is equated with ownership. However, the importance of distinguishing between the two terms becomes particularly apparent when we consider different property regimes governing the claims of ownership. Generally, regimes of private property rights are distinguished from common property regimes and state, or collective, property regimes (cf. Waldron 1988: § 2.5). Each of these property regimes differs markedly from the others in its distribution of powers ruling the claims of ownership. Under a regime of common property no individual has

<sup>35</sup> The most systematic exposition of these distinctions can probably be found in Hegel's *Philosophy of Right* (1821). Hegel's discussion starts with drawing the distinction between possession and ownership as matters of 'abstract right' (Hegel 1821: I.1, esp. §§45/6). In other words, these concepts apply between people even in the absence of any social order. The right to private property, Hegel recognises, only comes into existence in civil society under a state (Hegel 1821: § 217). However, this discussion is relatively limited compared to his earlier account of possession and ownership. Ignoring the dynamic nature of his philosophy, many commentators have therefore been tempted to regard the earlier account as presenting Hegel's theory of the right to private property (cf. Waldron 1988: Ch. 10; Munzer 1990: Ch. 4, §7.2 succeeds much better in presenting the different sides to Hegel's argument). Karl Marx took issue with Hegel's theory of right exactly by arguing that the system of property rights under the state lacks justification and simply sanctions the power relations established under abstract right (cf. Ryan 1984: Chs. 4 & 5). Obviously, I disagree in turn with Marx as I set out to justify the right to private property under democratic conditions.

the power to exclude claims to the goods of the others with whom these are held in common. Under a regime of collective property the power to adjudicate over claims to goods is concentrated in the political apparatus of the state. Only under a regime of private property can we properly speak about property rights residing in individual owners and warranting their claims to exclude others from the goods they own. It is only when the right to private property is recognised that it becomes self-evident that ownership implies a whole range of claims. This insight is missed when the right to private property is conflated with ownership.<sup>36</sup>

Ownership and the right to private property raise also rather distinct questions, although they are obviously related. The main question about ownership is under what conditions one acquires it. Generally a distinction is drawn here between principles of "original appropriation" and principles of "transfer". Principles of "original appropriation" define the conditions under which one can become the owner of a good that was previously owned by no one. Normally these principles lay down certain general social conditions that have to be fulfilled and certain actions that the prospective owner has to perform. Principles of transfer define the conditions under which the ownership of a good can be transferred from one person to another. Besides

<sup>36</sup> Consider, for instance, the argument of the Italian legal theorist Luigi Ferrajoli who disputes the status of private property as a right and reduces it to a claim. The grounds that Ferrajoli gives to substantiate his argument are that, unlike other basic rights, property is disposable and singular rather than inalienable and universal. As to the first ground he argues: "property is by its nature a disposable right, that is, an alienable, negotiable, transactable one" (Ferrajoli 1994: 270). This clearly refers to ownership, the claims of which are indeed disposable. However, the right to private property that serves as a guarantee for these claims persists even when ownership in certain goods is alienated. This is similar in the case of such a well-recognised right as the right to free speech which persists even when one does not actually (make a claim to) talk. A further similarity between property and other basic rights is that although all subject to them enjoy the protection granted by these rights, some are likely to derive more benefits from them than others because of different social circumstances and capacities. This point as well is completely missed in Ferrajoli's second argument, holding that property "is by its nature (...) not due to all since each may or may not be the bearer of it, and if so is its bearer to the exclusion of others" (id.). Again this is an argument about ownership which is distributed throughout society. The right to private property, however, applies equally and universally to all.

Interesting enough in the English translation by Iain L. Fraser we read 'ownership' rather than property (p. 9 of the manuscript). However, Ferrajoli consistently uses the Italian 'proprietà', since the Italian language has no equivalent for ownership, though it has one for possession ('possession'). To make the distinction Ferrajoli should consistently have distinguished between 'proprietà' and something like 'il diritto fondamentale di proprietà'.

general social conditions and certain actions by the prospective owner, these generally also regard certain actions by the original owner.

The right to private property requires, of course, that the conditions of ownership have been defined. However, the main concern of the right to private property is with the claims that can be derived from ownership. In a classical article A.M. Honoré has described ownership as "a bundle of incidents", comprising "the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the right or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary" (Honoré 1961: 113). Rather than referring to "incidents" or "rights", I call these individualisable legal entitlements "claims" (cf. Section 1.II above). As Honoré observes, ownership can be more or less complete, since all of these claims can logically be distinguished from each other and a person may enjoy some without enjoying all of them (cf. Honoré 1961 § III). One's ownership may, for instance, be severely restricted by the state under a regime of collective property that grants individuals only claims to possession and to limited income of the goods they own. However, when the right to private property is recognised, one's ownership of a good not only goes to support all possible claims to this good, but also comes with the personal power to exclude or assign any claims others may raise to the good. The central question concerning the right to private property is hence: on what grounds would one be willing to withdraw one's own claims to certain goods by virtue of other's ownership of them?

From all this it follows that one may accept a certain set of principles defining ownership without binding oneself to a particular conception of property, or, in particular, to private property. Nevertheless the basis on which ownership comes to be acquired may well play a central role in the kind of property regime one deems justified. One may, for instance, be inclined to recognise more claims to ownership that is acquired through individual effort than to ownership that is authoritatively allocated by the state.

In the next section I will address the question of the justification of the basic right to private property: on what grounds would one be willing to withdraw one's own claims to certain goods by virtue of other's ownership of them? I revisit the main classical philosophical answers given to this question which focus on the values of self-ownership, liberty and the preservation of a market-economy respectively. Though I do not want to downplay the moral force of the first two values, I argue that politically they fall short of justifying the duties, implied by the right to private property, to the people who have to bear them. As I will argue, the best justification of the duties imposed by the institution of private property, is that this right is needed to secure the public good of the market-economy. It is this argument, demonstrating how the right to private property serves the public good of the market-economy that warrants its status as a basic right.

Whatever basis the basic right to private property has in liberal democracies, one may well observe that claims that this right serves to uphold are frequently withheld by contemporary states. As commentators like Friedrich A. Hayek have persistently pointed out, such interventions undercut the security actors enjoy in the market-economy, and as this public good is detrimentally affected, society at large is set at a disadvantage. In section II my aim is to provide an account of how it is possible in liberal democratic societies to recognise, on the one hand, the basic right to private property and to decide, on the other hand, in particular cases that the claims supported by the right are to give way to other interests. For that aim I use the public good argument for the right to private property to develop a framework which allows us to dissect the different interests involved in the right to private property and to compare them with those competing consideration against which they must and can legitimately be weighed.

In section III I analyse two cases in which the basic right to private property is applied to adjudicate objections to state intervention into ownership claims. These cases clearly illustrate that private property is no absolute in modern liberal democracies. One may even fear that as states command an ever widening range of administrative

instruments the right to private property may in the end run void. However, the reconstruction of these cases is to demonstrate how the basic right to private property can be taken seriously even if ownership claims need not always prevail over competing claims.

The chapter concludes with a section that summarises the findings and tries to put them in one coherent perspective.

### **I) JUSTIFYING THE BASIC RIGHT TO PRIVATE PROPERTY**

As previously said, I consider the central question concerning the justification of the basic right to private property to be: on what grounds would one be willing to withdraw one's own claims to certain goods by virtue of other's ownership of them? Thus posed this question directs one to look at those who have to give in by virtue of this basic right, those who have to yield to certain duties. As Jeremy Waldron has argued:

"when we argue about property, our attention should be focused (more than it usually is) on the predicaments of those whose interests are most prejudiced by the normal operation of the privatized economy" (Waldron 1993h: 185)

Posed once more in other words, the question is why would one recognise the basic right to private property as it serves to privilege owner's claims to goods at the expense of one's own interests? According to Waldron, successful responses to such questions of justification have "to show that the hardship [involved] will not in fact occur, or that it is unavoidable or for some other reason not morally unacceptable in the circumstances" (Waldron 1993h: 185).

Typically in his *The Right to Private Property*(1988), Waldron proceeds upon the premise that a justification of the right will have to show that "an individual interest considered in itself is sufficiently important from a moral point of view to justify holding people to be under a duty to promote it" (Waldron 1988: 3; emphasis added). Turning to the classical account of John Locke in his *Second Treatise on Government* (1690), the value of self-ownership suggests itself as an individual interest on which the right to private property can be based. This individual value *par excellence* has in recent times been extensively explored by libertarians following the Lockean lead, Robert



Nozick probably being the best known example (Nozick 1974). Alternatively, one may turn away from self-ownership to argue that the right to private property is inherently implicated by the supreme individual interest in liberty. Below I will consider this argument on the basis of Friedrich Hayek's arguments in *The Constitution of Liberty* (1960).

However, I believe that both the argument of self-ownership and the argument of liberty cannot be taken to succeed in binding those who have to bear the duties imposed by the right to private property. Instead I argue that, contrary to Waldron's claim, we have to move beyond the specific value of the individual interests of proprietors, to ask whether society at large may share in the interest of proprietors in knowing their claims to be secure. This, I think, is indeed the case and can be shown by analysing the way proprietors operate in the market-economy and the benefits society at large, including those who see their claims to goods restricted, derive from it. Thus, I argue that the right to private property can be justified as it serves the preservation of the public good of the market-economy in which all members of society can be taken to have a common interest.

### Self-Ownership

John Locke's labour theory of property is probably the most widely discussed theory of property rights among political theorists. Locke's account of property starts from the presumption of self-ownership: "every man has a property in his own person. This nobody has a right to but himself". This premise leads straight into his basic argument:

"The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever he removes out of the state that nature has provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it has by this labour something annexed to it, that excludes the common right of other men" (Locke 1690: §27).

This argument basically relies on two phrases that demand elucidation (cf. Sreenivasan 1995). First, Locke defines the conditions under which some one can come to own a

certain good in terms of the "mixing" of labour. In a second step this leads to the exclusion of "the common right of other men".

Locke's use of the term "mixing" has given rise to some problems. As Robert Nozick asks:

"Why isn't mixing what I own [labour] with what I don't own [natural goods] a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice" (Nozick 1974: 174/5).

Though the "mixing"-metaphor serves to stress that in labouring one invests something of one's own, the term is obviously too broad. Instead James Tully and Gopal Sreenivasan have persuasively argued that Locke's view of the kind of labour that entitles one to ownership is best regarded as "making" that require of the actor besides the mixing of one's labour also a purposive, intellectual idea of the interests the belaboured good will satisfy (Tully 1980: 35 ff.; Sreenivasan 1995: Ch. 3). Corresponding to Locke's idea of God's purpose with man, labour entitles one to ownership as one makes an effort to bring nature to fruition. Indeed, this labour theory of original appropriation seems to be rather persuasive, even though it has lost most of its relevance in the modern world where few, if any, natural goods are still left unappropriated.

The major problem of Locke's theory lies not so much in the role the attributes to labour in defining ownership but rather in the property regime that he seeks to derive from these premises. Here we get to the second phrase: acquiring ownership works at the expense of "the common right of other men". Thus the question of the justification of private property is raised: does appropriation through labour suffice to ground the power of the right to private property to exclude all claims of others? For Locke this was really a major question as his natural law background committed him to the view that God had originally given the world to all human beings in common. Individual appropriation thus would appear to require the consent of all. However, "If such a consent as that was necessary, man had starved, notwithstanding the plenty God had

given him" (Locke 1690: §28). Therefore, Locke takes on the task to "show, how men might come to have property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners" (Locke 1690: §25).

Locke succeeds in this task by holding that the primacy the right to private property awards to the claims of owners can only be justified if certain conditions maintain. First of all, there is the "spoilage condition". Locke argues that no claims to property can be upheld if they will leave the goods involved to spoil: "As much as any one can make use of to any advantage in life before it spoils; so much may he by his labour fix property in" (Locke 1690: §31). Concretely, when two persons raise, for instance, the claim to use a plot of land and one will leave it to spoil, the claim of the other is to prevail even if the former qualifies as its owner.

The pivotal precondition for the claims of private proprietors to predominate is, however, the "sufficiency condition", that requires that "there is enough and as good left in common for others" (Locke 1690: §27). Obviously, this condition does not allow for too strict a reading; every appropriation reduces the stock left available to others (cf. Nozick 1974: 178 ff.; Waldron 1988: §6.15). However, the bottom-line of Locke's argument appears to be that claims of private property have to give way at the point where they prevent people from providing the means for their self-preservation (Sreenivasan 1995: Ch. 2). Locke's most precise rendering of this notion may be found in the *First Treatise*:

"God the Lord and Father of all, has given no one of his children such a property, in his peculiar portion of the things of this world, but that he has given his needy brother a right to the surplusage of his goods; so that it cannot justly be denyed him, when his pressing wants call for it" (Locke 1690: I, §42).

Besides the spoilage and the sufficiency condition, Gopal Sreenivasan has pointed out that Lockean property rights are further limited by two relatively minor conditions, namely "the necessity of satisfying disabled needy's right of charity and dependent children's right to maintenance (inheritance)" (Sreenivasan 1995: 149; cf. 100-106).

When these conditions are met, the distribution of property claims is bound to remain within equitable bounds (Locke 1690: §36).

The crucial point about Locke's argument for private property is thus that it can only be justified if no one finds herself obstructed in her desire to provide for her means for self-preservation. This condition easily obtains in Locke's "state of nature" as natural goods are available in great abundance and each individual has only limited means to appropriate them. However, things change with the emergence of money. Money enables an individual to own an infinite amount of goods as it can be hoarded up without spoiling and, as commerce develops, individuals soon develop an interest to appropriate every single piece of nature (Locke 1690: II, §§36, 45, 50; cf. Macpherson 1962: §V.2.iii). Nevertheless Locke believes that the sufficiency condition on private property can still be maintained as the economic expansion that follows from the exploitation of goods serves to widen the opportunities of all to secure the means to their self-preservation.

In recent years Locke's theory of property rights has received much attention as it was adopted by Robert Nozick to develop a rather extreme theory of justice: the entitlement theory (Nozick 1974). The essence of the entitlement theory is that one can be entitled to a claim to a good only if one of two conditions is satisfied. Such a claim is acquired either through "just acquisition" or through "just transfer".<sup>37</sup> Nozick's account of just appropriation closely follows Locke's labour theory of ownership. However, Nozick is much less inclined to accept the conditions Locke imposes upon ownership if it is to uphold the full range of claims under private property. Rather, he uses the difficulties implied in the sufficiency condition - "to leave enough and as good for others" - to argue for the most minimalist interpretation in which it protects nothing but the actual *use* one formerly made or could well have made of the good appropriated (Nozick 1974: 174-182).

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<sup>37</sup> In addition to acquisition and transfer, Nozick's entitlement theory includes as a third principle of lesser importance "the rectification of injustice in holdings" (Nozick 1974: 152). Rectification of past injustice might possibly require enormous redistributive measures, for instance as the American Indians were to be fully rectified for the disrespect the European pioneers showed for their established property.

Having thus reduced the relevance of the sufficiency condition, Nozick can argue that all possible claims to goods derive from ownership alone, and withhold any legitimacy to claims that may conflict with these or that impose certain limits upon them:

"There are particular rights over particular things held by particular persons, and particular rights to reach agreements with others, if you and they together can acquire the means to reach an agreement. (...) No rights exist in conflict with this substructure of particular rights. (...) The particular rights over things fill the space of rights, leaving no room for general rights to be in certain material condition" (Nozick 1974: 238).

As this passage makes clear, Nozick does not allow any other grounds to justify claims to goods than ownership acquired through either appropriation or transfer. On this (contestable) basis the unwillingness of the bad Samaritan who passes by the starving beggar without giving him any of the food she possess in great amounts stands fully in her right, while to impose such a transfer would be unjust.

Nozick bypasses the substantive conditions by which Locke seeks to limit the claims that can be upheld by way of the right to private property. Property rights in the entitlement theory allow for no interference at all. On the whole, Nozick's theory seems predisposed towards a well-functioning, assertive market society in which the winners have exclusive claims to all the goods they can acquire. As for the losers in such a society, Nozick seems to perceive little need to consider their claims and to justify to them the property regime he proposes.

The basic intuition underlying the self-ownership argument for the right to private property is that one deserves the fruits of one's labour (cf. Shapiro 1991). Informed by the natural law tradition, Locke himself is, however, sensitive to the fact that absolute and exclusive property rights may come at great costs for some. Eventually his justification of private property turns out to depend more on the condition that the basic need for self-preservation is to be secured for all than on the value of self-ownership alone. As Nozick's entitlement theory in no way seeks to meet the interests of those who find their claims withheld under the right to private property, it cannot but fail in justifying the right to private property

### A Private Sphere for Liberty

A second popular line of argument for the right to private property derives from the value of liberty. Though there are many different views on what actually constitutes liberty, its value and the need to secure this value against intrusion are virtually beyond dispute. Rather the wide debate on liberty goes to testify that it represents one of the supreme human values. Even if one does not regard liberty as *the* supreme value to be secured in politics, a minimum amount of it is often taken as a necessarily requirement for any justifiable political order.

The argument in this sub-section relies on a relatively simple conception of liberty that takes its essence to lie in the ability to choose or, to formulate it negatively, to not being bound in one's actions. It is this idea of liberty that is also adduced by Friedrich Hayek to justify the right to private property.<sup>38</sup> Freedom, according to Hayek, consists in the absence of coercion by others forcing one to act according to their will rather than one's own.<sup>39</sup> Coercion, Hayek maintains, "is bad because it prevents a person from using his mental powers to the full and consequently from making the greatest contribution he is capable of to the community" (Hayek 1960: 134). The main way in which coercion is to be prevented lies in "enabling the individual to secure for himself some private sphere where he is protected against such interference", and herein we find the basic justification for the right to private property: "The recognition of property is clearly the first step in the delimitation of the private sphere which protects us against coercion" (Hayek 1960: 139/40). It is this last step, however self-evident it may appear for Hayek, that I will challenge.

<sup>38</sup> Chandran Kukathas (1989: esp. Ch. 4), to whose critique of Hayek's thought I am greatly indebted, emphasises that for Hayek the value of liberty is instrumental; Hayek regarded individual liberty as a precondition for progress and civilisation. However, I do not think that this reduces the importance of this value in his theory. The place it claims (already) in the titles of his two major works in political theory - *The Constitution of Liberty* (1960) and *Law, Legislation and Liberty* (1976; 1979) - may testify to that.

<sup>39</sup> Following Hayek, I will regard the concepts of liberty and freedom as equivalents (Hayek 1960: 11). For Hayek's views on the different conceptions of liberty, see Hayek 1960: 54 ff..

The means by which a private sphere can be secured are laws. Undeniably, however, laws restrict freedom as they impose obligations upon people. Hayek acknowledges this, but holds that this is unavoidable since

"so far as men's actions towards other persons are concerned, freedom can never mean more than that they are restricted by general rules. Since there is no kind of action that may not interfere with another person's protected sphere, neither speech, nor the press, nor the exercise of religion can be completely free. In all these fields (and, as we shall see later, in that of contract) freedom does mean and can mean only that what we may do is not dependent on the approval of any person or authority and is limited only by the same abstract rules that apply equally to all" (Hayek 1960: 155).

Hayek thus concedes that liberty cannot be absolute. Its value is preserved, however, when restrictions upon it follow general, abstract laws.

The question then becomes how we determine these laws. For a start they are to be distinguished from commands. Coercion can be exercised capriciously by commands as they allow a ruler to impose his personal will whenever he deems it convenient on whomever has provoked his wrath. Laws, on the other hand, do not issue from a particular interest in an individual situation but derive from general considerations. Pursuing this line of argument, Hayek takes laws to be bound by three formal properties: 1) they should be general and abstract, 2) they should be known and certain, and 3) they should apply equally to all (Hayek 1960: 207-209; cf. 149 ff.). However, these formal criteria still fail to specify the content of the laws required. Why would these laws have to include the right to private property? Is that inclusion necessarily inherent to the private sphere of liberty? What then about the objection that laws establishing the right to private property secure undue advantages to the propertied over those without property?

There is one interesting passage where Hayek comes to consider such queries:

"The requirement that the rules of true law be general does not mean that sometimes special rules may not apply to different classes of people if they refer to properties that only some people possess. (...) distinctions will not be arbitrary, will not subject one group to the will of others, if they are equally recognised by those inside and those outside the group. (...) When, however, only those inside the group favor the distinction, it is clearly a privilege; while if only those outside favor it, it is discrimination. What is privilege to some is, of course, always discrimination to the rest" (Hayek 1960: 154).

Heeding these observations, the question remains whether the right to property cannot be regarded as a privilege of a certain class that, literally, possesses this property, while discriminating against others; why would those finding themselves outside of the class of proprietors consent to the abstract laws securing property?

Like the argument from self-ownership, the argument from liberty comes to affirm the legally sanctioned powers of owners to exclude claims of others without actually bothering to justify these. No doubt labour and liberty are relevant values in defining ownership titles. However, these arguments fail as justifications of the right to private property, upholding the extensive and exclusive claims owners may have to their goods against competing claims, because they do not seriously address themselves to "those whose interests are most prejudiced by the normal operation of the privatized economy" (Waldron 1993h: 185). Locke's classical theory of property may serve here as an exemplary exception as it resolves, besides a system of individual property rights, into an emphatic insistence on the social duty to secure for all members of society the opportunities to provide for their own means to self-preservation. However, to appreciate that the right to private property can meet this sufficiency condition, one must turn away from mere individualistic justifications of private property to consider how it may serve the public good.

### The Public Good of the Market Economy

No one who reflects about private property can fail to note that private property serves as an essential precondition for the expansion of value attributed to goods. This development can fully take off once the security of private property has laid the basis for the development of a market economy. Locke already observed how the institution of private property securing the willingness to labour combined with the invention of money to distinguish his nation from the Americans, "who are rich in land, and poor in all comforts of life (...) and a king of a large and fruitful territory there feeds, lodges, and is clad worse than a day labourer in England" (Locke 1690: §41).



Similarly, Hayek's account of the right to private property moves beyond the mere value of liberty it is taken to serve to its role in facilitating an effective functioning market-order. Hayek refers to this order as a 'catallaxy': "the order brought about by the mutual adjustment of many individual economies in a market through people acting within the rules of the law of property, tort and contract" (Hayek 1976: 109). We can think of catallaxy as a game: "It is a wealth-creating game (and not what game theory calls a zero-sum game), that is, one that leads to an increase of the stream of goods and of the prospects of all the participants to satisfy their needs" (Hayek 1976: 115).

Both Locke's and Hayek's observations on the role the institution of private property fulfils for the preservation of the market economy suggest a kind of 'maximin' argument: the institution of the right to private property is justified because it works in the benefit of the least advantaged as well (cf. Rawls 1971; Gray 1989). Characteristically Hayek maintains:

"though in the short run the unfavourable effect on them may out-balance the sum of the indirect beneficial effects, in the long run the sum of all those particular effects, although they will always harm some, are likely to improve the chances for all" (Hayek 1976: 122).

As it turns out, the proper functioning of the catallaxy is a public good that justifies the imposition of incidental unfavourable effects. In this light, and in this light *alone*, we can understand Hayek's assertion that "coercion is permissible only where it is necessary in the service of the general welfare or the public good" (Hayek 1976: 1). As Hayek hastily adds, concepts like general welfare or the public good are likely to be abused by irresponsible politicians, seeking to justify unwarranted limitations of freedom. In Hayek's view the public good refers solely to the laws that secure the free pursuance of individual plans in the market order.

Thus Hayek's justification of the right to private property relies on the empirical argument that private property is a precondition for an efficacious market economy and that in the long run such an economy assures greatest wealth for society at large. Hayek highlights a number of important features of the catallactic market order. For a start, this order is an artefact of civilisation, it only comes into being when individuals come

to respect certain laws. However, as Hayek is eager to emphasise, the order that it provides for human action does not arise from human design (cf. Hayek 1960: 54; cf. 1979: 155 ff.). His account is anti-rationalistic in this sense:

"What we must learn to understand is that human civilization has a life of its own, that all our efforts to improve things must operate within a working whole which we cannot entirely control, and the operation of whose forces we can hope merely to facilitate and assist so far as we understand them" (Hayek 1960: 70).

These, he adds, are not "arguments against the use of reason, but only arguments against such uses as require any exclusive and coercive powers of government" (id.).

The point that Hayek is getting at is that there is a wide dispersion of knowledge in society: "The sum of the knowledge of all the individuals exists nowhere as an integrated whole. The great problem is how we can all profit from this knowledge" (Hayek 1960: 25). In a catallaxy this problem is overcome as the market order serves to co-ordinate this dispersed knowledge. Once private property has been recognised to secure a private sphere, it fulfils a crucial function in this order:

"The rationale of securing each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge, especially of his concrete and often unique knowledge of the particular circumstances of time and place. The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions. At the same time it tells him what possible consequences of his actions he must take into account or what he will be held responsible for" (Hayek 1960: 156/7).

In other words, the right to property protects certain legitimate expectations that are required for efficacious interaction in the market place (Hayek 1976: 37; cf. Coleman 1987: 82).

### **The Socialist Alternative**

The alternative to the preservation of a catallaxy is a socialist order that relies on a collective property regime and has the allocation of goods administered by political agencies. Instead of reacting directly to claims raised in market interactions, the allocation of goods and all the incidents deriving from them - use, income, liability etc. (cf. Honoré 1961) - are then governed by administrative standards. This order severely

affects the expectations of the individuals handling goods. Their willingness to take care of goods and to labour so as to increase their value would still be required. However, compared to the circumstances in the market economy, the range in which they find themselves directly responsible for their actions is significantly reduced. It is not their task to anticipate whatever demands may rise in society and what can be done to meet them.

The problems likely to arise in a socialist order can be distinguished to be of two kinds. First, lacking the device of markets to register demands, the standards adopted by the economic administration are bound to remain defective (Mises 1932; cf. Lavoie 1985). Socialists have claimed that this problem may be overcome through the limited introduction of markets, if only as instruments for registration, not for allocation. However, the idea of 'market socialism' still appears a rather unstable hybrid of ideas and so far its proponents cannot point to any real-life examples that demonstrate its viability. The spectacular 1989 breakdown of the economic regimes in Eastern Europe and the retreat of the commitment to central planning among West European socialists rather testifies to the stubbornness of this problem.

The second kind of problems with socialism derive from the absence of mechanisms by which individuals can be motivated to invest their labour to care for goods and to increase their value. As all goods remain collective property, individuals' performance in taking care of them is not directly related to the satisfaction of their claims in the future. Indeed, it appears that the right to private property secures the conditions under which individuals are most likely to care for goods and to maximally increase their value. The point is straightforwardly stated by Richard Posner: "the legal protection of property rights has the important economic function of creating incentives to use resources efficiently" (Posner 1986a: 28; cf. Demsetz 1967). Markets are likely to communicate incentives that will induce proprietors to employ their goods to the full. Whenever such incentives are mediated by administrative agencies, the commitment of individuals to employ goods is likely to reduce. In any case, whatever alternative

system of motivation could be conceived of, it would at most achieve an effect equal to the market.

Hayek's argument is mostly identified with the first objection against socialism, that the institution of private property is a precondition for the effective co-ordination of economic interests through the market. However, the second argument emphasising the security private property establishes in individuals' ownership of goods turns out to be at least as forceful. Its full force becomes apparent when we consider the three strands that Cass Sunstein has distinguished as underlying this argument (Sunstein 1993b: 911-913). Firstly, Sunstein ascribes to human beings a powerful "inclination to bring goods and services to oneself and to the people one cares about". Such an inclination figures as a well-known theme in the history of political philosophy; Sunstein refers to Aristotle, of course the idea has often been imputed to Locke, but more emphatic statements of it can be found in the work of such diverse philosophers as Hume and Hegel (Schlatter 1951; cf. Ryan 1984). It is important to note that this inclination is not merely oriented towards the provision of the basic goods for life, it presupposes that human beings find value in owning goods, in their presence, possession and the care they can give to them. The institution of private property provides an important precondition for this enjoyment. What is more, as Sunstein observes, it takes advantage of it in turning it into a pillar of the market economy.

This argument is further developed with the second implication, which is that the institution of private property solves certain serious collective action problems. The paradigm example of such problems is the "Tragedy of the Commons": under a system of common property each individual having a claim to a plot of land will be induced to exploit it as intensive as possible, thus seeking to attain an advantage over the other owners. In the aggregate this leads to over-exploitation and a severe loss of value of the land. Such a loss can be avoided by assigning one actor a superior property right in the land.<sup>40</sup> She will then have an interest to calculate the costs of exploitation and can on

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<sup>40</sup> Of course, the Tragedy of the Commons can also be warded off by a regime of collective property. However, that solution comes with a "principal agent problem" as the

that basis assign claims to others (Schmidtz 1990; Demsetz 1967; cf. the alternative perspective by Ostrom 1990). Finally, Sunstein considers the advantages of a system of private property from a macro-economic point of view, arguing that such a system "creates the kind of stability and protection of expectations that are preconditions for investment and initiative, from both international and domestic sources" (Sunstein 1993b: 913).<sup>41</sup>

### Common Interests in Private Property

The argument that the right to private property induces proprietors to care for goods and to maximally increase their value, also serves to make apparent how other's interests are related to the proprietor's interest in goods. Typically, such interests reveal themselves by the willingness of others (third party beneficiaries) to purchase the good. As long, however, as the good resides in the secure possession of the proprietor the interests of others may be difficult to identify and no one in particular is likely to stand up for them. Nevertheless challenging the institution of private property will detrimentally affect the interests others may have in having the goods properly looked after or in sharing in the value added to these goods, as it undercuts the commitment of the proprietor to make the best of her goods.

That the right to private property serves a public good becomes clear when we consider society as a whole. Then we perceive that value is added to goods through widely dispersed interactions which together constitute the 'catallaxy'. With Locke, one may wonder that

"'tis not barely the ploughman's pains, the reaper's and thresher's toil, and the baker's sweat, [that] is to be counted into the bread we eat; the labour of those who broke the

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performance of the people assigned to take care of the land is not directly related to individual rewards.

<sup>41</sup> Sunstein proceeds by arguing that private property also serves as a major precondition for a viable democracy, emphasising in particular the realm of private autonomy that is secured by way of private property. On that basis, he concludes that "the right to private property helps create a flourishing civil society" (Sunstein 1993b: 916). This argument seems to me debatable at least. In my opinion the sources of private autonomy and civil society reside rather in a complex of cultural factors to which the contribution of private property is slight at most and may at times even be negative (cf. Habermas 1992: esp. Chs. III & VIII). Hence I see little justification for the institution of private property in these kind of arguments.

oxen, who digged and wrought the iron and stones, who felled and framed the timber employed about the plough, mill, oven, or any other utensils, which are a vast number, requisite to this corn, from its being seed to be sown to its being made bread, must all be charged on the account of labour" (Locke 1690: 43).

That goods are held secure under private property occurs as a precondition for labour being invested. The institutional effect of this is an efficiently functioning market. Eventually nobody is able to exclude herself from this process. We all rely on the capacities and labour of others to supply us with the goods we require. Thus we have a common interest in their being induced to exercise these capacities to the maximum. Given that this is secured by way of the right to private property, this right turns out to serve a public good in which all can be shown to have an interest.

## **II) RECONSTRUCTING THE INTERESTS IN PRIVATE PROPERTY**

The market, though it basically rests upon rather straightforward rules, is a complex phenomenon that can hardly be dissected in its constituting actions. As a genuine public good, no one can be excluded from sharing both in the benefits of the well-functioning market as well as suffering the costs when this public good is harmed. For Hayek the combined fact that the benefits derived from the market economy are great and that the effects of violations of it are beyond any one's control, issue into a rather absolutist endorsement of the right to private property. He argues that we cannot fully understand the market order and that all our rationalistic attempts to regulate it are bound to backfire against our interests. However, even Hayek cannot deny that the market cannot fully take care of itself and that certain political interventions in private property are required. In the following sub-section I will review how Hayek is unable to accommodate such interventions within his theoretical framework. In the second sub-section I move beyond Hayek by outlining an alternative argument that gives claims to private property their full due but that can also take competing claims seriously.

### The Untenability of Property Absolutism

Hayek's principal objection against interferences with private property is that they distort the signals on which individuals base their expectations and which rule their actions and that these signals cannot be controlled. For this reason he is deeply sceptical of any government intervention into private property rights. Certainly, Hayek recognises that even the most minimal state should exercise certain legitimate tasks. In particular he notes that state interventions are required for the provision of certain public goods, ranging from setting standards of weights and measures to road construction (Hayek 1960: 223).

Hayek's critique regards in particular state interventions in market conditions, for instance the imposition of restrictions on entry of suppliers or price regulation. He observes that the post-war welfare states use their authority in an increasing number of social domains, distorting the proper functioning of the catallaxy and causing negative effects that are not considered when such activist policies are adopted. In arguing against such political measures, Hayek the economist excels. One by one he shows how policies seeking to govern the market have either perverse effects that only worsen the problem they seek to address, or are futile in their attempt to control the market, or actually distort the market to such an extent that they put the underlying values of freedom and prosperity in jeopardy (Hayek 1960: Part III; cf. Hirschman 1991). Hayek's favourite targets are policies that seek to govern the business cycle and those that aim to alleviate the position of the poor.

To appraise the exact implications of Hayek's scepticism, we may consider the state's use of the instrument of compulsory purchase as a means of expropriation of private ownership. An example of the use of this instrument is the case of *de Rothschild and Eranda Herds Limited v. Secretary of State for Transport and Bedfordshire County Council* ([1988] 1 EGLR 67; [1989] 1 All ER 933) which I will extensively analyse in the next section. In this case the Bedfordshire County Council imposed a compulsory purchase upon land of de Rothschild Ltd. as a new bypass to a national highway had to be constructed.

Clearly the compulsory purchase of land for the construction of a bypass distorts the market. De Rothschild Ltd. had no intention whatsoever to alienate the land. Moreover, the particular value the company attached to the land may well have been above the compensation the Council was willing to pay. Thus the compulsory purchase distorted the company's legitimate expectations. Nevertheless in such a case even Hayek would concede the justifiability of government intervention. But how can this intervention be justified without opening the way for all possible kinds of interventions into private property?

Hayek struggles with this question on a number of occasions. At one point, for instance, he proposes to distinguish between state performance of (benign) service activities, on the one hand, and coercive measures, on the other (Hayek 1960: 222 ff.). However, this distinction does not overcome the fact that service activities such as the construction of a bypass require coercive measures. Moreover, once such coercive measures are found to be justified as they serve service activities, the floodgates open for an infinite number of other coercive measures which in some way or another can be shown to derive from "service activities". In short, the distinction between coercive measures and service activities is bound to break down.

At another point Hayek suggests that expropriation may be legitimate under the condition that the principle of "no expropriation without just compensation" is honoured. (Indeed, this principle is widely recognised as part of the law of private property, cf. Ackerman 1977). Just compensation, Hayek says, is:

"our chief insurance that those necessary infringements of the private sphere will be allowed only in instances where the public gain is clearly greater than the harm done by the disappointment of normal individual expectations. The chief purpose of the requirement of full compensation is indeed to act as a curb on such infringements of the private sphere and to provide a means of ascertaining whether the particular purpose is important enough to justify an exception to the principle on which the normal working of society rests" (Hayek 1960: 218; cf. 351 ff.).

Full compensation will undoubtedly serve to inhibit all too eager use of the state's means for expropriation and thereby protect the secure enjoyment of the public good of the market economy. However, Hayek's concern about the market economy and his



distrust of politicians and administrators, induce him to put aside all his critical powers when it comes to the position of the private proprietor:

"In view of the difficulty of estimating the often intangible advantages of public action and of the notorious tendency of the expert administration to overestimate the importance of the particular goal of the moment, it would seem desirable that the private owner should always have the benefit of the doubt and that compensation should be fixed as high as possible without opening the door to outright abuse" (Hayek 1960: 218).

Here it appears that Hayek is unwilling to appreciate fully what conditions motivate government intervention in markets. Markets simply do not by themselves meet all political demands. Moreover, they often show signs of imperfection, like when a particular piece of land is required for planning purposes and its owner can act as a monopolist in the negotiations with the authorities. As a consequence, Hayek's proposal may well serve to inhibit the development of infrastructure by the government.

Here we get to the basic shortcoming of Hayek's account of private property. At no point does he accept that good political reasons may actually prevail over the market. He values the market so highly and human reason so lowly that he cannot allow them to be weighed against each other. However, as he has to concede that the market is not always perfect, his argument breaks down. His distrust of government reaches to such extremes that he sees no other way out than to leave it to proprietors to push their claims to unreasonable heights.<sup>42</sup>

### Private Property in the Balance

Is there an alternative course to Hayek's?; Can we accept most of his lessons about the catallaxy without arriving at his extremely sceptical conclusions? A first step that we have to make beyond Hayek is to take seriously the claims challenging the right to

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<sup>42</sup> Similarly defective arguments are characteristic for the 'economic analysis of law', as most consistently outlined by U.S. Judge Richard Posner. Typically Posner argues: "The disregard of nonmarket values (...) creates a systematic downward bias in the prices paid in eminent domain procedures" (Posner 1986a: 43). This assertion one-sidedly identifies nonmarket values with the subjective perceptions of individual proprietors who, for instance, value their house more highly than its current market value because it is their house. By disregarding the nonmarket values that generally motivate government intervention in private property Posner, like Hayek, allows for a systematic upward bias in the compensation they would require for expropriation. Once again it appears that political questions cannot be circumvented by "economic" solutions.

private property. Government has to actively engage itself also with claims that are not concerned only with the effective functioning of the market, and that may even run contrary to it. We have to recognise that markets are not perfect and, what is probably even more important, they do not constitute the supreme good in society. Markets, perfect or imperfect, may cause all kinds of effects that people can legitimately claim to have redressed. They may affect our environment, by changing picturesque areas into busy sites of commercial trafficking or by claiming natural resources without discounting the long-run costs of their loss. Similarly, markets may serve to maintain huge differences in wealth between individuals which may be objectionable because of the position they leave the worst-off in or because they disrupt social cohesion and cause enmity. As we cannot leave it to the market to address claims that derive from these problems, they have to be given their due weight in the political process.

In turn, once we take claims competing with those deriving from private property seriously, we can no longer hold on to the rigid principle that excludes the market institutions from the realm of politics. What we have to do is to give them their due weight as well, that is a weight that does not only account for the direct personal interests in the property claims at stake but also regards the public good of the market. Thus, given competing political claims, the need to rationally reconstruct our political considerations cannot be evaded.

The recognition of the basic right to private property serves to secure that due weight will be given to the interests behind it. The question now is: what are these interests? First of all there is the personal interest of the proprietor in having her claims upheld against those of others. Then we have to move on to the interests of others that may be more difficult to identify directly. In a concrete case we may be in a position to identify "third party beneficiaries" who stood to benefit from the good involved. Possibly they turn up as potential buyers of the good, or they may have an interest in its yielding (as in the case of farmland or a plant), or to other claims which the proprietor might have granted or exchanged, such as access rights.

However, the main interest that lurks behind the personal interest of the proprietor is the interest in the preservation of the public good of a market society. Any intervention in private property is bound to disillusion legitimate expectations. They will have what Frank Michelman has called "demoralisation costs" which attach to the "losers [of property], their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion" (Michelman 1967: 1214). Michelman goes on to draw an elucidating comparison, observing that the disincentives to invest in goods attributed to expropriation far outweigh those attributed to the risk of losing one's property by, say climatic, accidents. Expropriation lacks the randomness of accidents, it is rather perceived as a strategically motivated action representing a systematic political disposition. Once expropriation goes out of bounds, all security in ownership dwindles away and demoralisation costs skyrocket. The very worst thing to do to undercut proprietors' legitimate expectations is to expropriate in a capricious manner (Michelman 1967: 1216/7).

Much of the anxiety about capricious expropriation can be removed when the government is committed to motivate its interventions with reasons. Some reasons will be better than others but once there is a public knowledge of which reasons may go to outweigh the right to private property and what kind of claims they justify, expectations can be adapted. Thus proprietors can come to live with the facts that public infrastructure demands compulsory purchase, that social security demands a certain level of income taxation and that environmental protection demands regulations and certain special taxes on scarce resources.

There is no standard metric to calculate how the interests in a claim to private property weigh against competing claims. What our analysis yields, however, is a framework by which we can identify the different interests involved. To summarise them once more, there are basically three categories of interests behind a claim to private property. First, there is the personal interest of the proprietor. Secondly, there are interests of (third) parties that stand to benefit directly from exchanges with her. Thirdly, there is the interest of securing the public good of the market economy.

Depending on the case, these different interests will receive diverse emphases. Proprietors will, for instance, have a stronger interest in the land on which they actually dwell than in land they only use for leisure activities. Similarly, a fertile and beautiful garden is more likely to benefit others than is a concrete square. Finally, the expropriation of commercial sites is more likely to cause a stir in the market economy than that of wasteland.

### **III) APPLYING THE RIGHT TO PRIVATE PROPERTY**

Liberal democratic states frequently withhold claims upheld by the right to private property. Thus far I have given a theoretical argument for recognising the basic right to private property but also for applying this right in such a way that it can allow for competing claims that outweigh the claims supported by the right. In this section I turn to two actual legal cases to illustrate my argument. Both cases concern government decisions to withhold certain claims to private property. My aim is to demonstrate that such decisions can be legitimately reached without disputing the whole validity of the basic right.

One familiar way in which government overrules claims to private property is through expropriation. This takes place as the government uses its powers to take a full title of ownership that was formerly privately possessed. Such a practice is illustrated by the first case I will consider and to which I already briefly alluded in the former section: *de Rothschild and Eranda Herds Limited v. Secretary of State for Transport and Bedfordshire County Council*, [1988] 1 EGLR 67; [1989] 1 All ER 933:

#### **Case 1: De Rothschild**

Land at 'Ascott Farm' owned by de Rothschild Ltd. was subject to a compulsory purchase order of the Bedfordshire County Council as it wanted to develop a new bypass. The company objected to this order, not so much resisting the act of expropriation itself, but opposing the specific scheme chosen by the council. In its place, de Rothschild proposed four alternative schemes, still crossing their land, but which, they argued, were superior on engineering, agricultural and environmental grounds. However, after having had an

inspector considering the alternatives, the Secretary of State for Transport rejected these and decided to confirm the initial purchase order.

This is a classical case of expropriation. Somehow we have learned to live with it without fearing that the power to compulsory purchase of the state leaves nothing of the basic right to private property. However, as Hayek emphatically pointed out, such interventions undercut the security actors enjoy in the market-economy, and as this public good is detrimentally affected, society at large is set at a disadvantage.

In contemporary liberal democracies, the institution of the right to private property is probably even more threatened by a category of measures that may be deceptive as they do not actually divest the proprietor of her ownership title. Rather they undercut the value of this ownership by severely reducing the range of claims that the owner can uphold. The "bundle of claims" to which one would be entitled by full ownership under the right to private property has become the object of infinite manipulatory moves by modern administrators. And thus, to use the phrase of Thomas C. Grey, "The concept of property and the institution of property have disintegrated" (Grey 1980: 74). How full ownership can be disintegrated is well illustrated by the second case that I will consider:

#### Case 2: Kleingarten

A landowner in Munich had leased an allotment society two pieces of land making up 44,271 square meters (BVerfGE 87,114). In November 1976 she wrote the society a letter announcing that in accordance with the terms laid down in the contract she intended to terminate the lease on 31 December 1979. However the allotment society failed to free the land by that date. The landowner then sued the allotment society to have her property right confirmed, but the trial court (Landgericht) ruled that she was not in a position to terminate the contract. Aiming to protect allotment lessees, the German legislator had provided that allotment contracts could not be bound to terms.

Here we find the basic right to private property being challenged not by direct expropriation of ownership, but by leaving it open to severe counter-claims. Ultimately, of course, if this is done with many, or the most valuable, claims of ownership the

difference with direct expropriation will be slight. This way the institution of private property loses all its purpose as it suffers "a death of a thousand cuts" (Waldron 1993h: 188)

### Case 1: Rights under British Discretion

In Britain governmental powers over private property are subject to strict scrutiny. Typically, compulsory purchase orders, though they may seem mere executive acts, are legislative acts. Authorities can only exercise the power of compulsory purchase after having obtained confirmation from the relevant Minister (Davies 1994: 37). The use of the power of compulsory purchase is checked further by a number of procedural guarantees. The procedure for compulsory purchase starts by an authority drafting an order. Copies of this order are sent to the owners, lessees and occupiers of the land, and are advertised in the local press. When objections against the order are then submitted, the Minister is obliged to hold either a local public inquiry or to have an inspector appointed to report on the objections. Only after having considered the report of the inquiry can the Minister come to confirm the order (Acquisition of Land Act 1981: esp. s. 11 & s. 13(2)).

The draft compulsory purchase order of Bedfordshire County Council to acquire the land required for the new bypass met with objections of, amongst others the de Rothschild Company. De Rothschild Ltd. did not object to the expropriation as such. There was a clear need to relieve traffic in the area to which the construction of the bypass would serve. Even though the company had not itself pursued the transfer of its land, it was willing to transfer the land against the appropriate compensation.

Its objections concerned, however, the route chosen over its land. It proposed four alternative schemes all involving its land but which it preferred for several reasons. Two of these, among which the alternative most favoured by the company, involved the construction of a grade separated junction rather than the roundabout in the Council's plan. A further proposal included an underbridge for the required railway crossing rather than the proposed overbridge, which, the company claimed, would have

advantages from a landscaping point of view. Finally, its options include an alternative route which would have agricultural advantages as it would lead through pasture rather than through the arable land involved in the Council's plan.

As this case concerned the construction of a bypass, the Minister who was to confirm the compulsory purchase order was the Secretary of State for Transport and he appointed an inspector to hold a public inquiry (Highways Act 1980: §247). The inspector conducted the public inquiry in April and June 1986, hearing the different parties involved and consulting expert witnesses. On 5 July 1986 he delivered his report, which the Court of Appeal would later characterise as "very full and very careful" [1989] 1 ALL ER 933 at 939.

The inspector considered each of the alternatives in turn. Regarding the options including a grade separated junction he found that they would take up more land, cost more, did not appear justified in traffic terms and might even have landscape disadvantages. On these grounds he rejected de Rothschild's alternatives. Concerning the railway underbridge, he accepted that the original proposal would be more visible, but not, however, to the point that it would detract unacceptably from the existing landscape. Comparing this alternative with the original proposal, he did not think that this advantage outweighed the extra costs and potential delay implied by the alternative. Finally, he conceded the agricultural advantages of the alternative route proposed. But again, extra costs and delay, combined with the impression that in engineering terms the Council's plan was more soundly based, led him to reject this alternative as well. Overall he concluded:

"I am of the opinion that there are no factors, including the offer to sell alternative land at Ascot Farm, which individually or together outweigh the disadvantages of extra cost and exceptional delay which would result from the adoption of the objectors' alternative route and I believe that the Bedfordshire County Council has shown unequivocally that the [original] Order route is the best in the public interest under the circumstances" (quoted in [1989] 1 ALL ER 933 at 940).

By the end of the following November the Secretary of State wrote a long letter in which he stated his reading of the inspector's report and concluded:

"The Secretary of State has carefully considered the report and recommendations of the Inspector together with all matters raised by the objectors both at the Public Inquiries and in writing. (...) From the evidence the Secretary of State does not believe that any of the suggested alternatives has sufficient advantages or benefits which would justify its adoption in place of the scheme as proposed by the County Council" (quoted in [1989] 1 ALL ER 933 at 941, emphasis added).

De Rothschild Ltd. was not merely displeased by this decision, it found that in reaching this decision the Secretary of State had failed to appreciate the claims deriving from its property in the land. Specifically, it read the last sentence quoted as mistakenly placing the onus on the company to prove the superiority of its scheme over the initial scheme. The company held that it was rather the other way around: the Secretary was obliged to accept the de Rothschild's proposal, if Bedfordshire County Council could not prove decisive advantages of its original scheme:

"The question was not whether the applicants' alternative alignment for the proposed road had advantages or benefits when compared with the scheme proposed by the second respondent but whether the advantages or benefits of the latter so outweighed those of the former that there was a 'compelling' or 'decisive' case for compulsory acquisition of land in the public interest, any reasonable doubt on the matter being resolved in favour of the applicants" quoted in [1989] 1 All ER 933 at 941.

With this as its principal argument de Rothschild Ltd. applied to the High Court to have the Secretary's decision quashed (cf. Acquisition of Land Act 1981: s. 23).

On 12 November 1987, the parties convened at the Queen's Bench. Here de Rothschild's application was dismissed, as Judge Mann held that the inspector had clearly stated that he regarded the original scheme as the best in the public interest and that the Secretary of State, notwithstanding his use of a negative formulation rather than a positive one, meant to subscribe to this conclusion.

### Claiming Private Property

As their application was thus dismissed in the High Court, de Rothschild Ltd. brought an appeal before the Court of Appeal which served 11 and 12 July 1988. Going through the arguments raised on both sides and the considerations of the Court, one can get a good impression of the status of the right to private property in



Great Britain. Indeed, one of the central questions in this case turned out to be whether or not the Secretary of State's decision was by virtue of the right to private property, subject to more than the normal guidelines to the exercise of discretionary powers.

The solicitor of de Rothschild sought to strengthen its case by invoking a number of authorities that suggested a distinctively strong conception of the right. First, there was the dictum of Lord Denning MR in *Prest v. Secretary of State for Wales*, [1982] 81 LGR 193 at 198:

"I regard it as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands: and then only on the condition that proper compensation is paid: see *Attorney-General v. De Keyser's Royal Hotel Ltd.*, ([1920] AC 508, [1920] All ER Rep 80). If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen."

Four things can be noted in this statement. First, Lord Denning emphasises that the severity of the decision to expropriate land is recognised by it requiring the approval of the supreme sovereign body, Parliament (though it is in actual practice represented by the Secretary of State). Secondly, and of most general interest, he asserts that expropriation can only take place on the ground that "the public interest decisively so demands". Now the public interest is a slippery concept (cf. Hayek 1960: 218; 1976: 1). However, its use can at least exclude those measures that can be demonstrated to derive solely from individual interests or that allow for an alternative; expropriation cannot be justified if either one of these conditions applies. A third point is Lord Denning's insistence on proper compensation. Like Hayek, he seems to regard proper compensation as the main way by which the bad of expropriation can be made up for. Finally, we come to the point that most directly seems to apply to the de Rothschild case, Lord Denning's statement that "If there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen". De Rothschild argued that in their case there had indeed been reasonable doubt, which was even implicitly recognised by the Secretary of State.

Nevertheless, the Secretary of State had decided against de Rothschild, rather than in its favour.

De Rothschild found a further authority supporting its claims in the words of Lord Justice Watkins in the same case:

"In the sphere of compulsory land acquisition, the onus of showing that a compulsory purchase order has been properly confirmed rests squarely on the acquiring authority and, if he seeks to support his own decision, on the Secretary of State. The taking of a person's land against his will is a serious invasion of his proprietary rights. The use of statutory authority for the destruction of those rights requires to be most carefully scrutinised. The courts must be vigilant to see to it that authority is not abused. It must not be used unless it is clear that the Secretary of State has allowed those rights to be violated by a decision based upon the right legal principles, adequate evidence and proper consideration of the factor which sways his mind into confirmation of the order sought" Watkins LJ in *Prest v. Secretary of State for Wales*, [1982] 81 LGR 193 at 211.

Lord Justice Watkins shows himself even more vigilant than Lord Denning in standing up for proprietary rights. He highlights the procedural safeguards that surround the power of compulsory purchase and emphasises in particular the duty of the courts to review the Secretary of State's decision. Above all he buttresses the duty upon the Secretary of State to set out the positive considerations that lead him to overrule the claims of the proprietor affected. Thus he lends force to the claim of de Rothschild that in rejecting its alternatives the Secretary of State had indeed an onus of proof to dislodge.

As the de Rothschild case came to the Court of Appeal, Lord Justice Slade, delivering the main opinion, duly acknowledged the importance of the right to private property:

"it has to be recognised that the compulsory purchase of land involves a serious invasion of the private proprietary rights of citizens. As Purchas LJ described them in *Chilton v. Telford Development Corporation*, [1987] 3 All ER 992 at 997, the powers of compulsory purchase of an acquiring authority are of a draconian nature. The power to dispossess a citizen of his land against his will is clearly not one to be exercised lightly and without good and sufficient cause" [1989] 1 All ER 933 at 935.

Similarly, somewhat later in the decision, the Lord Justice invoked the right to private property, asserting that the Secretary of State:

"must not exercise his powers capriciously. Given the obvious importance and value to land owners of their property rights, the abrogation of those rights in the exercise of his discretionary power to confirm a compulsory purchase order would, in the absence of what he perceived to be a sufficient justification on the merits, be a course which surely no reasonable Secretary of State would take" [1989] 1 All ER 933 at 939.

As much as these statements affirm the importance of the right to private property, they lend less support to de Rothschild's case than the authorities it adduced itself. The Court of Appeal shows itself reluctant to meddle with the competencies of the Secretary of State. Rather the reasonableness of his decisions is presupposed. Interestingly in this statement is further that Lord Justice Slade considers the dangers that lurk in the capricious use of the power of compulsory purchase. However, he does not make much of this argument as he suggests that these dangers are automatically circumvented when the Secretary of State can give sufficient justification for his decision.

De Rothschild's claim was contestable on the face of the terms by which the law had conferred on the Secretary of State the power of confirming or rejecting a compulsory purchase order. The relevant passage is to be found in Section 13 (2) of the Acquisition of Land Act 1981 and reads:

"the confirming authority (...) after considering the objection and the report of the person who held the inquiry or the person appointed as aforesaid, may confirm the order either with or without modifications."

On the basis of this provision the solicitor for the Secretary of State argued that there was no legal principle that put the onus to prove the superiority of its proposal on the acquiring authority. Rather, it was held: "The power to confirm or not to confirm was in its exercise to be judged as is any other exercise of a discretionary power and is subject to no other rule" [1988] 1 EGLR 70.

If indeed the power to confirm a compulsory purchase order is nothing but a normal exercise of discretionary power then the grounds according to which it is to be assessed are the Wednesbury/Ashbridge grounds. These grounds have most concisely been stated by Lord Denning in the 1965 Ashbridge case:

"The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has

acted on no evidence; or, if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law. It is identical with the decision of a lower tribunal which has erred in point of law" *Ashbridge Investments Ltd v. Minister of Housing and Local Government*, [1965] 3 All ER 374; cf. *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, [1948] 1 KB 223, [1947] 2 All ER 680.

Basically, as the open formulations of the Acquisition of Land Act 1981 do not subject the Secretary of State's decision to any substantive legal principles and given that the Secretary also took good notice of the evidence given to him by the inspector, these *Wednesbury/Ashbridge* rules would only allow a quashing of the confirmation if it could be flatly demonstrated that the Secretary of State had acted unreasonably.

Legal council for de Rothschild held that the Secretary of State's decision had not been subject solely to the *Wednesbury/Ashbridge* grounds. Relying on the authorities referred to and, as it was said, the general principles of British constitutional law, including the Magna Carta and Article 1 of the First Protocol to the European Convention of Human Rights<sup>43</sup>, it set out a number of "special rules" to which the decision was subject and against which it could be reviewed:

"(i) The onus is upon the acquiring authority to justify a compulsory purchase order and upon the Secretary of State to justify his decision to confirm such an order. (ii) A compulsory purchase order should only be confirmed if it is decisively in the public interest to do so, or if there is a 'compelling case' in the public interest. (iii) Any reasonable doubt as to the justification for a compulsory purchase order is to be resolved in favour of the owner of the affected land. (iv) If alternative land is available that is equally suitable for the purposes of the acquiring authority but which can be acquired without the use of compulsory purchase powers, the use of such powers cannot be justified. (v) At the very least it is for the acquiring authority to demonstrate that compulsory acquisition is necessary, and not for the landowner to demonstrate the converse" [1989] 1 All ER: 935.

<sup>43</sup> This Article (adopted in Paris, March 1952, entry into force 18 May 1954) reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Let us consider these "special rules" one by one in the light of the conception of the right to private property that has been developed so far. The first rule asserts quite generally that authorities are obliged to justify a compulsory purchase order, or to put it more concretely, they should demonstrate that the reasons in favour of this order outweigh those against it. The second rule echoes Lord Denning's dictum that the grounds in favour of a compulsory purchase have to be of the public interest and do not allow for alternatives. The third rule relies on the same dictum assigning the proprietor the benefit of the doubt. The fourth rule is slightly curious in presuming the possibility that alternative land would be available that could be purchased without the use of the power of compulsory purchase. At first sight such a rule would not seem to apply to this case, as all conceivable schemes would require part of the land of de Rothschild. However, there is an interesting argument hidden here since, having accepted the need for the bypass, de Rothschild volunteered to sell the land for the alternative options it proposed. In other words, these transfers would not need to be coerced upon the company. In the end it was only the original proposal that required the coercive use of the power of compulsory purchase. So it turns out that there were indeed alternatives to coerced expropriation. The value of this argument will be considered further below. Finally, the fifth rule concludes by reasserting the duty on the Secretary of State to demonstrate that the expropriation is necessary against the objections raised by the proprietor.

### **The Considerations of the Court**

Of course, a distinction has to be made between the question whether or not expropriation can be justified and the question how to decide between different routes. Lord Justice Slade considered that de Rothschild's case was weakened by the fact that the public interest in there being a bypass was beyond dispute and that, whatever happened, some of their land would be needed. For that reason much of the force was lost of Lord Denning's dictum that "no citizen is to be deprived of his land by any

public authority against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands" [1989] 1 All ER 933 at 943. The Court of Appeal sought to reduce the impact of the authorities invoked by the company further, as it found that the reasons for which these cases were decided in favour of the right to private property were that the Secretary of State had clearly decided unreasonably rather than that he had merely failed to explicate his prevailing considerations.

The Court of Appeal was sceptical about any "special rules" to which the decision of the Secretary of State would be legally subject. Lord Justice Slade read the Acquisition of Land Act 1981 as conferring "a very wide discretion" on the Secretary of State to decide about the compulsory purchase order [1989] 1 All ER 933 at 934. Lord Justice Croom-Johnson added to this:

"At the end what the Minister has to do is to investigate all the facts, the arguments and so forth and ultimately perform a balancing exercise. At the end he has to balance things against each other which are not at all compatible; they are not like each other and cannot be the subject of direct comparison. (...) In the end he comes out with what must be a value judgement that to confirm the order is justified in the public interest, and in my view it is not right to turn this value judgement into a legal formula" [1989] 1 All ER 933 at 943; cf. Slade LJ, *id.* at 939.

Thus the Court dismissed any claim that the Secretary of State's decision had been subject to any "special rules" beyond the *Wednesbury/Ashbridge* rules.

The question is, however, whether this reluctance of the Court to review the decision can be reconciled with its emphatically expressed respect for the right to private property. In all likelihood the Court is right to maintain that the decision to expropriate is extremely complex and withstands being determined by any straightforward formula. Moreover, for many reasons the Secretary of State may be in a much better position than the Court to consider all the factors involved (cf. Michelman 1967: 1250). However, there is an obvious point to de Rothschild's claim that the value of the right to private property warrants the imposition of additional rules (beyond the *Wednesbury/Ashbridge* rules) upon the decision to exercise the power of compulsory purchase (cf. Clarke 1989). Lord Justice Slade remarked on this point that "the draconian nature of the order will itself render it more vulnerable to successful

challenge on Wednesbury/Ashbridge grounds unless sufficient reasons are adduced affirmatively to justify it on its merits" [1989] 1 All ER 933 at 938. The disposition of the Court of Appeal, however, leaves doubts about the likelihood of a tightening of the Wednesbury/Ashbridge rules in cases concerning compulsory purchase. Lord Justice Slade's statement would have been more credible if he had tried to explicate what exactly, beyond their general formulations, these rules required in this case.

For this aim the Court might even have subscribed to some of the "special rules" proposed without having to revise its decision substantially. It could have strengthened its commitment to the right to private property by holding it upon the Secretary of State to carefully disentangle the considerations for and against expropriation. As the use of the concept of 'onus' was deemed unfitting, there was reason to reject special rule (i) (cf. [1989] 1 All ER 933 at 939). In its stead rule (v) could be put on top: "it is for the acquiring authority to demonstrate that compulsory acquisition is necessary, and not for the landowner to demonstrate the converse". Rules (ii) and (iii) derive directly from the dictum of Lord Denning. As, moreover, they were not decisive in the *de Rothschild* case, there is little reason to reject them: (ii) a compulsory purchase order should only be confirmed if it is decisively in the public interest to do so, or if there is a 'compelling case' in the public interest; (iii) any reasonable doubt as to the justification for a compulsory purchase order is to be resolved in favour of the owner of the affected land.

These three rules giving special protection to the right to private property could have been adopted by the Court of Appeal without substantially changing its decision in the *de Rothschild* case, since, as Lord Justice Slade observed, ultimately this case depended on "a short question of construction" [1989] 1 All ER 933 at 942. This was the question whether the Secretary of State had actually subscribed to the inspector's view which explicitly asserted that the original proposal was the best among the alternatives or that he had reached his decision by putting the onus on *de Rothschild* to demonstrate the superiority of its own proposals. In arguing the latter, *de Rothschild* suggested, as Lord Justice Slade put it, that the Secretary of State had imposed a compulsory purchase order on an unwilling landowner who "was willing to sell to the

acquiring authority land which would be seen to serve equally well for the same purpose after all relevant considerations, including of course cost and delay, have been taken into account" [1989] 1 All ER 933 at 942. Certainly, no reasonable Secretary of State could have done this. However, such an interpretation wrenched the crucial paragraph of the decision-letter out of context. In other paragraphs the Secretary of State had summarised the inspector's findings and explicitly stated that he agreed with his conclusions and recommendations. Hence de Rothschild's appeal failed: "To accept the appellants' submission would, in my judgement, involve an altogether too analytical, indeed I would say perverse, construction of the language by which the Secretary of State expressed himself, when his letter is read as a whole" [1989] 1 All ER 933 at 942.

On the basis of the reconstruction of the right to private property given above, we may, however, want to argue that the Court of Appeal was mistaken in deciding against de Rothschild. That argument would take up the proposed special rule (iv): "If alternative land is available that is equally suitable for the purposes of the acquiring authority but which can be acquired without the use of compulsory purchase powers, the use of such powers cannot be justified". As I have already set out, given that de Rothschild had accepted that its land was needed for the new bypass, it volunteered to sell parts of its land at market value. Only if the Council's original proposal had been confirmed would the "coercive" exercise of compulsory purchase have been necessary. Thus if rule (iv) were recognised, de Rothschild would have had a strong case to have its objections honoured. The case would then have boiled down to the question whether the alternative land was "equally suitable".

As the inspector had made clear, the differences between the original proposal and the best alternative proposed lay in extra costs and delay. Do these factors reduce the suitability of the alternative relative compared to the original proposal? The disadvantages of delay, it seems to me, cannot be held against de Rothschild. In any case, it would still take some time before the bypass would be finished and the responsibility to have it ready within a certain period is primarily that of the County



authorities. If they had entered in negotiations with de Rothschild early enough then any disadvantages of delay might well have been avoided.

Finally, there remains the issue of the extra costs of the alternative schemes, and the question whether these outweigh the harm done by imposing the compulsory purchase. Though there is no straightforward "legal formula" by which to answer this question as it indeed requires a "value judgement" (to use the expressions of Lord Justice Croom-Johnson), we can nevertheless try to dissect the components on both sides. De Rothschild might have tried to express its preference for the alternatives by attaching different prices to the different plots of land concerned: driving up the price of the land involved in the original proposal until the price differentials with the alternatives reflected its preferences (cf. *Prest v. Secretary of State for Wales*, [1982] 81 LGR 193). If Bedfordshire County Council had in turn provided a precise estimate of the different costs involved in the different plans, a deal could have been struck involving either the alternative schemes or, if extra costs still outweighed the value differential expressed by de Rothschild, the original scheme though at a significantly higher price.

Unfortunately, however, the actual situation reflects all possible imperfections that a market exchange may have since there is only a single supplier facing a single demander (monopoly versus monopsony) while the latter, moreover, commands the power of coercion as a latent threat. De Rothschild would be tempted to push the prices of the plots most cherished to unlikely heights, thus justifying in retrospect the coercive powers of the authority. Referring back to our earlier analysis of the right to private property, we may observe, however, that the harm done by imposing the compulsory purchase is not restricted to de Rothschild's interests alone. Third party interests may be at stake as well and there may be, to use Frank Michelman's expression, "demoralisation costs" that are incurred by all who find their legitimate expectations in their property rights shaken (Michelman 1967: 1214). Whatever price is paid to de Rothschild, these interests will remain uncompensated. Notably, both the decision of the Secretary of State and the decision of the Court of Appeal leave in doubt whether

they actually took these costs into consideration. It seems instead that they only paid attention to the harm done to the proprietor.

All this goes to show the complexity of the particular decision as it involved a great many interests. That is all the more reason, however, to take utmost care in formulating what is at stake in the right to private property. The rejection of de Rothschild's claim would be justified if, when taking account of the demoralisation costs involved as well as the personal interests of the company, the extra costs of the alternative schemes were still found to outweigh them. This is a question for which the inspector lacked the authority to make a decision by himself. Recognising the basic right to private property, it would have been the duty of the Secretary of State to deal with this question. Then the Court, though it might have good grounds not to put itself in the place of the Secretary of State, might nevertheless have required that this consideration was fully and explicitly set out in his decision.

### Case 2: The Power of German Constitutional Rights

The claims against the right to private property raised in de Rothschild case lie within the range of services that any minimal liberal state will have to provide. The construction of a bypass is a classical example in which the state, in providing public infrastructure, solves a collective action problem. Even most of the staunchest protagonists of the right to private property, like Hayek or Nozick, are willing to concede a cause for government intervention in this domain (but cf. Rothbard 1973). By contrast, in the German *Kleingarten* case, we confront claims that lie beyond the range that these free marketers regard as legitimate. Here claims deriving from private property rights are dominated by claims motivated by considerations of social justice.

Another major difference between the two cases is that while in Great Britain the basic right to private property is protected only as a closely guarded residue of the law, in Germany it is explicitly asserted in Article 14 of the Basic Law:

14.1 Property and the right of inheritance shall be guaranteed. Their content and limits shall be determined by statute.

II Property imposes duties. Its use should also serve the public weal.

III The taking of property shall only be permissible in the public weal. It may be effected only by or pursuant to a statute regulating the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation, recourse may be had to the courts of ordinary jurisdiction (cf. Doemming, Füsstein & Matz 1951: 144 ff.).

The first and last paragraphs of this article define the right to private property in terms with which Hayek would have found little fault. Paragraph I emphatically asserts the right to private property and stipulates that it will be limited only by way of laws, having the abstract features so endorsed by Hayek, and not by arbitrary commands. Paragraph III embodies the principle "no expropriation without just compensation" that Hayek so fiercely defended, though he might have objected to the presumption of public interest as it may go to justify unwarranted reductions of the amount of compensation.

While Article 14.I stipulates the formal features that restrictions of the right to private property will have, Article 14.II is to be read as a substantive orientation point for the legislator (Papier 1994: Rn. 298/9). But what does it mean to claim that property obliges and that its use should also serve the public weal? In a way it goes without saying that property serves the public weal, since its very protection serves to secure the public good of the market economy. But something more seems to be implied with this provision, and this becomes apparent when we turn to our case. The Munich landowner found her right to private property restricted exactly for the reason that land used for allotments is regarded to serve the public weal in the sense of Article 14.II of the Basic Law. Among other things this has as a consequence that land used as allotments cannot be disposed of in whatever way the proprietor may like. Special guarantees have been set up to ensure that allotment land will not disappear by turning the land to other uses.

The Federal Constitutional Court explains how the right to property as it is established in Article 14 has to be conceived of:

"In taking measures deriving from Article 14.1/2, the legislator has to give equal consideration to both elements of the relation established in the Basic Law between the constitutional warranty of rights and the decree that the property-regime has to be socially

justifiable; he will have to bring those interests of the parties involved which are to be protected in a just reconciliation and a balanced relation. This corresponds to the way in which the legislator is bound to the constitutional principle of proportionality. The public weal is not just reason, but also the limit for the restrictions that can be imposed upon property. Restrictions of property may not go any further than the aim of protection, that the measure is to serve, ranges" (BVerfGE 87,114 at 138/9; BVerfGE 52,1 at 29/30; Papier 1994: Rn. 301-314).

This striking statement nicely reflects the idea that the presence of basic rights warrants the broadest consideration of all interests involved. Still, it is not fully clear what meaning is exactly imputed to the "public weal", which interests does it represent? Presumably the personal interest of the proprietor in her land lies beyond the public weal (cf. Michelman 1967: 1194). Thus the public weal might easily be adduced to justify whatever claim that can be raised against her right to private property. Nevertheless, as the Court states that the public weal also poses a limit to justifiable restrictions of property rights, it is suggested that the public weal includes the public good of the preservation of the market.

As regards allotments it can be said that throughout the twentieth century the German legislator has fulfilled its responsibility for heeding the public weal in a somewhat erratic manner. The basic legislation regarding allotments dated from 1919, and a continuing stream of amendments kept it up to date up until the 1980s. In the economic crisis of the 1930s, allotments were regarded as important means by which individual citizens could secure their own minimum of comestibles. Therefore measures were taken to stimulate the provision of land for allotments. In 1939 it was even decreed that lease-contracts of allotments could not be terminated at all, even in the presence of strong motives. This latter decree gave rise to some serious administrative difficulties which were then partially addressed by a 1942 ordinance for the protection against termination. This ordinance provided that all lease-contracts were to be for an indefinite time. Even if the parties had contractually agreed upon a definite term, such an agreement would be legally void (*Kündigungsschutzverordnung*, KSchVO §1.I/1 & 2).

Basically, this ordinance left only two conditions under which the proprietor would be allowed to terminate the contract: either when the lease-holder was three months behind with the payment of the rent, or in the case that the lease-holder, notwithstanding warning, seriously violated his obligations in properly taking care of the land under the terms agreed in the allotment contract. In 1969 the legislator considered that these provisions were rather restrictive, particularly if they were regarded in the light of the constitutional right to property. Therefore an Allotment Amending Law was adopted which provided that a landowner could also terminate the lease contract when she could demonstrate an urgent economic need in the use of the land (if not, it was added, "the public interest in the continuation of the lease contract would predominate") (*Kleingartenänderungsgesetz, KGÄndG: §2.1*).

Compared to other countries, allotment gardening has as an expression of "*Kleinbürger*-independence" held a distinctive, strong presence in German society throughout this century, and this is reflected in the protection the law has come to give to it. The overall picture that arises out of the range of provisions is that the interests of the proprietor in commanding the power to terminate leases is regarded to be outweighed by the interests of the lease-holders to know their enjoyment of the allotments to be secure in the long run. It is quite an intervention in the right to private property to render void the power to enter into lease contracts for a definite term. Such an intervention affects market behaviour as it discourages proprietors to lease out land for allotments in the first place. This effect will, however, be little felt as the market itself already directs landowners to other, more profitable uses than allotments. The primary aim of these regulations is thus to retain the established stock of allotments as its expansion is not to be expected. By these measures, the interests of the lease-holders are served and thus the regulations secure their motivation to invest in the land. A further interest that has been gaining in prominence over the decades is that allotments serve to secure green belts in cities where most sites are turned to more productive but less environmentally friendly activities.

The Munich landowner had leased her land from 1 January 1955 up to 31 December 1979. The contract provided further that this lease was to be prolonged with terms of five years if none of the parties announced its termination at least six months before the end of the term. But, as she was told by the Trial Court (*Landgericht*), the 1942 ordinance made this agreement legally void. The contract was considered to be agreed upon for indefinite time instead (BVerfGE 87,114 at 119). However, shortly after this decision the Bavarian Administrative Court of Appeal asked the Federal Constitutional Court to review the allotment legislation. As the Federal Constitutional Court did so, it found that

"the termination of a lease-contract is basically impossible and that its prohibition has become a principle (...) The law does not explicitly prohibit the sale (of land); however, the legal regulations have as a consequence that this is not realisable in any economically meaningful way".

The Court thus ruled that the standing allotment laws altogether led to "an excessive burdening of the private lessor which cannot be reconciled with the constitutional guarantee of property" (BVerfGE 52,1 at 30/1).

### **The 1983 Federal Allotment Law**

After the Federal Constitutional Court had ruled that the existing allotment laws could not be reconciled with the constitutional right to private property, the Ministry for Urban Planning set up a working group to review the allotment legislation. This working group, which contained administrators as well as representatives of allotment holders, concluded that a whole new law was needed. The German Government followed this recommendation and drafted a new Federal Allotment Law, working on the assumption that

"The renewal of the allotment legislation will have to regard the legitimate interests of both lessors and lessees and therewith it will have to meet the decision of the Federal Constitutional Court" (BT-Drucks 9/1900: 1).

On the one hand the interests of lessors are presumably secured by the constitutional right to private property. On the other hand the government specifically defined the countervailing interests:

"Allotments compensate for deficiencies in the residential sector and its environment, particularly in densely build city quarters. Moreover they are important means for the greening and breaking up of build areas and improve the ecological basis of the cities" (id.).

The government accepts following the instigation of the Federal Constitutional Court, that these countervailing interests do not warrant the elimination of the power to contract for a definite term from the rights of proprietors (BT-Drucks 9/1900: 9 ff.). That provision is therefore removed from the law. Still the government considers that the interests of city inhabitants without gardens of their own and of urban planning in general warrant measures preventing allotment sites from being turned towards other, more profitable, purposes. Cities are enabled to secure this aim by assigning sites as "stable allotments" (*Dauerkleingarten*) in their town plans.

The justification that the government gives for the special status of stable allotments is not primarily derived from the personal interest of lease-holders. Interestingly, it argues that protecting the expectations of the lease-holders derives from a public interest:

"The site of stable allotments with its streets and the communal provisions, e.g. the playing grounds, need continuing care not in the last place from the perspective of urban development and its inclusion in the city green belt. Only then can it fulfil its urban function. In this the willingness of the allotment holder to perform is crucial. Naturally this willingness is with indefinite contracts higher as with contracts for a limited period" (BT-Drucks 9/1900: 15).

Thus the government considers that the public good of taking optimal care of the allotment sites is preserved by the lease-holders rather than by the proprietors. The social value of the allotment site depend on the lease-holder's labour. As the proprietor does little to contribute to this value, the claims deriving from the right to private property lose much of their (*prima facie*) force.

The West-German parliament adopted the Federal Allotment Law (*Bundeskleingartengesetz*, BKleinG) on 28 February 1983. The legislator considered, however, that if it allowed contracts to terminate right away, many landowners would seek to get rid of their allotments before local councils could secure these sites as stable

allotments. To give the councils time to include sites for stable allotments in their town plans, paragraph 16.III of the new law provided that landowners could terminate their leases not earlier than 31 March 1987. Thus the prohibition of contract termination by term was to persist a little longer. The Social-Democratic Party (SPD) even suggested prolonging this term by another three years, but this proposal was rejected by the majority in parliament (BT-Drucks 10/3401).

The case of the Munich landowner became rather complex since it unrolled during this whole period of legislative change. While the Trial Court (*Landgericht*) had rejected the landowner's claim to terminate the contract on the basis of the old legislation, by the time the Court of Appeal (*Oberlandesgericht*) came to consider her case, the new Federal Allotment Law was already in force. The Court of Appeal turned to paragraph 16.III of this law and ruled correspondingly that the contract could be terminated only after 31 March 1987. Once again the landowner appealed, this time to the Federal Court of Appeal (*Bundesgerichtshof*). This Court turned to the Federal Constitutional Court (*Bundesverfassungsgericht*) to have paragraph 16.III of the new Federal Allotment Law reviewed on its constitutionality, in particular with reference to the constitutional right to private property. The Federal Court of Appeal submitted that the legislator could not fall back on the legal prohibition of contracts by a definite term as it had been held unconstitutional. Hence the lease-contract had legally expired, either already in 1979, or with the adoption of the new law in 1983, or, if one five year term of renewal was upheld, at the latest in 1984 (BVerfGE 87,114 at 120/1).

In considering the issue, the Federal Constitutional Court admitted that between its rejection of the former allotment regulations in 1979 and the adoption of the new law in 1983 there had been a "*rechtlicher Schwebezustand*" - a legal openness, during which it had been open whether lease-contracts for a definite term could be terminated or not. It held, however, that it was in the first place up to the legislator to decide one or the other. Moreover, the Federal Constitutional Court held the solution adopted by the legislator for defensible, since it foresaw considerable administrative problems in reversing the legal situation by allowing the termination of contract by term in this



intermediate period (BVerfGE 87,114 at 136/7). The Court added that the four year suspension of contract termination was justified by the consideration that time was needed for securing "stable allotments" in town plans. This provision did not violate the right to property as long as the legal grounds for termination concerning gross neglect on the lease-holder's side still obtained, as they can be found in paragraph 8 and paragraph 9.I of the new law (§9.I/3 & §9.I/4 excluded) (BVerfGE 87,114 at 144). Hence the Munich contract did not expire at any point before 31 March 1987.

### **Town Planning**

Concretely, stable allotments differ from other allotments in two important legal aspects. First, stable allotments are bound to the specific use as allotments. Secondly, while all other allotments from 1987 onwards can be leased out for a definite term, such contracts remain legally void in the case of stable allotments (BKleinG: §6). Having one's allotment site assigned as a "stable allotment" thus affects one's property rights in three respects. First, one is no longer free to choose any other way to use the land but as an allotment. Secondly, the market value for which the site may be sold is correspondingly reduced. Given these losses, the final implication, the indefinite perpetuation of lease-contracts, becomes relatively slight.

On 30 March 1987, one day before the lease contract of the Munich landowner might finally have expired, the city council published its decision to have the allotment at stake included in the town plan as a "stable allotment". Thus the right to property of the landowner was subjected to the maximum of restrictions possible. Town planning decision-making is not exempted from the constitutional safeguards of the right to private property. However, planning is generally rather well protected as it is taken to express the commitment to the public weal in the sense of Article 14.II of the Basic Law. In paragraph 1.V of the Federal Building Law (*Bundesbaugesetz*) the legislator has specified the complex of public interests that need to be considered in town plans. These public interests range from "the general requirements for healthy living and work circumstances and the security of the living and working population" to "the interests of

defence and civil protection". A public interest in the preservation of private property rights is not acknowledged. These rights only come to be considered as private interests in the next paragraph that asserts:

"§1.VI The public and private interests have to be balanced justly against each other and among each other in drawing up the town plans."

One may wonder whether these provisions assure that the full range of interests implicated in the basic right to private property will be considered. As I have argued throughout this chapter, the right to private property does not merely represent the private, personal interest of the proprietor, it serves a public interests in laying the foundation for the market economy. As we saw, this idea can be read into the way the right to private property has been secured in the German Basic Law. However, it is doubtful whether this protection maintains its full force in the context of the Federal Building Law.

Though substantive protection of the right to private property may be limited in town planning, planning has been legally embedded in a range of procedural checks. Town plans generally are decided on the basis of an existing site-use plan (*Flächennutzungsplan*), in which higher administrative bodies have already laid down the use of the land in the most general terms. Moreover, the planning administration has to consider all opinions that citizens and other actors involved may raise about the town plan proposed. The administration can only reject suggestions of citizens by way of a reasoned statement. Only when this procedure has been concluded can the local council decide about the plan. Even after that it is in many cases still subject to approval by higher administrative bodies.

If planning proceeds carefully through all these phases, courts are unlikely to examine the town plans on their substantive merits. Their review will be restricted to the way the administration has balanced the interests involved. Thus town plans will be overruled only when a reasonable balancing has not even taken place, when things that needed consideration have not been considered, when the importance of certain interests has been ignored, or when the public interests have been balanced in a way

that does not correspond to the objective importance of the individual interests (Hoppe 1970; Mainczyk 1992: §1.54).

In assigning sites as "stable allotments", local councils are first to turn to their own land, only if that has been more or less exhausted do they have reason to turn to land held by private owners. To determine the size of the need for stable allotments a number of demographic standard is in use. The conference of directors of the city allotments councils has, for instance, proposed to set such a standard at one allotment for every 7 to 10 houses without a garden. Other standards relying on other statistics (e.g. population) are also used (Mainczyk 1992: §1.47). All the evidence indicates that the decision of the Munich city council in which it assigned the sites for stable allotments met all legal conditions. Hence, the landowner had in the end to accept that the right to private property in her land was to be severely restricted.

#### The Remnants of the Right to Private Property

The losses of the Munich landowner were mitigated by the fact that the Federal Constitutional Court did find that the new Federal Allotment Law violated the constitutional right to property in another way, namely in its setting of a maximum lease price (§5.1/1 BKleinG). Such a regulation need not by itself violate the right to private property, but in this case the Court considered that the maximum had been set unreasonably low. The perceived need to protect the less wealthy lease-holders could not justify this regulation, because this goal could have been pursued with alternative means (subsidies, providing council land for allotments) which would not restrict the right to property as severely. Once again the legislator was put to work, and on 8 April 1994 the German Parliament adopted a Law to change the Federal Allotment Law (BKleinÄndG, BGBl. II 1994: 766). This Law retained a maximum lease price for allotments, but allowed it to be twice as high. Moreover, a provision was introduced by which the landowner could charge their lease-holders maintenance costs and contributions for public facilities (cf. Mainczyk 1994). These measures thus sought to

recognise the interests of the landowners and to secure their willingness in the provision of allotment sites.

Ultimately, the remaining claims that the right to private property secures in a leased out stable allotment are the claim to receive rent, and the power to check gross neglect of the allotment through termination of the contract. In most relevant respects then it appears that the proprietor has a poorer title to the allotment than the leaseholder. As extreme as this (re-)distribution of claims may appear in the light of the basic right to private property (and to the eyes of Hayekians), I think that the German political system has nevertheless made a good case for its justification. First of all, it has recognised as legitimate the social and environmental needs for gardens in the city. If the distribution of land were left to the market, these needs would probably be crowded out as they are unlikely to be adequately represented by the strongest actors (corporations) in the market and it would require an extraordinary organisation of smaller actors to raise them effectively. Secondly, it has recognised that the value of allotments rests not so much in the hands of the proprietors as in the hands of the leaseholders. Thus the public interest in having allotments well-preserved is served by the latter rather than the former whose claim to serve the public good of the market economy correspondingly dwindles.

One may even wonder whether it would not be more efficient actually to cede the property to either the government or the allotment association or, to look at it from the other side, to have it expropriated against a single compensation payment instead of leaving the proprietor a lasting claim to receive rent. Against such a move it could be argued that the presence of the proprietor still serves a lasting function since her interests motivate her to guard that the allotments will not be grossly neglected. Presumably she can exercise this function more efficiently than any government agency. However, the guardian function can also be exercised by allotment societies who actually control most allotment sites and unite the different individual leaseholders. The fact that allotment sites are not fully expropriated in exchange for one-time

compensation, can in the end be read as a sign of the lingering respect for ownership once attained.

#### **IV) SUMMARY AND CONCLUSION**

In the introduction above I asked on what grounds one would be willing to withdraw one's own claims to certain goods by virtue of other's ownership of them. One way to answer this question is to assert that the right to private property is a moral, personal right deriving from individuals' self-ownership. Revisiting Locke's classical labour theory showed, however, that Locke himself held property rights subject to a number of rather strict conditions. Thus it turned out that the self-ownership argument taken on its own does not yield an adequate justification for the basic right to private property. Similarly, though private property can be shown to serve individual liberty, it did not become clear how invoking this value would suffice to make people yield to the exclusive claims of ownership.

We had to change perspective to find that the claims deriving from the right to private property owe their overriding force to the way in which the public good of the market economy depends on them. More concretely, the willingness of individuals to take care of goods is maximised under a regime of private property rights. Thus securing their expectations serves not only their personal interests but also those of others potentially interested in acquiring claims to these goods. As the market economy operates through continuous transfers of claims in goods, this effect operates throughout society, implicating all. Hence, a challenge to a claim deriving from the right to private property implicates more than merely the personal interest of the proprietor. Beyond this personal interest, one needs to take account of the interests of those who might want to acquire claims to the good involved from the current proprietor. Moreover, challenging claims deriving from the right to private property may damage the expectations of proprietors throughout society and thereby undercut the preconditions for the public good of the market economy. These considerations provide the grounds for the recognition of the right to private property.

This, however, does not imply that no claim deriving from the right to private property can ever be legitimately challenged. For a start, even ardent supporters of markets admit that they do not always operate optimally with regard to the very standard of efficiency they presuppose. Moreover, as these supporters may find harder to swallow, the market economy is not the only, nor the supreme, good in society. I analysed the implications of these considerations by turning to two actual cases of decision-making involving the right to private property.

In the first case the need for a bypass warranted the expropriation of land of de Rothschild Ltd. All parties involved affirmed the importance British law has attached to the right to private property. Nevertheless, de Rothschild's claim to have the original scheme abandoned in favour of one of the alternatives it proposed failed. Indeed, the decision against its claim may well be justified as the extra costs that these alternatives required outweighed the interests in having the right to private property respected. However, there was little evidence in the case that any of the authorities involved had actually considered the full range of interests represented by de Rothschild. Rather an inspector took account of the technical arguments involved and the Secretary of State for Transport followed his recommendations without introducing the consideration of how his intervention would reflect upon the public good of the market economy. In turn, the Court of Appeal was satisfied to leave the Secretary of State a wide range of discretion in thus reaching his decision and refrained from substantiating the basic right to private property by recognising certain special principles to which this decision was liable.

In the second case the interests of allotment lessees and considerations of urban planning motivated the German legislature to severely restrict the claims of a Munich landowner to an allotment site she had given in lease. Interestingly, the Federal Constitutional Court ruled on two consecutive occasions that these restrictions could not be reconciled with the constitutionally recognised right to private property. Nevertheless the legislator persisted in seeking to meet the claims competing with the right. Employing the provisions of planning law, it ensured the opportunity to give

maximum protection to these claims. On the other hand, the procedural guarantees inherent to town planning were to ensure that the interests in the claims deriving from the right to private property would be fully considered before such limits would be imposed upon it. The main point of criticism in this case derived from the fact that there is reason to doubt whether planning procedures actually meet the requirements of the basic right to private property. However, as the German legislator observed, it is the lease-holder rather than the proprietor who preserves the value of allotments. For that reason the claims deriving from the right to private property lose much of their force, and may well be outweighed by the interests of lessees.

Though both of these cases can be criticised in terms of details, they demonstrate how the basic right to private property is effectively recognised in both liberal democracies while at the same time countervailing claims can still be considered to justify limiting the claims deriving from the basic right.





## THE BASIC RIGHT TO FREE SPEECH

There are probably few political principles that appear as deeply entrenched in liberal-democratic societies as the right to free speech. The recognition of this right is possibly the main mark by which liberal-democratic regimes distinguish themselves from other, non-democratic, ones. In the post-war free world it is the First Amendment to the American Constitution that has come to serve as the banner of this creed:

Congress shall make no law ... abridging the freedom of speech. Or of the Press.

Though James Madison formulated the amendment in 1789, it has acquired the prominence we ascribe to it only at a much later time. Only in 1919 did Justice Holmes sow the seeds for contemporary First Amendment doctrine.<sup>44</sup> Over the years following it was above all Holmes's colleague Brandeis who continued to write minority dissents advocating the stringent protection of speech, with which Holmes often, but not always, concurred. In the post-war decades the principled interpretation of the First Amendment was pursued further by U.S. Supreme Court Justices Douglas and Black. It was not until the 1960s that the majority of the Supreme Court came to adopt a principled and affirmative stance on the issue of free speech with the landmark rulings in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In any case, Holmes's and Brandeis's speeches as well as a number of post-

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<sup>44</sup> The landmark opinion is Holmes's dissent in *Abrams v. United States*, 250 U.S. 616 (1919). However, as no commentator can ignore, earlier in the same year Holmes had shown himself far less committed to free speech values as he wrote the majority opinion in *Schenck v. United States*, 249 U.S. 47 (1919) in which he formulated the famous and endlessly contested test of "clear and present danger". The intricacies of Holmes's position on the First Amendment and its marked differences with that of his close colleague Brandeis were already noted by Alexander Meiklejohn (1948). Among the many commentaries, Mark Graber's (1991) is extraordinarily successful in accounting for the subtle but crucial shifts in the different opinions of these two, see also Sunstein (1993a: 23 ff.).

1960's rulings of the Supreme Court have become major reference points for American constitutionalism and an example of liberal principledness world-wide.<sup>45</sup>

The right to free speech is an absolute, if any basic right is. Though the Supreme Court never went as far as proclaiming this but always retained "safety valves" (Smolla 1992: 23) as to be able to uphold certain limits to the claims that the right would justify, it is often suggested that truly enlightened liberal politics cannot allow any exceptions to the right to free speech. Moreover, the perception that the right to free speech is at the heart of liberal democratic politics is by no means confined to the political system of the United States. The symbolic status of free speech for liberal democracies in general is comparable to that of the abolition of slavery. Both are regarded as great achievements of civilisation and any scepticism of the value of either is regarded not only as reactionary but as immoral. Any infringement of the right to free speech is suspected of relying on lingering pre-liberal sentiments, showing up the intolerance of a particular elitist morality or taste. Only non-liberal democratic regimes can uphold wide-ranging censorship regulations and intense prosecution of statements inimical to the regime.

It was probably inevitable that the most severe backlash against the right to free speech would emerge in the land of the First Amendment. This change in American public opinion is occasioned by the heightened awareness of, what has been aptly labelled, "hate speech", speech that more or less deliberately sets out to hurt people while lacking reasonable grounds for doing so. The standard examples concern bluntly racist statements published in the heterogeneous environment of university campus. Such incidents present liberals with a dilemma: does their allegiance to the right to free speech imply that they are bound to tolerate such statements? can the same Bill of

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<sup>45</sup> Major accounts of the history of the First Amendment are the classic *Free Speech in the United States* (1941) by Zacheria Chafee, and the more recent but already authoritative *A Worthy Tradition* (1988) by Harry Kalven. From a more philosophical view Alexander Meiklejohn's "Free Speech and its Relation to Self-Government" (1948) has become a constitutional classic. Recently Cass Sunstein's *Democracy and the Problem of Free Speech* (1993a) has made a major mark on the ongoing debate. Particularly provocative and challenging I have found the historical and sociological analyses of Frankenberg & Rödel (1981) and Graber (1991). See further Redish (1984), Bollinger (1986), and Smolla (1992).

Rights that meant to recognise all people as equal and that was the main instrument of the 1960's civil rights movement, serve to protect such regressive affirmations of inequality? As individuals claim to be hurt by "hate speech", the belief that speech cannot hurt is severely challenged. Are we to tell them that speech cannot *really* hurt or that the pain is only slight and not worthy of authoritative retribution? Will that answer do in the cases of black American college students confronted with racist remarks in "their" student journal?

"Hate speech" is only one strand of speech that is perceived as doing particular damage, pornographic publications is another classical example, or, depending on your affiliations, denials of the Holocaust or the circulation of Salman Rushdie's *Satanic Verses*, may serve as topical cases making the point that speech can hurt badly.<sup>46</sup> Of course, in each single manifestation of these cases one may still contest whether people have a justified claim to have speech abrogated. They demonstrate, however, that the invocation of the right to free speech against actual objections cannot be taken to render superfluous the question whether these competing claims might be based on reasonable grounds.

These current claims set the background for the central question to be addressed in this chapter: For what reasons would one acknowledge that speech that one actually finds objectionable, should nevertheless be protected by the right to free speech? This question will be dealt with in four steps. The first section opens the discussion by bringing into full light the costs free speech can have. That effect is most effectively attained by introducing two actual cases of victims of speech, one from Great Britain and one from Germany. I then point out that the claims of those hurt by speech are often not taken sufficiently seriously in accounts of free speech. This is particular the case in two common lines of argument, one insisting on the virtue of toleration and the other claiming a special governmental incompetence in the field of speech.

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<sup>46</sup> On pornography, see the examples in MacKinnon (1993). On the *Satanic Verses* cf. R v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury, [1991] 1 All ER 306.

In the second section I turn to the more substantial arguments that have been adduced to justify the right to free speech. All of these can be traced in some way or another to derive from John Stuart Mill's classical work *On Liberty*, nevertheless they can be distinguished in two main strands, an individualist and a consequentialist one. My own position is eventually in the latter camp, but instead of identifying with the classical arguments that rely on the value of truth or of self-government, I emphasise the public good the right to free speech serves of preserving an open culture.

The latter sections then directly address the question, how, having found strong reasons for the recognition of a basic right to free speech, justice can still be done to those hurt by speech. In the third section I argue for the feasibility and necessity of a framework which can account for the distinctive value of free speech as well as the harms it can do. I substantiate this argument by setting out an analytical framework that can allow for the articulation and validation of the different interests at stake in conflicts concerning the freedom of speech. Then in the fourth section I return to the cases introduced in the first section and, using the theoretical ideas developed, examine the ways in which they have been dealt with in the legal systems of Great Britain and Germany. The final section concludes this examination and is meant to put it again in the light of the general argument of this chapter.<sup>47 48</sup>

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<sup>47</sup> Of the many theoretical accounts proposed of free speech doctrine, mine displays striking parallels with Joshua Cohen's "Freedom of Expression" (1993). This chapter can be read as an attempt to elaborate his "foundational strategy" (id: §III) which seeks to account for the interests served by free speech as well as its "costs" or, what I refer to as, its "harms". I do not think that the objections Cass Sunstein has expressed against Cohen's approach are severely damaging to it (Sunstein 1993a: 145-7). For reasons that I will touch upon in the course of this chapter, I think that the alternative "two-tier strategy" proposed by Sunstein rests upon far weaker foundations, in particular as it regards general freedom of speech merely as a kind of derivative, if not an externality that has to be borne, of the protection of political speech.

<sup>48</sup> This chapter thus gives a classical account of free speech as a "negative right" or, in other words, as only justifying liberties against intervention and not positive claims against others to support one's opportunities to speech. Hence, I refrain from entering into the debate about "positive" claims to freedom of speech, such as access claims to fora and mass media. Similarly, I do not touch upon the political threats posed by severe imbalances in the means to speech as following from the accumulation of private media power. Such issues require a much broader framework of analysis adapted to the study of "positive", "social" rights. Some basic notions for such a framework will be developed in the next chapter. Then, however, I will look at the right to education rather than at the right to free speech. For pathbreaking treatments of the right to free speech as a positive right see Fiss (1990) and other contributions in the collection edited by Judith Lichtenberg (1990), Graber (1991: Ch. 6), Sunstein (1993a), and Barendt (1995).

## **I) SPEECH THAT HURTS**

Claims that speech hurts cannot be ignored nowadays. The examples I referred to above - hate speech, pornography, the Holocaust-denial, and the *Satanic Verses* - may suffice to support this thesis. The current topicality of these four cases is above all accounted for by the fact that they all involve claims of groups to have the specific sensibilities attached to their identity protected. Thus they raise a whole range of questions that are currently widely debated in the context of "the multicultural society". While the topicality of these debates lends particular force to the awareness that speech can hurt, analysing them requires that many of the specific issues surrounding group identity and the nature of political relationships in the multicultural society have to be addressed.<sup>49</sup> Given these questions, the disagreements between protagonists and antagonists range over a great many issues that do not directly concern freedom of speech. Though the specific claims made by certain groups to have free speech restricted thus provide an interesting decor, in building up my argument about the right to free speech, I prefer to start with two cases of a more straightforward nature. They concern personal defamation.

### Case 1: Telnikoff v. Matusevitch

Consider the case of Vladimir Telnikoff, a Russian émigré living in London and (at the time) working as a probationer for the BBC Russian Service. His experience at the Russian Service led him to write an article for the British newspaper the *Daily Telegraph* that was published 13 February 1984 under the title "Selecting the right wavelength to tune in to Russia". The piece presented a history of broadcasting to

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<sup>49</sup> There currently is an enormous waive of publications dealing with such issues. Outstanding and thought-provoking remain the contributions by Iris Marion Young (1989; 1990) and Will Kymlicka (1989; 1995a). Further references to these debates can be found in the review article by Kymlicka and Norman (1994). Particularly interesting contributions directly bearing upon the right to free speech are by Joseph Raz (1994b) and, with specific reference to hate speech, by Mari Matsuda (1989). In the concluding chapter I present some observations on the tenability of basic rights in general in modern, "multicultural" societies.

Russia and issued in a severe critique of the BBC Russian Service which contained the following paragraphs:

"But still, after three decades of gradually becoming aware of the significance of Russian language broadcasting, I believe its general concept has never been set right. It continues to reflect the fatal confusion of the West, which has yet to clarify to itself whether it is threatened by Russia or by Communism. We fail to understand that Communism is as alien to the religious and national aspirations of the Russian people as those of any other nation.

This confusion further manifests itself in the policy of recruitment for the Russian service. While other services are staffed almost exclusively from those who share the ethnic origin of the people to whom they broadcast, the Russian Service is recruited almost entirely from Russian-speaking national minorities of the Soviet empire, and has something like 10 per cent of those who associate themselves ethnically, spiritually or religiously with Russian people. However high the standards and integrity of that majority there is no more logic in this than having a Greek Service which is 90 per cent. recruited from the Greek-speaking Turkish community of Cyprus.

When broadcasting to other East European countries, we recognize them to be enslaved from outside, and better able to withstand alien, Russian, Communism through our assertion of their own national spirit and traditions. However, this approach, leaves room for flirting with Euro-communism or 'socialism with a human (non-Russian) face' as a desirable future alternative, and well suits the Left in the West.

Resisting the ideological advance of Communism by encouraging anti-Russian feelings is of less obvious value with a Russian audience. Making "Russian" synonymous with "Communist" alienates the sympathetic Russian listeners. It stirs up social resentment in others against the Russians. Making those words synonymous also makes sympathy for Russia into support for the Communist system."

One reader of Telnikoff's article was Vladimir Matusevitch. Though the two had never met, there were some striking parallels in their personal histories. Like Telnikoff, Matusevitch was a Russian émigré. Moreover, he also worked as a journalist for a radio station broadcasting to Russia, in his case Radio Liberty, a United States radio station based in London. Unlike Telnikoff, however, Matusevitch is of Jewish descent and suffered persecution in Russia before emigrating to the United Kingdom. In other words, Matusevitch is a member of one of the "Russian-speaking national minorities of the Soviet empire". This accounts for Matusevitch's decision to write a letter to the

editor of the *Daily Telegraph*, which is published on 18 February 1984 headed as "Qualifications for Broadcasting to Russia":

[1] Sir - Having read 'Selecting the Rights Wavelength to Tune in to Russia' (Feb 13) I was shocked, particularly by the part on alleged inadequacies of the BBC's Russian Service recruitment policies.

[2] Mr Vladimir Telnikoff says: 'While other services are staffed almost exclusively from those who share the ethnic origin of the people to whom they broadcast, the Russian Service is recruited almost entirely from Russian-speaking national minorities of the Soviet empire'.

[3] Mr Telnikoff must certainly be aware that the majority of new emigrés from Russia are people who grew up, studied and worked in Russia, who have Russian as their mother tongue and have only one culture - Russian.

[4] People with Jewish blood in their veins were never allowed by the Soviet authorities to feel themselves equal with people of the same language, culture and way of life. Insulted and humiliated by this paranoid situation, desperate victims of these Soviet racist (anti-Semitic) policies took the opportunity to emigrate.

[5] Now the BBC's Russian Service, as well as other similar services of other Western stations broadcasting to Russia, who are interested in new staff members (natives) employ these people in accordance with common democratic procedures, interested in their professional qualifications and not in the blood of the applicants.

[6] Mr Telnikoff demands that in the interest of more effective broadcasts the management of BBC's Russian Service should switch from professional testing to a blood test.

[7] Mr Telnikoff is stressing his racist recipe by claiming that no matter how high the standards and integrity 'of ethnically alien' people Russian staff may be, they should be dismissed.

[8] I am certain the DAILY TELEGRAPH would reject any article with similar suggestions of lack of racial purity of the writer in any normal section of the British media.

[9] One could expect that the spreading of racist views would be unacceptable in a British newspaper." (*italics-author's emphasis, underlining added; paragraph numbering adopted from the verdict of the House of Lords*)

Given his personal background it is quite understandable that Matusevitch was driven to object vehemently against the views expressed by Telnikoff. However, the wordings used to express his feelings are markedly strong as they suggest not only that Telnikoff has racist convictions but also that he is quite willing to implement them by the rather crude means of a "blood test" and a strict regime of racial purity (with all the implicated

references to the practices of twentieth century totalitarian regimes). As understandable as Matusevitch's feelings may be, it is just as understandable that Telnikoff is hurt by having these accusations published in one of the major newspapers in Britain. The more so as he regarded himself as a prominent activist for human rights in the Soviet Union.<sup>50</sup> He decided that he could not let this publication pass as if it did not affect him and wrote a letter to Matusevitch demanding an apology. Matusevitch refused to grant this. As Telnikoff was thus left with his hurt feelings, he decided to turn to the courts.

### Case 2: Forced Democrats

The second case I want to consider concerns Franz Josef Strauß who, as the leader of the CSU (*Christlich-Soziale Union*, Christian-Social Union), was one of the most prominent German politicians in the 1970s and 80s. Politically the CSU was closely allied to the main, national Christian-Democratic party (CDU), but it retained its own particular electoral basis in the southern German *Land* of Bavaria and therewith a distinct political profile. The *Land* of Bavaria is generally regarded as a more traditional and conservative part of the Federal Republic and this image was politically represented by the CSU and above all by its prominent leader Franz Josef Strauß. Besides being leader of his party, Strauß was actually President of Bavaria and was notably effective in asserting a sense of its own cultural and political identity distinct of the Federal Republic. Although Strauß's power-basis was specifically localised, he exercised disproportionate national power by being a key ally of the Christian-Democratic party in its contest against the Social-Democrats, while at the same time guarding the right wing of the Christian-Democratic party as he presented a potential alternative for this part of the electorate.

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<sup>50</sup> This information I owe to the summary judgement of United States District Judge Ricardo M. Urbina who came to consider Telnikoff v. Matusevitch for the U.S. District Court Columbia. Urbana adds that Telnikoff had testified before the British courts to have leaked information to the West about the political persecutions in the Soviet Union and to have been a confidant of such well-known Russian activists as Alexander Solzhenitsyn, Andrei Sackarov, Yelena Bonner, and Vladimir Bukovsky. For how this case got to the U.S. District Court Columbia, see note [75].



Strauß represented for many, more progressive, Germans the paragon of the political right, which was suspected never to have broken completely with the extremist, fascist German politics of the first half of the century. The mark that this past still leaves on the German nation remains an important topic in the national public debates. The Nazi-past not only instils a great sense of caution in German public debate, it also is often explicitly or implicitly invoked as a yardstick by which current public actors are measured.

In 1987 the writer and journalist Ralph Giordano published his book "Die zweite Schuld oder Von der Last Deutscher zu sein" (*The second guilt or On the burden of being German*). The first guilt implied in this title referred to the German guilt to the rise of national-socialism and its politics which issued into World War II and the Holocaust. The main topic of the book, the second guilt, is the tendency to repress and deny this first guilt which, Giordano argues, not only hinders a right appraisal of the past, but also poses a threat to the preservation of democracy in Germany. Elaborating this last allegation, Giordano coins the expression "Zwangsdemokrat" ("forced democrat") by which he refers to those people who pretend to endorse the German democracy under the public pressure to do so, but who, if it were left to them, would much prefer to dismantle it. One chapter in "Die zweite Schuld ..." is called "Franz Josef Strauß and the forced democrats, on the remaining longing for the strong man" (*FJS und die Zwangsdemokraten, über die verbliebene Sehnsucht nach dem starken Mann*). Notwithstanding the fact that Giordano presents Strauß as the major figure representing the second guilt, he emphatically rejects the comparison between Strauß and "the actual strong man between 1933 and 1945", as much as he rejects the comparison between national-socialist Germany and the Federal Republic.

27 August 1987, on the occasion of the death of Rudolf Hess, right-hand-man of Hitler during the Nazi-era, the German weekly *Stern* published an article called "Rudolf Hess and the second guilt of the Germans" which contained an interview with Giordano (*Stern* 1987 (36): pp. 21E & 21G). On the interviewer's remark, "You have coined the expression 'Zwangsdemokraten'", Giordano answered:

"That I consider to refer to those people who had themselves converted to democracy only by force or for opportunistic reasons and who uphold this system of government merely formally. Franz Josef Strauß is for me the personification of this type.

Stern: The political "vita" of Bavaria demonstrates, however, that we are better democrats than we appear to be - since he has not made it yet.

Giordano: It is true that Strauß has not attained his goal. The second German democracy has domesticated him. But that does not change anything about the fact that this type - I would like to de-personalise this, because it in no way refers to Franz Josef Strauß alone -, that this type is very much alive in the Federal Republic. For sure, its trees have not reached the sky, the remaining longing for a strong man, say the federal-German version of the national-socialist führer-cult, has not asserted itself; notwithstanding this, I hold this type of forced democrat to be very dangerous. Not that they could take over the democracy, but they could do damage to it."

Now while Strauß had not raised any objections against the earlier publications of Giordano, he was provoked to undertake action when these particular statements occurred in one of the most popular weekly magazines in Germany. As Strauß was to tell the court later, he regarded these statements as "a libellous criticism, which could not be surpassed in hatred and defamation". He further maintained that contrary to what Giordano suggested, he had always consented to the parliamentary democracy and regarded it as the best form of government. The suggestion of the contrary implied an offence against his personality rights and his human worth (BVerfGE 82, 272 at 274).

One need not particularly sympathise with either Telnikoff or Strauß to understand that they felt seriously hurt by the statements published about them. That is not to say that Matusевич and Giordano had no grounds for their statements. They were made as part of heated political arguments in which the parties were clearly on different sides. The question is, however, whether the two parties sued could legitimately have labelled their antagonists as "racialist" and "forced democrat". Neither of the victims could be expected to identify affirmatively with the label applied to him, especially since these labels are unequivocally negative. Moreover, the fact that these qualifications were published in the national press - allowing every one to read them, and even granting them a certain mark of editorial authorisation - added to the harm of their painful

content a very public embarrassment. Does the right to free speech commit one to bear this harm? If so, then it requires at least a good justification.

### The Politics of Toleration

Behind arguments defending the right to free speech there often lurks the contention that "Sticks and stones may break your bones, but names will never hurt you" (cf. Schauer 1982: 10).<sup>51</sup> Indeed, though all wish at times that others would have left things unsaid, many people in liberal democracies are never the object of statements that hurt them to the extent that they would seek officially sanctioned authoritative retribution. Most of us belong to the safe majority and we are unlikely to encounter an offensive public depiction of ourselves.

While most people experience little harm from free speech, they identify with the need and value of toleration. It is in the value of toleration that the right to free speech in liberal democracies is historically rooted. When toleration is absent in society, discord is bound to become manifest. Historically this lesson was taught by the intense religious struggles that in the sixteenth and seventeenth century divided the people all over Europe. It took a long time before the value of toleration became broadly recognised, even though it was pleaded for from an early stage by intellectuals like Erasmus. For long the presence of heretics appeared as a great enough harm to warrant the struggle against them. Only when neither the Catholics nor the Protestants were able to attain full control over the whole European population, did the practice of toleration appear as the only viable alternative to indefinite struggle (Kamen 1967).

In retrospect we have come to appreciate toleration as a great political achievement and its paradigm case remains religious toleration. What harm, we ask, does it do that one's neighbour believe in another god? No harm whatsoever, is the answer modern liberals are committed to, and for liberal practice two conclusions

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<sup>51</sup> This idea is also strongly relied upon when a clear distinction is affirmed between offences done by words and those done by actions, presupposing that words do no harm and punishment should be restricted only to actions. A further tenet of this line of argument is that only the actor exercising violent actions is responsible for these, not the instigator who calls upon him. Whether this distinction between words and actions can actually be upheld is, to say the least, doubtful (Scanlon 1972: 207).

follow. First, with striking liberal modesty we refrain from making any claim to prescribe what others have to believe. More particularly, with the historical traumas of religious persecutions in mind, we oppose in principle any claim articulated through the state to prescribe one religion at the cost of suppressing others.

Having established the freedom of belief, the recognition of free speech seems a logical step to make next (cf. Richards 1994). Almost certainly, the right to free speech has been the principal institutional implication of the spread of toleration. However, we cannot simply apply the model of religious toleration to speech, since the two goods are essentially different. For a start, even though we can no longer see any harm in our neighbours' believing in another god, it is not difficult to imagine that they could say things that would actually hurt us. Hence we may doubt whether the two conclusions attached to the model of religious toleration apply with equal force to the case of free speech: Whatever others may say, will we just shrug our shoulders wondering why we would ever prescribe what they should say? And secondly, is it objectionable in principle to rely on the state for the silencing of certain statements?

Of course, merely objecting to a statement is not enough reason to contest another's freedom to publish it. The experience of offence is a minimum requirement to do so. Adhering to the right to free speech in the name of toleration even requires the predisposition to bear some harm that speech may do, though not necessarily all. However, it seems that the invocation of the value of toleration begs the very question it purports to answer. Toleration can be upheld where harm is not, or no longer, felt. That others practice other religions is something that affects us most of the time as much as the colour of the clothes they choose to wear. Toleration is strained, however, when harm is made acutely felt, as, for instance, when fanatics try to impose religious views upon us or when clothing (or the lack of it) turns into indecency. Similarly when speech hurts, the value of toleration cannot simply be invoked to protect it. Rather toleration needs to be justified itself, time and time again.

### A Special Governmental Incompetence?

There remains the second tack holding that it is objectionable in principle to rely on the state to have certain statements silenced. Admittedly, state power is the most secure means to silence people. Maybe at times one can obtain a retraction of statements just by voicing one's objections (like Telnikoff sought by writing to Matusevitch to demand an apology), but in most cases one would probably need the authoritative power of the state to enforce such a retraction. If, however, there are reasons of principle to object to the use of state power in regulating speech then these might provide a negative, but sufficient basis for freedom of speech.

This is indeed the line of arguing employed by a number of important contemporary philosophers seeking to justify the right to free speech. Most notably Frederick Schauer emphasises the particular governmental incompetence in the realm of speech:

"Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of government determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense" (Schauer 1982: 86; cf. Scanlon 1979: 534).

Notably, the argument from government incompetence recalls that for long the main argument opposing free speech was the argument of seditious libel which held that publications bringing the capacity of the governors in disrepute were to be prohibited for the general interest in the preservation of governing power. Rulers may employ the law of seditious libel as a welcome instrument to censure political opposition and to persecute people for their opinions. Indeed, notwithstanding the fact that the cynicism of censorship politics may easily be exaggerated (many rulers in the sixteenth and seventeenth century upheld censorship in the genuine conviction that their subjects would in the end benefit from being protected against such 'bad' speech, Kamen 1967), there appear to be good reasons to mistrust rulers' judgement of what bad speech their subjects should be protected from and therefore good reasons to restrict their powers in this field. On this basis, Schauer concludes that the right to free speech serves to

counterbalance rulers' inclinations to over-regulation by institutionalising the idea that an infringement of individuals' freedom of speech comes at a higher cost than the harm they may do to the public interest (Schauer 1982: 137 ff.).

The question is, however, whether this argument for governmental incompetence, focusing on the law of seditious libel as the main opponent of free speech and emphasising the autocratic tendencies of rulers, still obtains today. In fact, the role of the offence of seditious libel in current free speech law has become rather small, if it exists at all.<sup>52</sup> As is demonstrated by the cases I have been referring to so far, what is at stake in most current free speech cases are not the abstract, public interests of state power but somebody's personal interests, as in defamation cases, or the interests of a cultural group, as in instances of hate speech. In these cases the preference given to the interests in free speech is not absorbed by the state but comes directly at the cost of the individuals offended. In effect, holding the government to be incompetent in judging these cases, implies that certain concerns are left politically unaddressed. Instead of serving as a guiding political principle, the right to free speech then turns to a rule excluding certain issues from political consideration altogether, while allowing the harm to persist (cf. Fish 1994: 110).

The argument of governmental incompetence is further weakened by the fact that the seventeenth century authoritative states have been replaced by liberal-democratic ones. Even though the ideal of democracy may be far from fully realised, checks and balances are to secure that democratic rulers cannot usurp their powers. In the light of the liberal democratic ideal, the right to free speech cannot serve simply to ignore certain political claims. Rather it is to serve well-considered decision-making in dealing with them. It is only through considering each case on its substantive merits that democratic self-government can be attained. If the people do not trust democratic government they do not trust themselves able of governing themselves. Hence, inherent in the argument from governmental incompetence there remains a striking "libertarian

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<sup>52</sup> A notable exception is the British 'Spycatcher'-case: *Secretary of State for Defence v. Guardian Newspapers Ltd.*, [1985] AC 339, [1984] 3 All ER 601; *Observer and Guardian v. United Kingdom*, (1991) 14 EHRR 153.

bias" which may leave the untouchables unconcerned, but ignores the genuine claims of those who are hurt by speech (cf. Strauss 1991).

## **II) JUSTIFYING THE BASIC RIGHT TO FREE SPEECH**

People can have many different interests in speech. The primary among these is the interest one has as a speaker in being free to say whatever one wants to say, since there simply is no speech without a speaker claiming the freedom to speak. Others may have reason to object to this claim, they may want to have certain speech restricted. Under the right to free speech, however, the claim to speech is privileged and *prima facie* dominates the objections brought against it. This raises the following questions that I seek to answer in this section: Why would we attach this force to claims to speech? How can the right to free speech be legitimately upheld against those who have clear interests in having certain speech restricted? In short, on what basis is the right to speech justified?

In the following sub-sections, I examine the main substantial arguments that have been proposed to answer these questions. An obvious line of argument takes a highly individualist stand, emphasising the specificity of the personal interest of speakers to be free to say whatever they want to say and working towards the conclusion that this interest is not just another personal interest but that it is a fundamental interest of all human beings. Speech, it is argued, is one of the main activities, if not *the* main activity, through which individuals realise themselves, through which they are able to go beyond mere passive reactions to external stimuli and make their own, distinctive mark on the world. To restrict speech is to prohibit individuals from being or becoming themselves, it is a denial of the humanity of the subject and a way to force her back into the lifeless order of things. Obviously, this is a very general and abstract argument and its political implications are far from clear. I will examine two variations of this argument, one elaborating the individual interest in free speech as an interest in moral independence, the other regarding it as an interest in personal autonomy.

All arguments seeking to justify the right to free speech cannot but locate their starting point in *the* classical work on free speech: John Stuart Mill's *On Liberty* (1859). Mill provides the root idea for individualist justifications of free speech as he maintains that each individual possesses a sphere of liberty to which society cannot claim any interest. This sphere is to comprise above all:

"the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in part on the same reasons, is practically inseparable from it (Mill 1859: 16/7).

For Mill freedom of speech is thus inherently implied by the absolute liberty of thought (cf. Mill 1859: 19). Nevertheless, he notes that there is a difference between these two freedoms, as speech can, and often does, affect others in a much more direct way than thoughts can. For that reason, Mill elaborates his argument in two different directions. While, on the one hand, he continues to maintain that there are fundamental objections to any interference with speech because of its direct entanglement with individuals' liberty of thought, he turns, on the other hand, to another, consequentialist, argument by which he seeks to show that free speech indirectly serves the interests of those who may be disposed to curb it as well.

While the first two sub-sections below examine the possible directions for which the individualist argument allows, the consequentialist argument is taken up in the latter sub-sections of this section.<sup>53</sup> Mill points in particular to the important role free speech plays for the pursuit of truth. This argument meets with a number of well-known objections. In the contemporary debates on free speech it lives primarily on as part of the popular line of argument that holds that free speech is an essential and necessary

<sup>53</sup> The labels 'individualist' and 'consequentialist' should not be taken as logical opposites, they merely serve to characterise the main directions in which justifications for the rights to free speech have been sought. As professor Lukes has pointed out to me, individualism and consequentialism are not necessarily mutually exclusive. One may, for instance, seek to justify the right to free speech by pointing to the beneficial consequences it will have for individuals.



precondition for democratic self-government. Each of these arguments makes certain valuable points, still I will argue that neither of them by itself can fully justify the basic right to free speech.

Ultimately, the aim of this section is to bring these different arguments together under one coherent formulation recounting the interests involved in the protection of free speech. In the final sub-section, I argue that free speech should enjoy special protection not merely because it is a manifestation of a certain important value, as, for instance, personal autonomy, but because besides serving the interests of the person acting under its protection, it also protects interests of audiences and, in the aggregate, society at large by preserving the public good of an open culture.<sup>54</sup>

### Liberty as Independence

Mill's idea of liberty is not synonymous with license. It has a clear limit which he defines as the "harm-principle": "Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind" (Mill 1859: 62). Mill suggests, for example, that the statement that private property is robbery may be justly punishable when delivered to an excited mob. Thus liberty is not the single, fundamental principle ruling Mill's conception of politics, its primary aim is to delineate a secure sphere of self-regarding actions from which government action can be excluded. The sphere of liberty is to ward off governmental paternalism in matters of personal morality.

The specificity of Mill's theory of liberty is well captured by Ronald Dworkin who reads it as expressing an idea of liberty as independence rather than as license. Liberty as independence refers to "the status of a person as independent and equal" (Dworkin 1977: 262 f.). Dworkin himself seeks to show how this idea of independence

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<sup>54</sup> Thus, in response to Alexander and Horton's argument for the unlikelihood of an "independent" free speech principle, I argue that the basic right to free speech can be justified according to the general conceptual framework of basic rights obtaining in liberal democracies, while the specific substance of this argument draws upon the particular nature of the good of free speech (Alexander & Horton 1983; cf. Schauer 1982).

can be used to found a system of rights. That system of rights is to rely on the background right to independence, or rather, as Dworkin has elaborated it, moral independence, and amongst other rights it includes the right to free speech.<sup>55</sup>

The idea of moral independence mirrors Mill's harm-principle. Rather than asserting that the presence of harm is a minimum requirement to make practices punishable, it affirms that personal, moral convictions alone do not suffice to make certain practices of others punishable. Dworkin points out that moral convictions often lack rational grounding and are rooted in unreasonable sentiments and prejudice (Dworkin 1977: Ch. 10). Such convictions can thus not be legitimately invoked to bind other's behaviour. Only when that behaviour can be demonstrated to cause real harm is there a reason to make it punishable.

One of Dworkin's favourite arguments maintains that the idea of moral independence justifies the protection of pornography as an instance of offensive speech. Typically he argues that

"The right [to moral independence] is therefore a powerful constraint on the regulation of pornography, or at least so it seems, because it prohibits giving weight to exactly the arguments most people think are the best arguments for even a mild and enlightened policy of restriction of obscenity" (Dworkin 1981b: 354).

The idea of moral independence nullifies the force that arguments regarding pornography as something despicable or unworthy and regarding paternalistic commitments to safeguard the vulnerable, can have to justify the restriction of pornographic publications. Such restrictions, Dworkin says, can only be justified if it can be shown that pornography fosters criminal behaviour, for instance sexual violence.

<sup>55</sup> The background right to moral independence is closely related to the principal background right Dworkin argues for: "a natural right of all men and women to equality of concern and respect" (Dworkin 1977: 182 & 272 ff.; cf. Rawls 1971: 511; critique in Sartorius 1984; Raz 1978). His writings even suggest that the two may be two different ways of stating the same thing. In any case, Dworkin's idea of equal respect seems to require the recognition of each other's moral independence. In the text I focus on the right to moral independence because it nicely pursues the line set out by Mill's individualism and because it is the formulation Dworkin invokes when arguing for a right to pornography (cf. Dworkin 1977: Ch. 11; 1981b).

He asserts, however, that this relation cannot conclusively be established in the case of pornography.<sup>56</sup>

Dworkin's position raises the question whether genuine harm is limited to violent crime and whether all other offences experienced can be brushed aside as illegitimate, prejudiced moral sentiments.<sup>57</sup> He does not offhand reject all claims to genuine offence, but he reduces the impact they can have by arguing that in practice it is generally impossible to distinguish genuine objections from irrational moral prejudices. Given that difficulty, a society committed to the idea of moral independence should be extremely cautious in adopting policies restricting pornography. Overall Dworkin clearly rates the potential costs of restricting certain speech far higher than the offences it may cause. In that respect his argument retains a "libertarian bias" (Strauss 1991: §IV.B): while it may meet with sympathy from confident intellectual elites for whom irony is the main force of speech, those vulnerable to offensive speech (public figures, women, racial minorities) may well find that Dworkin fails to do justice to their claims.

As the argument from independence remains contestable in justifying a right to pornography, it falls even further short of providing a secure ground for the basic right to free speech (cf. Schauer 1982: 64/5). As speech is inherently relational it is hard to see how the idea of independence can be adduced to justify its general freedom. This is clearly shown by the defamation cases cited above. Certainly some speech uttered in private settings may be of negligible effect to others, but the general aim of speech is exactly to have an effect on others. Cannot these others therefore legitimately expect to have their claims to having certain speech prohibited met?

<sup>56</sup> For a contrary view that points to abundant evidence of how pornography serves to maintain a social climate in which sexual violence towards women is ever present, see MacKinnon (1993).

<sup>57</sup> This question is extensively addressed by Joel Feinberg in his monumental three-volume work *The Moral Limits of the Criminal Law*. Feinberg's analysis diverges from Mill's harm-principle by adding an offence-principle which may justify criminalisation of behaviour as well. Most of the challenges to free speech dealt with in this chapter could be analysed in terms of this offence principle (Feinberg 1985). I consider Feinberg's distinction between harm and offence in the next section.

### Personal Autonomy

This question can be answered by bolstering up the individualist defence of free speech once more. Freedom of speech is then taken to derive from the value of personal autonomy, the capacity of each individual to be best able to consider her own reasons for action. Thomas Scanlon (1972; cf. Strauss 1991) has argued that such a conception of personal autonomy invalidates the major reasons commonly adduced for prohibiting speech. The main reason that Scanlon finds invalid is the argument that restriction can be justified to prevent individuals from adopting false beliefs. An autonomous individual cannot accept this reason since it would require him to alienate his own powers of judgement as he would "concede to the state the right to decide that certain views were false and, once it had so decided, to prevent him from hearing them advocated even if he might wish so" (Scanlon 1972: 217/8). The second reason for prohibiting speech that Scanlon holds to be invalid is the argument that speech can be prohibited for advocating acts which have been declared illegal.<sup>58</sup> This argument, he shows, fails to distinguish between challenging the laws and actually breaking them. Autonomous persons do not simply adhere to whatever statements come to them but consider them on their merits. The state can only legitimately interfere once persons decide to act contrary to the laws. Given that they are assumed to reach this decision on their own balance of reasons, no one but they themselves can be held responsible for such acts.

The autonomy argument has found its classical expression in U.S. Supreme Court Justice Brandeis's opinion in *Whitney v. California*:

"the fitting remedy for evil counsels is good ones (...) no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence" 274 U.S. 357 (1927) at 577-9.

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<sup>58</sup> As Alexander and Horton rightly emphasise, this argument rests solely on the idea of autonomous belief-formation and should not be equated with a right to disobey (Alexander & Horton 1983: 1326; cf. Schauer 1982: 70).

This statement reflects Scanlon's argument that speech advocating criminal behaviour should be answered by counter-reasons rather than being restricted. However, a problem inherent in Scanlon's argument and more explicit in Brandeis's is that they assume that speech causes its major harms only by way of its consequences in actions. This ignores that in many cases the cause of the harm done by speech does not follow from its persuasive impact but from it being published in the first place. The autonomy argument fails to appreciate that the assurance that no reasonable, autonomous person will be persuaded by a certain offensive statement need not suffice to soothe the pain of its victim.

In an article published seven years later, Scanlon reconsiders the autonomy argument and concludes that it mistakenly suggests a rather rigid free speech principle that excludes certain legitimate objections to speech. Autonomy, he now corrects himself, cannot be adduced to invalidate certain considerations from the start, rather it suggests that citizens are sufficiently able to decide for themselves what kind of restrictions on speech they regard as justified. As an example Scanlon refers to restrictions on cigarette advertising. Surely a political community of autonomous citizens can have legitimate grounds to adopt such restrictions (Scanlon 1979).

A particularly interesting insight in Scanlon's later argument is the emphasis he puts on the fact that free speech concerns more than one, single range of individual interests. It is not simply our respect for the autonomy of the speaker (Scanlon talks about "participants") that binds us to uphold free speech. Neither, however, can we rely on a single, definable interest of the public at large (Scanlon talks about "audience") that commits us to recognise the right to free speech (Scanlon 1979: §11; cf. Barendt 1987: 23 ff.). The interests of the public in speech are most of the time extremely diverse. While some of its members may positively value certain statements, others may find them abhorrent. Moreover, people are often not sure whether their interests are served by being exposed to certain speech or not. The example of cigarette advertising illustrates this point.

In the light of this argument we can recognise most of the individualist arguments for free speech as favouring one set of individual interests over others. Generally, speakers' interests are favoured over those of the public, and the interests of those seeking for information are favoured over those who want to be protected against being exposed to statements they find offensive. The focus on these interests remains relatively unproblematic as long as speech is recognised to serve general interests, as in the case of political speech. However, as these arguments get to hard cases, like pornography, they make some strange twists. Dworkin is most courageous as he turns the protection of pornography into a political virtue. Others are more defensive as they contest the communicative content of pornography or assert that it would be "bizarrely literal and formalistic" to regard pornography as speech (Strauss 1991: 341; Schauer 1982: 181). Scanlon is probably most candid as he says:

"I do not find the prospect of increased exposure to offensive expression attractive, but it is difficult to construct a principled argument for restriction that is consistent with our policy towards other forms of expression and takes the most important arguments against pornography seriously" (Scanlon 1979: 550).

Individualist arguments for free speech are left in a dilemma. Either they are bound to accept certain harms which the individualist perspective cannot accommodate, or they severely restrict the individual interests justifying the special protection of speech, leaving little of the broad and principled right obtaining in liberal democracies.

### Mill's Argument from Truth

Let us go back to John Stuart Mill's defence of the right to free speech in *On Liberty*. While this argument is embedded in the language of individualism, the specific argument for free speech is a strikingly consequentialist one that regards society at large, betraying Mill's utilitarian background:

"the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error" (Mill 1859: 21).

This argument does not deny that speech can harm. It asserts, however, that silencing speech, though possibly appealing in the short run, is likely to be an even greater evil. The main basis for this argument is scepticism of society's ability to determine the truth. Even though we may hold our beliefs on good grounds, they are bound to be defective, or at least to fall short of the complete truth. Other opinions may have their value in correcting the deficiencies of our own views, or at least they provide an opportunity to re-assess our beliefs.

Notwithstanding this sceptical note, Mill's argument relies also on the more optimistic presumption that in the free exchange of ideas individuals can eventually be relied upon to let truth prevail. More consistent sceptics can challenge this presumption, since what would assure that individuals would indeed be able to distinguish truth from error? May not the free exchange of ideas foster the proliferation of error? Critics of the idea that truth is bound to prevail in the confrontation with error have a wide range of counter-examples to draw upon: Do not blatantly irrational ideas such as racism and intolerance show themselves to be ineradicable? (Schauer 1982: Ch. 2).

It is true enough that the attainment of truth is not an unshakeable, unilinear process. But the sceptical case can only be maintained to a limited extent. In the end we are committed to believe that the ideas we regard as true are superior to those we have rejected, even though we cannot assert this belief but with our own grounds. There is no indicator of truth independent of our own convictions. Hence, the trust that in the multitude of statements tolerated by free speech the correct ones will eventually dominate the mistaken ones still lies at the heart of mainstream philosophy of knowledge, from Mill via Sir Karl Popper to Jürgen Habermas (cf. Strauss 1991: 352).

The argument justifying the right to free speech on the basis that it serves the public good of the pursuit of truth fails not because it is demonstrably mistaken but because it cannot be made fully transparent. It cannot be demonstrated that free speech will always and necessarily serve the pursuit of truth. After this is granted, the argument

is not able to distinguish speech that does serve the truth from that that does not. Thus it remains inconclusive.<sup>59</sup>

### Free Speech and Democratic Self-Government

The argument that free speech serves as an essential precondition for democratic self-government is probably the justification for the basic right that is most in vogue these days. To a certain extent this argument combines some tenets of the argument of autonomy, relating individual autonomy to social autonomy achieved through self-government, with some consequentialist theses about the ability of society to distinguish good arguments from bad ones similar to those employed in the argument from truth. These debts are clearly apparent in Alexander Meiklejohn's classical account of the American First Amendment:

"No one can deny that the winning of truth is important for the purposes of self-government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for sharing whatever truth has been won. (...) The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon their common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information may be kept from them" (Meiklejohn 1948: 74/5).

As the argument from self-government thus relies on some of the tenets of the arguments from personal autonomy and from truth, it is also open to the criticisms

<sup>59</sup> The lack of transparency is not resolved by re-conceiving the argument from truth in terms of the "market-place of ideas", as proposed by Justice Holmes in the U.S. Supreme Court:

"the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out" (Justice Holmes dissenting in *Abrams v. United States*, 250 U.S. 630 (1919)).

Though the market-metaphor suggests an explanatory mechanism for the prevalence of truth, it fails. Market-efficiency is explained by the fact that parties enter into individual market-transfers of goods to their mutual advantage. Hence, the market in goods moves towards Pareto-efficiency in the aggregate. However, relations established through speech are not necessarily established for mutual advantage. They are inherently asymmetrical as they involve a subject (the speaker) and an object who may not have an interest in the statements made, but may just as well object to or feel aggrieved by them. There is no logic to these relations that would suggest that in the aggregate they tend towards some ideal of social optimality or efficiency.



adduced against either of these. Like the objection raised by the argument from truth, it can be asked what exactly the mechanism is by which citizens succeed in differentiating good arguments from bad ones and whether we can really depend on their ability to do so (Schauer 1982: Ch. 3). The argument from democratic self-government can meet this objection by retorting that democratic politics can recognise no other authority on political beliefs than the people themselves.

This answer brings us to the main problem with the argument from democratic self-government, which was already anticipated in the critique given of the argument from personal autonomy: what if the people find grounds to restrict the freedom of speech? Most concretely, what if the predominant opinion in society succeeds through democratic politics to prohibit politically extremist speech that, for instance, advocates racism or terrorist action? Here the distinctive nature of the argument from democratic self-government comes to light, as it refuses to regard such a decision as legitimate. It maintains that the right to free speech is actually entrenched in a 'constitutional' stage prior to the democratic process or, at least, an essential component of its very constitution (cf. Rawls 1971: §31). Another way to make this point is to argue that the right to free speech is implicated in the very procedures that define the democratic process and that to oppose it from within the democratic process thus involves one in a performative contradiction (cf. Habermas 1992: Ch. 3; Alexy 1996). Hence, the argument from democratic self-government immunises freedom of speech from the democratic process itself.

But is this democracy? There remains a paradox in this argument as it withholds a range of decision-making from the very democratic process it invokes as its primary value (cf. Schauer 1982: 40 ff.; 1990). Consider the example that Thomas Scanlon adduced to disassociate himself from the argument from personal autonomy, the case of cigarette advertising (Scanlon 1979). Surely committed democrats would not want to exclude such regulations *a priori* from the democratic process. Hence they often come to emphasise a stringent distinction between the freedom of political, or public, speech

that is indeed implicated by the adoption of democracy, and other forms of speech that are open to democratic regulation (Meiklejohn 1948: esp. 79).

At this point the argument from democratic self-government issues in a "functionalisation" of the right to free speech for the democratic process (Habermas 1992: 504).<sup>60</sup> Against this position are, however, both practical as well as theoretical objections to be raised. Practically, the good of democracy is bound to remain rather indeterminate. Do, for instance, racist speech or insults serve democracy or can they be prohibited as mere 'distortions' of genuine democratic deliberation? Further, it can be asked whether the value of democracy can be weighed against other values, for example privacy. Certainly, democracy is not the only social good, nor the supreme one. In the end the primary value of democracy is instrumental for preserving other values, even when it is granted that there are also inherent advantages to democratic practices. Finally, in focusing exclusively on political speech the argument from democratic self-government misrepresents, I think, the value that is attached in liberal democracies to freedom of speech in general. Its primary concern is the freedom of *political* speech. In this light issues as pornography and personal defamation appear to be of marginal relevance and are problematical only to the extent that they cannot be fully severed from political speech.

Hence, the justification of the basic right to free speech provided by the argument from democratic self-government tends to protect at the same time too much and too little speech (cf. Barendt 1987: 21/2). It rules out of the democratic domain *tout court* the question whether certain political speech may be so offensive that its restriction can be justified. At the same time it is bound to under-appreciate the wide range of other interests free speech serves in securing people's liberty to express themselves and to communicate with each other outside of the political realm.

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<sup>60</sup> As I argued in Chapter I, notwithstanding Habermas's emphatic notice of this danger, his "procedural paradigm of law" in the end provides little ground on which the "functionalisation" of basic rights can be avoided (cf. Alexy 1994: 236; Böckenforde 1974: §4).

### The Public Good of an Open Culture

The status that the right to free speech has acquired in the political discourse of liberal democracies may well lead us to exaggerate our personal interests in speech. This point has been well made by Joseph Raz:

"Politicians, journalists, writers, etc., excepted, their right to free expression means little in the life of most people. It rightly means less to them than their success in their chosen occupation, the fortunes of their marriages, or the state of repair of their homes" (Raz 1992: 137).

The right to free speech primarily serves the interests of a certain group of people, something like the 'opinion-making elite', politicians, writers, journalists. These people share in what Thomas Scanlon calls "the most general participant interest": "an interest in being able to call something to the attention of a wide audience" (Scanlon 1979: 521; cf. 1972: 206).

Most people, however, rarely get to address a wide audience. They have their main interests in free speech as part of the receiving public. Though the interests of the public in speech only follow after that of the speakers, they are nevertheless manifold. The basic interest of the public in speech is its interest in information. Indeed, speech is probably the main medium on which the public relies for being informed. Thus the interests of speaker and public generally coincide; to adopt an expression by Joseph Raz, they are "doubly harmonious" (Raz 1992: 134).

Though we can assume that speakers and public generally share a general interest in free speech, at times members of the public may find cause to object against speech. Being exposed to speech, they may find themselves offended by certain things said, and seek to be protected against these. To this aim a number of different claims can be raised. Speakers can be obliged to refrain from making certain statements and when they do not they may be liable to a penalty.

Speakers can invoke the right to free speech to parry such claims. But why exactly would this right strengthen their claim? In the preceding sub-sections I have tried to show that neither the invocation of one's individual liberty as independence nor the idea of personal autonomy suffice to grant *prima facie* primacy to the speaker's

claims. Nor could it be made sufficiently clear how the argument from truth would succeed in justifying the speaker's case. Finally, I also objected against the "functionalisation" of the right to free speech for democratic self-government. Instead, I propose that the force of the right to free speech derives from the fact that the protection of speech serves a whole range of interests in society beyond the speaker's interest in having her speech uninhibited. Thus the right lends an advantage to the latter interest over and above the interests raised against it (cf. Farber 1991).

For a start, as a consequence of the diversity of the public, speech that some find offensive may well be agreeable to others. Thus, while some members of the public may oppose the speaker, others may well have their interests on her side (they are "third-party beneficiaries"). This argument can be pursued further. Not only can the speaker's interest in free speech be directly related to the interests of those who are interested in her message, having this interest institutionally secured will have an aggregative, "institutional" effect throughout society. Information travels widely. Statements made public today, may tonight be broadcasted on television, appear tomorrow in the newspapers, and may reach a wider public even later by being published in books. Moreover, statements generate new statements which echo them while transforming them. This dispersion of speech throughout society is greatly facilitated when no one needs to fear punishment for making certain statements and when there are no restrictions on what can be said. In the end the protection of free speech has an impact on our sense of security in expressing ourselves, ranging from highly specialist, professional settings to the everyday context of table conversations within families. Thus the right to free speech serves to preserve the public good of an open culture (cf. Smolla 1992: Ch. 1).

The argument justifying the right to free speech by reference to an open culture draws both on the idea of personal autonomy and consequentialist arguments, like Mill's argument from truth and the argument from self-government. In allowing an open culture in which individuals are exposed to a multitude of different ideas, free speech requires and fosters personal autonomy as the ability of individuals to consider

different ideas against each other, to choose between them or to reconcile them. An open culture allows people to experiment with ideas, to test how they work and how they are received by others. New knowledge can be freely pursued and published, thus allowing others to use this knowledge to consider their choices of action. Such processes stimulate the quest for scientific truth and the growth of knowledge. Consider, for instance, Copernicus's discovery that the earth circles around the sun rather than the other way around. By outlawing the publication and dispersal of this knowledge, the religious and political authorities inhibited the activities of astronomers and contemporary intellectuals in general. Beyond these directly identifiable audiences, these measures worked against general interests in scientific and technological progress.

However, there is more at stake in an open culture than merely the march of science. An open culture also allows for the exchange of political opinions. Such exchanges do not simply aim at the discovery of definite political truths. Their primary aim is rather to stimulate political engagement between different actors, to familiarise them with each other's claims and allow for co-ordination between them. Similarly, an open culture has important cultural functions that cannot be reduced to the revealing of "cultural truths". An open culture allows individuals to familiarise themselves with different ways of life, to trigger their interest in them or, at least, to induce their respect (cf. Raz 1994b: 11).

As the idea of autonomy already suggests, the reception of information is not merely a passive activity. Any member of the public who receives information has to make sense of it herself. Information has to be interpreted, set against one's own experiences and appreciated. Just as when we are told that the earth exercises a gravitational force on all objects within its reach, we can test it by dropping an object, find the idea confirmed, and regard it as true. In the same way political information contributes to the opinions we hold. For instance, when we are told that social benefits only foster dependency of people on the state, we confront this information with the other beliefs we hold about people's motivation and social justice and decide either to accept or reject this claim. A further instance of the same process can be found in the

formation of cultural preferences or tastes. When somebody recommends a certain record to us, we listen to it, try to make sense of it in the light of the music that we are familiar with and come to appreciate it either positively or negatively. In short, the diverse information communicated to people in an open culture serves them to constitute their beliefs, political opinions and cultural preferences.

An open culture can flourish as it relies on the sense of security that is provided by the institutional recognition of the right to free speech. If speech is known to be free, individuals can communicate with each other without fearing sanctions. From mass media publications to private conversations, the benefits of speech can only be enjoyed fully if suspicion can be suspended and one's audience trusted to deal with one's message by themselves rather than to rely on authoritative powers to regulate speech.<sup>61</sup>

### **III) RECONSTRUCTING THE RIGHT TO FREE SPEECH**

Having identified the distinctive weight given to free speech by way of the basic right as deriving from its contribution to the public good of an open culture, we still need to address the objections raised against certain speech. The recognition of the right to free speech serves to ensure that political decision-makers will not focus merely on the personal interests of the speaker in free speech but also take account of the interests of their publics and of how restrictions of free speech will reflect generally on the preservation of an open culture. However, this wide range of interests in freedom of speech does not warrant that interests against certain speech being free be simply

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<sup>61</sup> Could not some people reasonably reject the public good of an open culture for a closed and monistic culture? Admittedly my argument relies on a weak, but undeniable predisposition of modern human beings towards an open culture. It presupposes the "fact of pluralism", that is the circumstance that in contemporary liberal societies numerous ways of life exist next to each other and have to find a way to live together (Rawls 1993). Indeed, I believe that the fact of pluralism applies far beyond liberal 'western' societies, if not to all societies of today's world. I would even hold that there is much to be said for an open culture as a public good even in societies in which pluralism is not a paramount fact, societies in which the plurality of ways of life is held in check and aberrations are rare and easily identifiable. As is to become clear in the further course of my argument, objections deriving from fears for harmful abuses of the open culture can be mitigated as the recognition of it as a public good still allows for possibilities to justify certain restrictions on speech. Nevertheless, conceivably in certain societies individuals may have good reasons to prefer a closed and monistic culture to an open culture. This question has been taken up in Section 1.1 above, and will be returned to in the final chapter.

ignored. It only severely reduces the likelihood that these latter interests will prevail in balancing them against the former. Thus balancing requires that all relevant interests involved can be identified and assessed on their merits. In this section I want to develop a conceptual framework that is to facilitate this aim. This requires first the rejection of a particular strand of scepticism that challenges the belief that the right to free speech facilitates the appraisal and balancing of different interests. Having rejected this sceptical position, I will indicate the range the interests supporting claims to free speech and categorise the different interests that may weigh against these.

### Balancing without Rights

Embedding the right to free speech in a conceptual framework that can account for its distinctive force as well as for claims raised against it, answers Stanley Fish's outrageous claim that "There's No Such Thing as Free Speech and It's a Good Thing, Too". Fish challenges the belief some naive liberals may still hold on to, that the right to free speech as asserted by the American First Amendment is an absolute. Of course it is not, as we cannot simply rely on it to ignore the harms that speech can do and it has to be recognised that in extreme cases speech may do such harm that there are legitimate reasons to prohibit it. In emphasising this insight Fish's argument is effective against attempts to exempt speech altogether from political intervention, as they have for instance been derived from the argument from governmental incompetence.

From here, however, Fish moves rashly to some rather extreme conclusions. He simply dismisses the attribution of any special value to free speech, as in his reading the right to free speech has never provided

"any normative guidance for marking off protected from unprotected speech; rather the guidance we have has been fashioned (and refashioned) in the very political struggles over which it then (for a time) presides. In short, the name of the game has always been politics (...)" (Fish 1994: 111).

This quote already displays the tension that inheres in Fish's argument: first he dismisses any normative guidance, then he smuggles it in again conceding that it is "fashioned and refashioned".

Fish aims to empty the idea of the right to free speech of all its content. In its stead he pleads for a re-appraisal of politics. But what kind of politics is this? The primary conception of politics invoked by Fish is an inherently adversary, almost cynical, one in which principles such as the right to free speech are only means to impose one's interests over those of others. Thus the right to free speech has most of the time been manipulated to serve a specific class of interests (cf. Fish 1994: 110, 114; cf. Fish 1989). However, there is a hidden ambiguity here, as Fish hints at times that there may be something virtuous in politics, as it is seen as "the attempt to implement some partisan vision" (Fish 1994: 116). As conflicting interests confront each other in politics some justifiable decision can still be made. The recipe of politics recommended by Fish is that

"we must consider in every case what is at stake and what are the risks and gains of alternative courses of action. In the course of this consideration many things will be of help, but among them will not be phrases like 'freedom of speech' or 'the right to individual expression,' because, as they are used now, these phrases tend to obscure rather than clarify our dilemmas" (Fish 1994: 111).

Fish suggests a rejection of general principles in favour of a "local" approach that takes account of all particular interests at stake in a conflict. However, as he himself may well have sensed by interjecting the qualification "as they are used now", the opposition between general principles and particular interests is a false one. Any mediation of conflicts of interests in speech will have to rely on general principles to articulate these interests and to make them commensurable. Indeed, in the absence of any shared principle, politics can be nothing but a cynical power game. Certainly, some principles may be better than others, but there is no solution in abandoning them altogether.

Can Fish's claim, then, that the right of free speech is a meaningless principle, still be maintained? Only, I think, on the basis of a naive, and unreasonable, reading that takes the right as an absolute, but that reading serves as a strawman in Fish's argument. There are few, if any, persons who have ever seriously defended this reading. Certainly judges, above all those of the U.S. Supreme Court, have always known better than that (cf. Barendt 1987: 32; Smolla 1992: 23-27). Instead of deconstructing the



right to free speech as a tool for manipulatory politics, my aim is to show that actual legal and political practices allow for a critical, but constructive, reconstruction of the right.

### Interests in Free Speech

Logically, the primary interest in free speech is the personal interest of the speaker. As such this interest is beyond contest; others cannot reasonably sustain the view that one does not have an interest in something one wants to say. At times this interest may be relatively great, as, for instance, when one wants to bear testimony to one's innermost (religious) convictions or when articulating one's political needs (cf. Cohen 1993: 225). However, there is no necessary reason why the interest of the speaker should always prevail over objections of others. Taken by itself there is no reason why the personal interest in speech would necessarily weigh either less or more than other competing interests.

The personal interest in speech may, however, be reinforced by the interests members of the public can claim to have in the speech. The members of the public are relatively disadvantaged in securing their interests in certain information. They are only likely to stand up for it when they already enjoy a certain knowledge about the content of the information. Most of the time the members of the public who (potentially) would have an interest in the free circulation of challenged speech cannot fully be identified. Thus to a large extent it is up to the speaker in claiming her freedom of speech to represent the interests of an only vaguely identifiable audience. Nevertheless there are often indicators available which allow to determine the interests of the public in certain speech, and in certain cases the public can actually be engaged. Readers of Salman Rushdie can, for instance, claim an interest in having his books freely available. However, the quantity of the interests of the public does not necessarily decide the case in favour of free speech. Often the harm done by speech corresponds proportionally to the size of the public to whom speech is addressed. Speech that remains relatively

harmless in private between two individuals, can cause great pain when made public to a large audience.

The decisive element in the justification of free speech is the common interest in the preservation of an open culture. The impact of a restriction of speech on the open culture at large has been conceptualised as the "chilling effect". Consider, for example, the 'forced democrats' case. Suppose Giordano is punished for suggesting that Strauß's political presence fosters anti-democratic and fascist sentiments, will this not greatly inhibit ('chill') the political debate about the contemporary German political right? In the light of the national-socialist experience this debate is bound to be loaded with strong sentiments. As likely as it is that people will employ heated terms in this debate, it is just as likely that they will touch upon the sensitivities of others. Once people are not sure whether their speech will enjoy protection or not, they may well decide to withdraw from the debate. Thus the scope of the openness of the culture will be reduced.

To get round the chilling effect altogether, the right to free speech would have to be turned into an absolute. Surely, however, there are instances of speech which can badly harm certain interests while serving only marginal interests of speakers and public. Correspondingly, the chilling effect of restricting such speech will also be slight. Consider, for example, the publication of gross and untruthful lies about certain persons. There seems to be little point in tolerating the harm they can (notwithstanding their falsity) do for the sake of some presumed interest of the publisher to express these views and of the public to take notice of them. As certain falsehoods at least are beyond contest, few interests will be served by them. Moreover, as restrictions of this kind of publications inhibits other publications of a similar extravagance, the chilling effect is only advantageous as it prevents further harms. Thus the easy solution of regarding the right to free speech as an absolute cannot be justified, since certain claims to harmful speech cannot be left unaddressed.

The only justifiable way in which the undesired chilling of speech can be minimised, is by the adoption of clear principles that serve to distinguish protected from

unprotected speech. To understand how the right to free speech can be maintained as a general principle without warranting an absolutist interpretation, we can adopt the helpful distinction between the range of acts the right covers and the range of acts that it actually protects (Schauer 1982: 89-92; cf. Alexy 1985: §6.II). Although the right to free speech covers in principle all acts of speech, it need not necessarily protect all of them. In other words, while every one claiming an interest in being free to make a certain statement can invoke the right to free speech to have that claim upheld, in some cases the decision to withhold protection may still be justifiable. Thus we have to distinguish between two questions of domain delineation. First, on what basis are speech acts covered by the right to free speech to be distinguished from non-speech? Secondly, how is the distinction between protected and unprotected speech to be determined?

In asking for the distinction between speech and non-speech, the principal problem is how speech is to be delineated from conduct in general (cf. Barendt 1987: Ch. 2).<sup>62</sup> Frederick Schauer has urged that the crucial distinguishing feature of speech is communication (Schauer 1982: Ch. 7). Speech in this conception covers all symbolic acts that are intended to convey a message to a public. Thus speech is not mere self-expression; my practising the trumpet is, for example, not covered as speech, but when I give a concert it is.

Schauer continues his discussion by conceding that: "It would be alluringly uncomplicated to hold the principle of freedom of speech to cover (but not necessarily protect) all communication, regardless of its content" (Schauer 1982: 101). Emphasising the caveat regarding protection, I think that this is indeed the basic idea that underlies the right to free speech.<sup>63</sup> Schauer is, however, reluctant to subscribe to

<sup>62</sup> In many cases speech is intrinsically entwined with conduct. A prime example is leafleting. Claims deriving from objections to the conduct, for instance the nuisance leafleting may cause, may then warrant a restriction of speech. However, such cases often allow for a compromise in the form of specific time and place restrictions that only slightly affect the freedom of speech. Of course, when it is felt that in effect such restrictions inhibit the effective communication of the speech concerned, the case requires to be dealt with in terms I set out in this section.

<sup>63</sup> To follow the terminology of J.L. Austin's speech act theory, this definition focuses on the "illocutionary effect" of speech (Austin 1962).

this view. He holds that the range of speech acts covered by the right to free speech will be restricted by the kind of justification one adduces for the right. For instance, if free speech is taken to derive mainly from political values like self-government, like in Alexander Meiklejohn's account, the right is unlikely to cover commercial speech. However, one of the principal features of the justificatory account of free speech I have subscribed to - relating it to the preservation of an open culture in general - is that it covers in principle all speech acts. Hence, any argument to restrict speech cannot simply rule out certain acts from the domain of coverage (as Schauer seeks to do with hard core pornography, Schauer 1982: 181 f.; cf. Alexander & Horton 1983: 1333), it has to demonstrate good reasons to withhold protection (cf. Posner 1986b: 11).

When it comes to the protection granted by free speech, we may be inclined to give more of it to certain speech acts than to others. Free speech scholars often distinguish fully protected from non-, or at least less-, protected speech by categorising different speech acts. In particular political speech has been distinguished as a distinctively privileged category. The privileged status of political speech can be justified for a number of different reasons among which the argument from governmental incompetence in regulating political speech features often strongly (Scanlon 1979: 534; Sunstein 1993a: 134/5). I stated earlier my objections against this specific argument as, by disqualifying the democratic state, it leaves those who are genuinely offended by certain speech without the means to have their claims considered. Moreover, categorisation of speech as more or less protected is problematic as it is bound to give rise to serious chilling effects. The boundaries of categories of speech generally withstand secure definitions. Many theorists have recognised that there is a 'slippery slope' in restrictions of any kind of speech that in some way or another is bound to reflect as well on the privileged speech (cf. Schauer 1982: 83-85). Some have for that reason come to accept the protection of speech in general as a kind of 'fall-out' of the special protection due to political speech (e.g. Scanlon 1979: 550 on pornography, as cited above).

My claim is that the line between protected and unprotected speech cannot be drawn on the basis of a single principle or by determined rules separating different categories of speech. Rather the question whether certain speech is protected or unprotected can only be answered on the basis of a balancing exercise that takes full account of the range of interests for and against its protection.<sup>64</sup> Chilling effects can then be minimised by employing clear principles defining the interests that are to be considered and the parameters that determine their weight. On the basis of the analysis in the foregoing section justifying the right to free speech by reference to the public good of an open culture, I propose to distinguish between three different kinds of interests for protection of speech: those of the speaker, of her directly identifiable public and of the preservation of the open culture in general. This analysis does not warrant the *a priori* privileging of one category of speech, like political speech. Instead it provides a pre-emptory reason for the protection of speech in general, emphasising that all speech in principle serves the public good of an open culture and avoiding the drawing of contestable boundaries as implied by the categorisation of speech acts.

Nevertheless on the basis of this analysis we can account for differences between the protection that different speech acts are likely to enjoy, as these interests will be more or less pronounced in different cases. Compare, for instance, political speech with advertising. In advertising for a particular brand of good or service, as Richard Posner observes, most of the benefits are "captured by the producer of that

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<sup>64</sup> In American First Amendment jurisprudence such a balancing approach is most clearly represented by Justice Hand's formula in *United States v. Dennis*, 341 U.S. 494 (1951), that maintains that the Court should "ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (Hand meant of course to say 'probability' rather than 'improbability'). In other words he opposes the costs of restriction of free speech to those of the harm that may ensue from it being free. Notable, of course, is Hand's introduction of a measure of probability (cf. the extensive analysis by Posner 1986b: §III.C.1). Its relevance in *Dennis* derived from the fact that the speech at stake propagated communism, thus the harm Hand was concerned with was that of the (im-)probable event of a communist revolution. However, as Hand's colleague Justice Frankfurter already observed, this (quasi-)mathematical device introduces many practical and theoretical problems. Generally I think that there is little need for the idea of probability and that in most cases the speaker can either be held fully liable for the harm done by her speech or not at all. Consider, for example, the cases put forth by John Stuart Mill "An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard" (Mill 1859: 62).

brand" (Posner 1986b: 22). In other words, the speaker claiming freedom of commercial speech by herself represents the main range of interests involved. This is generally different in the case of political speech for a couple of reasons. Essential to the value of political speech is that it is not merely stated in the interest of the speaker but that the public at large can be taken to have an inherent interest in the ideas presented. While the costs of restrictions of commercial speech are thus primarily born by the speaker, restrictions of political speech severely affect many others. This difference is also reflected in the salience of the chilling effect in the two cases. When restrictions are imposed upon commercial speech, corporate actors will by themselves be able to restrict their speech in a way proportionate to the demand of the public. However, the speaker's reaction to restrictions upon political speech is unlikely to be discounted by the interests of the public and may therefore severely backfire upon them. To put it in economic terms: while the "restriction-elasticity" of the supply of commercial speech is proportional to its demand, that of political speech is significantly larger than its demand warrants. Generally, as speech serves more of a public good function, the costs of chilling effects arising from restrictions of this speech will be felt more widely (cf. Posner 1986b: 19 ff.).

Categories of speech cannot be introduced to exclude some kinds of speech from the coverage of the right to free speech from the start. The basic right to free speech applies to all kinds of speech, even though some kinds of speech (like political speech) generally serve a wider range of interests than others (like commercial speech). Most kinds of speech find some kind of receptive public and any restriction of speech threatens the security of the public good of an open culture. If there are legitimate grounds to restrict speech, they are not to be identified in terms of categories of speech, but primarily, I suggest, in terms of the detrimentally affected interests of others. What we need first and foremost in order to define the line between protected and unprotected speech, is not a catalogue of categories of speech but of categories of harm inflicted.

### The Harms Speech can do

The right to free speech provides a pre-emptory reason for leaving speech unrestricted. But the recognition of the right to free speech does not imply that there are no good reasons at all for which speech may be restricted. Restrictions of speech can be justified as it causes harm. However, no harm by itself can justify the restriction of speech. The eventual decision to restrict speech can only be taken after the harm done by certain speech has been well defined and has been weighed against the full range of interests protected by the right to free speech.

Rather than relying on categories of speech, I think that cases in which the right to free speech may be overruled can much better and more determinably be delineated on the basis of categories of harm.<sup>65</sup> Emphasising harm strengthens the general presumption in favour of free speech. No category of speech is by itself liable to restrictions. Only on the occasion of harm can a restriction of speech come to be considered. Furthermore, while speech categories rely upon contestable authoritative definition, the experience of harm is to be put forward by the individuals affected. Finally, removing speech categories dislodges undue chilling effects by increasing the security of speakers. Instead the responsibility is instilled upon them to anticipate the interests they may harm.

The identification of harm is thus *the* primary requirement for any challenge to free speech. Transparent definitions of what kind of harms can be recognised under the right to free speech, serve the interests of speakers, who thereby know where their limits lie, as well as those of potential victims who rely on the protection they give (cf. Ladeur 1993: 532). What constitutes a harm may, however, be open to dispute. Joel Feinberg has defined harms as "setbacks to interests". He elucidates:

"One persons harms another (...) by invading, and thereby thwarting or setting back, his interest. The test, in turn (...), of whether such an invasion has in fact set back an interest

<sup>65</sup> The following argument for the primacy of the identification and categorisation of harm in cases in which free speech is opposed, challenges not just approaches that focus instead on categories of speech but also approaches that depart from the identification of the "functions", "spheres", or "fora" of the speech at issue (cf. Scanlon 1979; Sunstein 1993a; Ladeur 1993).

is whether that interest is in a worse condition than it would otherwise have been in had the invasion not occurred at all" (Feinberg 1984: 34).

Worth noting is the way this definition focuses on the thwarting of options for action: there is no harm if people's capacity to pursue their goals is not affected. Feinberg recognises that one may have reasons to object to others' actions even when these do not affect one's capacity to pursue one's goals. However, in these cases Feinberg does not speak of harms but rather of offences and hurts (Feinberg 1984: §1.4; 1985: §7.1).

Feinberg argues that both harm and offence (including hurt) provide good reasons for the criminal prohibition of certain acts. At the same time he recognises that both can only issue in such prohibitions after they have been balanced against the countervailing interests (Feinberg 1984: Ch. 5; 1985: Ch. 8). Nevertheless he has no doubt that

"offense is surely a less serious thing than harm. (...) most people after reflection will probably acknowledge that a person is not treated as badly, other things being equal, when he is merely offended as when he is harmed. We may (at most) be inclined to rank extreme offenses as greater wrongs to their victims as trifling harms (...). It follows from this evident but unprovable truth that the law should not treat offenses as if they were as serious, by and large, as harms" (Feinberg 1985: 2/3).

I do not want to subscribe to this view. Certainly in the specific context of speech there is a general case to be made for regarding offences, for instance done by hate speech, as greater wrongs than harms, like for instance set-backs on commercial interests.

Feinberg's distinctions between harms, hurts and offences serves to show that people may object to speech for different kinds of reasons. While I object to the suggestion that some reasons (harms) are inherently stronger than others (offences), these distinctions suggest an order in the "directness" with which people are affected. In this order the most direct way in which people may be affected is hurt. Speech may hurt as it causes physical injury to people. Harm, in the specific sense of a setback to an interest, is less direct than hurt as it is mediated by an interest. Speech harms people as it is used to cause undue competitive advantages or to exploit personal weaknesses. Finally, whether one is affected by offences does not depend on the specific interest one may have, but rather on less tangible factors such as one's identity and beliefs.



Categories of offences are personal degradation, identity humiliation, and degradation of sacred symbols. Let me emphasise once more, the fact that one is affected in a different, less direct way does not mean that the pain is less. The hurt of physical injury and the harm done by a setback to one's interest may well be more easily overcome than the lasting pain inflicted by a severe offence.

Thus I distinguish six categories of harms (in the broad sense, including hurts and offences) that speech may do (cf. Smolla 1992: 48/9).<sup>66</sup> Though I cannot claim this list to be exhaustive, I maintain that these categories at least delineate a range of cases that may give reasonable cause to consider a challenge to free speech. I will shortly discuss each of these categories in turn and seek to identify in each case the factors that contribute to the substantiation of these objections. Of course, actual objections to speech may well rely on more than a single category and combine elements of hurt, harm and offence.

i) causation of physical injury. The force of an objection against speech for causing harm relies on two factors: the extent to which the causation is mediated and the foundedness of the assertion objected to. The weight of these factors can be examined by comparing Justice Holmes's famous example of the man who, without cause, shouts "fire!" in a crowded theatre (*Schenck v. United States*, 249 U.S. 47 (1919)), with the most dramatic, contemporary example of speech that directly threatens to cause physical injury, the *fatwa* Ayatollah Khomeini declared over Salman Rushdie. The man in the theatre causes all people to run towards the exit and creates a

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<sup>66</sup> I deliberately leave off the list one classical category of harm done by speech: the disclosure of secret information. That corporate and political organisations desire to keep some information unavailable from their competitors, respectively their enemies, is all too understandable. Thereby it is up to these organisations themselves to monitor this information and the people who are trusted with it. These people can, for instance, be bound by contract. There is nothing particularly special about such a practice. Friends can similarly confide certain personal information to one another under the condition that the other will not publicise it. Such restrictions of speech can be justified as long as the persons involved can indeed choose for or against it. Once entered into, such contracts/promises can be upheld by certain available social sanctions or in the extreme case by recurrence to civil law. However, it may be obvious that the party holding the secrets remains liable to the risk incurred by sharing them. My view is that the protection of sensitive information, including state secrets, is to be secured by way of private law and does not warrant provisions of public or criminal law. The most spectacular case involving this kind of issues in recent years has of course been the British 'Spycatcher'- case: *Secretary of State for Defence v. Guardian Newspapers Ltd.*, [1985] AC 339, [1984] 3 All ER 601.

dangerous situation in which people are likely to be physically injured. Except for the trouble-maker himself there are probably few people who take an interest in this speech. On the other hand, the harms it may cause are "clear and present", that is immediate in the reaction he causes. The absence of mediating factors in this situation combined with the demonstrable unfoundedness of the claim suffice to make his exclamation punishable (Posner 1986b: 29 ff.).

Compared to the 'fire'-case the harm occasioned by the *fatwa* raises many more questions about both mediation and foundedness. While any person can reasonably be expected to act on the shout of "fire!" in the theatre, the *fatwa* can achieve its physically injurious effect only while being mediated by a range of other factors that decide whether any one wants to, and can act upon it. Indeed, we would expect every reasonable person, Muslim or non-Muslim, to reject its claim given the chance of consideration. This is not meant to downplay the authority that such a call may carry. However, the force of authority may vary widely and depends again on many contextual factors. While, for example, there is good reason to object to a mullah publicly endorsing the *fatwa* in front of a full mosque, the same statement may be freely made on a private occasion (cf. Mill 1859: 62). Secondly, the question whether the call is demonstrably unfounded can in this case not be answered simply by referring to objective 'facts', but remains open to dispute. Even though it is clearly outrageously out of the bounds of reasonableness and most of us cannot fully identify with the grounds that occasioned it, we cannot off-hand reject these grounds as unreasonable.

Most cases in which speech leads to the infliction of injury are probably less like the "fire!"-example and more like the *fatwa*: there are mediating factors present and the grounds on which the claims are made remain contestable. Moreover, in many of these cases the speaker may well find some members of the public on his side. Indeed he relies on these for the injury to be done.

ii) causation of undue competitive disadvantages. Apart from directly inflicting physical injury, people can also use speech instrumentally to gain competitive advantages over others. Such advantages are most likely to be sought among business

competitors and politicians. They may improve their position in the competition for clients and supporters by spreading incriminating information about their competitors. The problem again with such publications is that their falsity can often not be conclusively demonstrated. Moreover, already the slightest negative suggestion, when properly placed, can sometimes have rather unsettling effects on the competitive conditions. Consider, for instance, the impact publications on the mad-cow-disease had on the consumption of British meat in the winter of 1996. Even when later publications come to correct the picture, the stain can often no longer be removed.

In many sectors business or political parties adhere to some kind of agreed upon or informal code which mutually binds the competing parties not to publicly comment on each other's performance. Such codes enjoy, however, at most a semi-official status. Little can guarantee that at an opportune moment one of the parties will not break the silence as it perceives a major chance to advance its position, thereby causing lasting damage to the position of its competitors. Again, this does not by itself constitute a clear-cut case for the restriction of speech, but when publisher and victim are actually competitors and there is reasonable doubt to the foundedness of the statements made, the basic requirements are met for a legitimate case against unlimited freedom of speech.

iii) exploiting personal weaknesses. The justification of the right to free speech as contributing to an open culture relies on the assumption of a minimal individual capacity of autonomy, of the individual's ability to consider things said for oneself. Though most people command this capacity there are well-known exceptions, children and the mentally handicapped in particular. For that reason speech that is addressed directly to these groups can be subject to special regulations. This applies in particular to speech that, though not harming any one in particular, is found morally offensive in substantial parts of society, ('soft') pornography may be a case in point.

Particularly relevant is here that certain speakers - parents, teachers and social workers - enjoy distinctively authoritative positions as the groups involved rely on their care. Given these relations of dependency the capacity of these groups to take a

autonomous, critical stance to what is being said is further inhibited. However, though paternalism is warranted to a certain extent in these cases, the capacity of autonomy of these groups should not be underrated, they have preferences of their own and are sufficiently able to make certain choices. Though there may be, for example, good reasons to prohibit the communication of pornography in the classroom, these apply to a much lesser extent to the sale of pornographic magazines to persons 'under age' as in the latter case the initiative lies on their side.

iv) personal degradation. Though at times every one finds oneself labelled in objectionable terms, certain labels may be personally so painful that they need not be tolerated. The primary benchmark which objectionable insults have to pass is whether no reasonable response can make up for the offence done by having them said in the first place. Here the idea of unfoundedness takes on an ambiguous role. Often personal degradation results from statements that are neither demonstrably true nor obviously false. When their falsity is obvious, they are bound to miss their point any way. When they are true, the victim has a certain responsibility for these facts.<sup>67</sup> A lasting harmful effect on persons can most effectively be attained in the grey zone between truth and falsity.

The two cases I set out above fall under this category. The public suggestion that Telnikoff holds racist views and that Strauß is merely a "forced democrat" are obviously occasioned by specific acts of theirs, thus they are not completely unfounded. On the other hand, however, they are strikingly severe accusations which, even if they could be fully countered, are bound to leave a lasting stain on the reputation of either victim. In the next section I take up a further examination of the vicissitudes of these cases.

v) identity humiliation. Speech humiliating certain identities basically relies on the same effect as personal degradation: no reasonable response can make up for the offence done by having it stated. The main difference is that the speech involved does

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<sup>67</sup> I am thinking of attacks on character in particular. As Dan Oakey reminded me, the point about responsibility obviously does not apply to physical disabilities that may inspire insults.

not address persons by name but by certain common features, such as race, gender, sexuality, ethnicity. This lack of specificity exacerbates the difficulties in properly answering such statements by exposing them as fully and definitely mistaken. Any answer is bound to fall short, not only because, like in the case of personal degradation, answering them in its defensiveness may serve to affirm some of the assertions made, but also because the party held liable may concede every individual rejection as an exception to the assertion made: "Sure, John would never hurt a woman, but generally men are latent rapists". This example points towards the major characteristic distinguishing identity humiliation from personal degradation. In some way the generality of identity humiliation is taken to assuage the offence inflicted (Posner 1986b: 31). The conceptualisation of identity humiliation as 'group libel' in contrast to personal libel generally emphasises this feature, making it unlikely that individual actors can secure its penalisation.

There is, however, a further distinctive element to identity humiliation which in a way recurs in the points made about undue competitive advantages. Humiliating a certain identity buttresses the difference between those who share in that identity and those who do not. As a consequence, inherent to identity humiliation is not only the effect to degrade the other (as in personal degradation) but also to affirm one's own superiority and thereby to legitimise a power-relation in which the former is subordinated (cf. MacKinnon 1993). The offence that identity humiliation does is severely increased, as such affirmations of power often reflect persisting social inequalities and thus express that even if the assertions objected to could be definitively refuted, they would nevertheless remain ingrained in the practices of the superordinate actors.

vi) degradation of sacred symbols. Maybe modernity is bound to empty its symbols of content so that in the end no symbol is sacred. However, if such a society ever emerges in which all are capable to give and receive any assertion in irony, it will be a unique achievement. For the time being most people cherish certain particular symbols as deserving nothing but respect. Possibly a case could be made to include the

depiction of human degradation, violent and pornographic, under this heading, but I think the experience of offence in these cases is primarily caused by people's identification and therefore closer to the former category. The principal examples of offensive speech degrading treasured symbols are blasphemy and degradation of national symbols, particularly well illustrated by the case of flag-desecration (*Texas v. Johnson*, 109 S.Ct. 2533 (1989); *United States v. Eichmann*, 110 S.Ct. 2402 (1990); BVerfGE 81, 278).

If in most of the categories considered earlier it is already often extremely difficult to make a reasonable assessment of the harm done by speech, it is probably impossible to get beyond subjective testimony in assessing the offences experienced from the degradation of sacred symbols. As sensitivities are dampened throughout society and as they become less widely shared, the force of this category of objections to speech is likely to reduce. Inversely, however, to the extent that society harbours certain distinctively strong sensitivities, for instance of particular religious groups, and to the extent that certain core beliefs retain a continuing predominance in society, they may still provide legitimate grounds to challenge the freedom of speech.

#### **IV) APPLYING THE RIGHT TO FREE SPEECH**

The adoption of a balancing approach rather than an absolutist one, implies that the decision whether or not to protect certain speech cannot be taken on the basis of general principles alone. What exactly these require can only be found by taking careful account of the specific features of each individual case. To demonstrate how the abstract positions I have thus far defended apply to actual political and legal decision-making I return in this section to the two cases set out in Section I of this chapter. Both these cases, it will be remembered, involved objections raised to personal defamation: Telnikoff sought to have Matusevitch's statement imputing racist views to him withdrawn, while Strauß raised a similar claim against Giordano's assertion associating him with "forced democrats". In this section I seek to show how the right to free speech

bears upon Matushevitch's and Giordano's claim to be free to say what they said against the objections of Telnikoff and Strauß.

As the cases were brought before the courts, we have to turn to the legal provisions in each country regarding free speech. Comparing the British legal system with the German one, we find some striking differences. Notably, of course, the British legal system lacks a single document which can be referred to as the constitution or a Bill of Rights. Does this fact cause British citizens to feel less secure about their speech being free than, for instance, the Americans or Germans? Not necessarily, I think. The mere absence of constitutional recognition does not mean that the norm implied by the right to free speech cannot be adhered to in political and legal practice. Essentially, I think that inhabitants of Britain share with citizens in all other liberal democracies the conviction that speech is protected.

One way British lawyers have often dealt with this question is to assert that the right to free speech does not require legal recognition as it is a liberty and can thus be regarded as a residue beyond the reach of the law. Such was already the position taken by William Blackstone in his eighteenth century *Commentaries of the Laws of England* and by A.V. Dicey in his nineteenth century defence of the Common Law. Dicey famously asserted that "Freedom of discussion is (...) in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written" (quoted by Barendt 1987: 29).

Dicey's remark, however, clearly suggests how precarious the freedom of speech remains in the absence of a general clause expressing a commitment to free speech in general. Without such a legal recognition, the reasons to uphold freedom of speech in the interests of certain audiences and the preservation of an open culture in general are unlikely to be given their full weight against the distinctive interests that a group of shopkeepers (or any other group of individuals, for that matter) may directly perceive in imposing restrictions. Indeed, the need to protect certain distinct interests in speech has not gone unnoticed in British law, but instead of issuing in the legal recognition of a general right to free speech, the British legislator has sought to protect these interests in

a characteristically ad hoc manner. Thus, scattered provisions have been brought into place to privilege speech under specified conditions, for instance in the particular contexts of parliament, courts, and universities (Gardner 1994: 213).

In support of his claim to free speech, Matusевич could turn to one of such provisions, the 'defence of fair comment' which would serve to uphold his claim under the following conditions:

"The comment must be (1) on a matter of public interest; (2) based on a fact or facts that are truly stated; and (3) a fair comment on such fact or facts, within the wide limits which the law allows. It is for the trial judge to decide whether the matter is one of public interest, and for the jury to decide whether the fact or facts on which the comment is based have been sufficiently proved and whether the comment on such fact or facts is fair" (Halsbury's Laws of England, Vol. 28: §132, notes omitted; cf. Gately, McEwen & Lewis 1974: §705 ff.)

Notwithstanding the specificity of this definition, the leading compendium on English law prefaces it with the assertion that "The defence of fair comment is in the nature of a general right, and enables any member of the public to comment on matters of public interest" (Halsbury's Laws Vol. 28: §131, emphasis added). This idea, that the defence of fair comment does not merely define a particular condition under which speech is protected but that it represents a wider recognition of the value of speech in general, is further amplified by its qualification by another authority as "a bulwark of free speech" (Committee on Defamation 1975: §151). These statements suggest that, notwithstanding the absence of a Bill of Rights, British law succeeds in effectively upholding a basic right to free speech. On the other hand, however, the legal terminology remains notably specific. These observations leave the following question to be addressed in examining the protection of speech under British law: can a principled defence of the right to free speech be upheld on the basis of specific and scattered formulations?

By contrast, in Germany the right to free speech is firmly asserted in Article 5 of the Basic Law:

5.1 Everyone shall have the right to freely express and disseminate his opinion in speech, writing and pictures and freely to inform himself from generally accessible sources. The freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.



Taken by itself this paragraph establishes the right to free speech in an even more affirmative manner than the United States First Amendment. However, it does not stand on its own. Unlike the First Amendment, it is immediately followed by a second paragraph that explicitly concedes that there may be legitimate other interests that dominate the right to free speech:

5.11 These rights are subject to limitations in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honour.

On a first, straightforward, reading these two paragraphs simply divide speech into a protected and an unprotected sphere: All speech is free except that which the legislator decides to mark off by law. This would suggest that the legislator can on its own balance of reasons legislate to expand the sphere of unprotected speech infinitely beyond the constitutionally recognised values of the protection of the youth and the right to inviolability of personal honour. Indeed, this position was generally adopted under the Weimar Constitution which contained a similar article (Art 118 RV).

However, in a pathbreaking decision in 1958, the 'Lüth-decision', the Federal Constitutional Court came to affirm the primacy of the right to free speech over any limits that may be imposed upon it.<sup>68</sup> For a start, the Court boosted the values preserved by the basic right to free speech. Interestingly, in the light of the earlier discussion of justifications for the basic right to free speech, the Court did not seek a monistic synthesis of the values underlying the right. Rather, while on the one hand it put speech up as "the most unmediated expression of human personality", it maintained on the other that the right is "essentially constitutive for the liberal democratic order". Then it proceeded by asserting that:

"the general laws must in their limiting impact upon the basic right in turn be regarded and interpreted in the light of the meaning of this basic right so that the special values

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<sup>68</sup> The facts of the 'Lüth-case' are of marginal relevance. Lüth who was head of the press-agency of the city of Hamburg, used the occasion of the opening of a film festival to call upon the German film business to boycott the film-director Veit Harlan. His reason for this was that Harlan had directed a propaganda and anti-semitic film under the Nazi-regime. Harlan had, however, been absolved by a jury investigating his involvement with the Nazi's on the grounds that under the circumstances he had more or less been coerced to co-operate. Emphasising the public importance of the right to free speech the Federal Constitutional Court decided to overrule the decision of the Hamburg Trial Court that had found fault in Lüth's call as it deliberately aimed to obstruct Harlan's practising his profession.

contained in this right - which in a liberal democracy has to imply a fundamental presumption in favour of the freedom of speech in all spheres, public life in particular - will in any case be preserved" (BVerfGE 7, 198 at 208).

This idea of re-interpreting the laws limiting the right to free speech in the light of the primary values protected by the right has become known in German jurisprudence as the "interaction-theory" (*Wechselwirkungstheorie*). As this concept nicely suggests, the core-tenet of this theory is that the limits that laws can impose upon the protection given by the basic right are themselves in turn inherently limited by the content of the latter.

The "interaction-theory" of the Federal Constitutional Court has been widely criticised (Herzog 1994: Rn. 257 ff.; Mackeprang 1990: §2.1.2bb; Kiesel 1992). Many have observed that its underlying argumentation is viciously circular. It cannot but be true by definition that the limits of the laws restricting a basic right inversely reflect the limits of the right. Substantive principles are needed to define how these limits are to be determined, but these the "interaction-theory" does not provide. Nevertheless, by emphasising the underlying values of the right to free speech, the "interaction-theory" in effect pushes back the limits imposed upon the right.

This leads to a further criticism pointing out that the "interaction-theory" may serve to hollow out the limits on the right to free speech. Adopting this theory, the Federal Constitutional Court is drawn to conclude that the boundary between protected and unprotected speech cannot generally be determined but is subject to the balancing of values (*Güterabwägung*):

"The right to free speech must step back, when protection-worthy interests of others of higher standing are harmed by the exercise of free speech. Whether such predominating interests of others are present is to be determined on the basis of all features of the case" (BVerfGE 7, 198 at 210/11).

As the Court refrains from giving any specification of what interests in particular might dominate free speech (that, it may argue, is a task for legislation), balancing is destined to proceed in practice on a case by case basis. Such a situation creates legal insecurity which may chill speakers as well as detrimentally affecting the expectations of people offended by speech (Ladeur 1993; Kiesel 1992: 1137).

In short, while the Basic Law puts the basic right to free speech on a firm basis in Germany, its implications are not immediately clear. For one the Federal Constitutional Court employs a pluralistic, and hence inherently indeterminate, theory of the interests at stake in free speech. Moreover, though the need for limits on the right is recognised, these have only been specified to a limited degree and the impact they are to have remains open to dispute.

Before proceeding with the analysis of both cases let me note some striking differences between them. Above all in the German case the victim of libel is a person well known to the public whose general reputation as a politician is affected. By contrast few British people are likely to have taken an interest in the person of Telnikoff. Thus, there is little reason to doubt that the British audience taking an interest in this debate was smaller than the German audience for the confrontation of Strauß and Giordano. This would suggest that there was more force to Giordano's claim to free speech as it served a wider audience than to Matusевич's.

At times, especially in First Amendment jurisprudence, it is furthermore suggested that the issue whether the victim is a public figure or not is of crucial importance (cf. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); Smolla 1992: Ch. 5). Public figures should be prepared for strong criticism and they enjoy, moreover, more than average resources to react to defamatory allegations. (In Germany this latter argument is known as the *Gegenschlag*-principle.) I would challenge the weight given to these arguments. As a bare minimum, free speech requires all citizens to be prepared to tolerate a certain range of criticism, but when it comes to offence I do not see why a public figure should have to tolerate more of it (cf. Posner 1986b: 42; Mackeprang 1990). What is more, the solace that can be derived from having the opportunity to publicly react to certain allegations is inherently limited as we recognise that the offence done by defamation can never be fully undone.

Finally, one might question whether the harms done in the two cases are of comparable magnitude. I think that in this respect the cases are very much comparable:

they both involve highly laden political (dis-)qualifications the effect of which is increased by the particular social and personal backgrounds of the persons. The only difference here is that the harm done to Strauß may be aggravated as a wide audience may be receptive to the qualification coined by Giordano. In Telnikoff's case this effect is much more limited.

As important as it is to bear in mind the particular differences between the two cases in the following analysis, I do not think that they invalidate the comparison I make. The most important difference, the socially much wider saliency of the 'forced democrats' case, is eventually one of degree rather than kind. As is also confirmed by the perceptions of both Telnikoff and Matusevitch [1990] 3 WLR 1990 725 at 733, essentially both cases concern an issue of public interest, the German case being rather more salient. In any case, the comparison I want to draw does not turn on the substance of the two cases, they only serve the function of allowing me to present the actual objects of my concern: the arguments employed in the British and German legal system to deal with the question of free speech.

### The Harm of Personal Defamation

In this sub-section I examine the conditions a case against free speech has to meet to come to court. On the basis of the theoretical account presented earlier, I submit that the main condition for this is that a certain recognisable harm has been done. The harms that Telnikoff and Strauß suffered from the comments they objected to may have been of several kinds. Primary among these was the harm of personal degradation, about which I noted in the former section that it has to involve labelling that is personally so painful as to make it intolerable.<sup>69</sup> Above I added as a minimal requirement that the offence done by the statements cannot be undone by any reasonable response the

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<sup>69</sup> Both Telnikoff and Strauß may well have suffered further harms that fall in the category of 'causation of undue competitive disadvantages'. Obviously, Giordano's statements directly bore upon Strauß's political profile which was of course essential for his electoral success. Telnikoff explicitly raised the issue of social-economic harms only at the final stage of the case, at the re-trial before Justice Boreham. He submitted that his employment at the BBC Russian Service was terminated as a consequence of Matusevitch's letter. However, given the difficulties in proving this allegation, the judge refused to allow this matter to come before the jury.

offended person may try to make. Qualifications like 'racialist' and 'forced democrat' well demonstrate the point made by this requirement. Once published, such labels operate as rhetorical questions like "have you stopped beating your wife?". They put the respondent in an awkward, defensive position and any response to them is likely to affirm the message of the initial statement. Why, any observer is bound to think, would one have to make a point about disclaiming being a racist, if there is not at least a grain of truth in it in the first place? Legal proceedings may aggravate this effect, as they bring the qualification under challenge in the public light.<sup>70</sup> Nevertheless victims may find solace in receiving damages, an authoritative statement in their favour, and an injunction protecting them against similar statements in the future.

Notably both British and German law rely on a similar concept to specify the conditions under which defamation may justify the restriction of free speech: malice. As both Telnikoff and Strauß had to rely on this concept seeking reparation of the harms inflicted upon them, the question in this sub-section is whether the concept of malice can indeed serve to give an adequate estimation of the harm done by speech.

#### Britain: Malice and Fairness

On 19 April 1984, Telnikoff issued a writ of libel against Matusevitch claiming "(1) damages for libel contained in a letter headed 'Qualifications for Broadcasting to Russia' written by the defendant Vladimir Matusevitch, and published in *The Daily Telegraph* dated from 18 February 1984; (2) an injunction restraining the defendant from publishing the same or any similar libel concerning the plaintiff" [1990] 3 WLR 725 at 726. As Matusevitch defended himself against these claims by invoking the defence of fair comment, Telnikoff replied in turn with the allegation that in publishing the words complained of Matusevitch had been actuated by express malice.

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<sup>70</sup> Manfred Kiesel observes on the effect of Strauß's court action: "Thus will a politician like Strauß, who for more than two decades has been elected with overwhelming majorities, have to enter history as a 'forced democrat'", adding in a footnote: "Now already all verdicts that occupy themselves with this case carry the telling title 'forced democrat Strauß'. This stigmatisation will not change in the future." (Kiesel 1992: 1134).

Indeed, proof of express malice is the one ground provided by British law which can dominate the defence of fair comment. Malice has been defined as "ill will or spite towards the plaintiff or any indirect or improper motive in the defendant's mind at the time of publication which is his sole or dominant motive for publishing the words complained of" (Halsbury's, Vol. 28: §145, notes omitted). As the case came to court on 22-24 May 1989, Judge Drake made up his mind already after having heard Telnikoff's case and decided that there was no case to go to the jury on the grounds that "(1) any reasonable jury properly directed would be bound to uphold the defence of fair comment and (2) there was no evidence of express malice" (quoted in [1990] 3 WLR 725 at 727).<sup>71</sup>

This decision left Telnikoff dissatisfied. Submitting his appeal, he pursued an interesting tactic in trying to establish that Matusevitch had harmed him unjustifiably. As he was unlikely to demonstrate express malice on Matusevitch's side, he steadily moved beyond this question. For a start, he raised two other challenges. The first of these held that there was "reasonable doubt as to whether the words are statements of fact or expression". This challenge will be discussed in the next sub-section. Secondly, even if it were asserted that the letter contained mere comment then still it could not be regarded as fair in the sense that a fair-minded man could have written it in response to Telnikoff's article. The distinction between malice and fairness which Telnikoff exploits here, serves primarily a procedural point in British law. While the question of malice is to be adjudicated by the court, the question of fairness is to be considered by a jury (Halsbury's Vol. 28: §§133, 141, 228). However, once recognised, the distinction raises the substantive question whether fairness requires more than the mere absence of malice? Telnikoff's point is to maintain that it does. Thereby he opens the possibility to restrict the protection of speech not only on the ground of malice, but also on the separate test of fairness.

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<sup>71</sup> Actually, Telnikoff v. Matusevitch first came to court on 5 October 1988 before Judge Michael Davis who decided in favour of Telnikoff awarding him £65,000 damages. Matusevitch, however, had not been present at this trial. Occasioned by the verdict he applied to have the judgement set aside. The judge conceded to this application leaving Matusevitch the costs of the abortive trial and of the application to set aside.

The Court of Appeal made short shrift of Telnikoff's claim of express malice.

Lord Justice Lloyd observed:

"Two things stand out. First the defendant believed passionately in the evil of anti-semitism. Secondly, he and the plaintiff were total strangers. In those circumstances no reasonable jury could have held that the defendant's dominant motive was to injure the plaintiff, rather than express his own honest, if misguided views" [1990] 3 WLR 725 at 742.

Then the Court considered at length the claim that even if the comments did not qualify as express malice, it still had to be demonstrated that they were fair.

At this point a further question arose as to what was required for fairness to be established. Initially Telnikoff followed general practice in holding that the question to be answered in establishing fairness was "whether the comment was on its face (and regardless of the issue of malice) such as could be made by a fair-minded man on the plaintiff's article" [1990] 3 WLR 725 at 727. This test is called the "objective test of fairness" (Sutherland 1992).

Putting Matuskevitch's statements to the objective test of fairness, the Court of Appeal found that it passed beyond any doubt. Lord Justice Lloyd argued:

"The plaintiff was complaining that 90 per cent. of those employed by the Russian Service came from national minorities of the Soviet Empire. If that was indeed his complaint, I do not see how it could be corrected except by discrimination against national minorities in recruiting new staff in the future, or dismissing existing staff. It was not disputed that Jews are a national or ethnic minority. How, in those circumstances, could any reasonable jury regard the comment as other than 'fair' in the objective sense? There is no other possible view" [1990] 3 WLR 725 at 735.

Thus conceived, it seems that the objective test of fairness is simply implied by the question of malice. Certainly there is no clearer evidence for malice than when the speaker clearly has had to bend the facts on which his comments are based. Nevertheless one may observe that in insisting upon the distinction between malice and fairness, and by leaving the latter question up to a jury, British law maintains an ambiguity which leaves the line between protected and unprotected speech insecure.

However, in the course of the hearings before the Court of Appeal, Telnikoff took up the question of fairness to extend once more the grounds on which speech can be challenged. He invoked the so-called "subjective test of fair comment" which holds

"that no comment can be fair unless it is the honest opinion of the person making the comment" [1990] 3 WLR 725 at 734/5 (cf. Sutherland 1992). Thus, Matusевич would not only have to show that the comment could have been made by a fair-minded man, but also that the "comment represented his real opinion".

Different legal authorities had given contradicting answers to the question whether indeed this subjective element has to be incorporated within the test of fairness. For example, the Canadian Supreme Court had answered this question affirmatively in *Cherneskey v. Armadale Publishers Ltd.*, [1978] 90 DLR. (3d) 321. Further, one of the major textbooks, *Gatley on Libel and Slander* (Gatley, McEwen & Lewis 1974), appears to contradict itself in stating in paragraph 729: "The law does not protect the expression of an opinion not honestly held, even if it is an opinion which someone else might have honestly expressed". While in paragraph 789 it is held: "the defendant who relies on a plea of fair comment does not have to show that the comment is an honest expression of his views".

In *Telnikoff v. Matusевич* Lord Justice Lloyd reached the following conclusion on this matter:

"In my judgement the correct view of English law is that where the defendant's comment is fair by the objective test, it is presumed to be the honest expression of his view unless the plaintiff pleads and proves express malice" [1990] 3 WLR 725 at 737.

This does indeed seem to be the best view. Certainly, the question of honesty can be most relevant in libel cases. However, this issue by itself provides insufficient a basis for restricting freedom of speech. Speech cannot be prohibited for the sole reason of not representing one's honest opinion. Such a decision can only be taken on the basis of other, weightier considerations, the magnitude of the harm done in particular. In any case the presumption in favour of free speech serves to lay the burden of proof on this question firmly on the side of the plaintiff. Thus the subjective test of fairness was rightly rejected and Telnikoff failed to establish that Matusевич's statements were not fair.



### Germany: Malicious Libel as a Judicial 'Counter-Concept'

Strauß demanded an injunction by which Giordano would henceforth be forbidden to state and spread the opinion that Strauß was "the personification of the type of people who had themselves converted to democracy only by force or for opportunistic reasons and who uphold this system of government merely formally". Strauß claimed further that *Stern* should be obliged to publish the legal verdict that would clear his name.

Though Article 5.II of the Basic Law asserts that the right to free speech finds its limits on "the right to respect for personal honour", it was by no means inevitable that this right would indeed suffice to uphold Strauß's claims. Notably, though this right has been included under the constitutional right to free speech, it is not recognised as representing a constitutional right by itself (Herzog 1994: Rn. 286/7; but cf. Mackeprang 1990: 134 ff.). Nevertheless it has become common opinion in German jurisprudence to regard this right as implied by the two other constitutional rights, the right to human dignity (1.I GG) and the right to the free development of personality (2.I GG). The dignity of individuals is recognised in the very first paragraph of the German Basic Law:

1.I The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.

The first paragraph of the second article of the Basic Law adds to this a right to the free development of personality:

2.I Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality.

Peter Tettinger has suggested that these two paragraphs emphasise two complementary aspects of personal honour. Article 1.I, he says, concerns the "internal" aspect of personal honour inherent in being a human being and thus equally shared by all. Article 2.II in contrast concerns the "external" aspect of personal honour referring to the specific respect due to one in actual social relations. While every one deserves a certain respect, the respect required in this "external" sense differs depending on one's social position relative to others (Tettinger 1983: 319/20).

In German jurisprudence these different provisions paying tribute to personal honour have given rise to the development of what has been called a "counter-concept" to free speech (*Gegenbegriff*), the concept of "malicious libel" (*Schmähkritik*) (Herzog 1994: 15a). As such malicious libel serves to characterise those cases of libel to which the protection of free speech does not extend. Notably, however, the concept of malicious libel is not to be found in the Basic Law nor in any other statute. It emerged and is maintained only in legal practice where its contours have been rather generally defined by legal precedents. Actual decisions of whether statements qualify as malicious libel have to rely in the end on a rather subjective assessment.

As the Trial Court Munich (*Landgericht*) came to consider Giordano's case, it held that though the statements made in the interview fell under the constitutional right to free speech, they had crossed by far the limit of malicious libel. All Strauß's claims were granted: *Stern* was to publish the verdict in favour of Strauß and if Giordano ever again publicised views suggesting that Strauß was a "forced democrat", he would be liable to a fine or even imprisonment.

Neither Giordano nor *Stern* could subscribe to this decision and for that reason they appealed.<sup>72</sup> The Court of Appeal (*Oberlandesgericht*) affirmed, however, the Trial Court's opinion that Giordano's statements qualified as malicious libel (OLG München 1990: 1435-7). Malicious libel, it specified, relying on a formulation of the Federal Court of Appeal (*Bundesgerichtshof*), requires that the statements contain "a surplus of insurmountable degradation" that justifies its prohibition. This requirement was demonstrably met by Giordano's reference to "the remaining longing for a strong man, say the federal-German version of the national-socialist führer-cult". The effect of this remark was to establish a close relation between Strauß and National-Socialism. It implicated that Strauß would have continued the national-socialist führer-cult, if the

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<sup>72</sup> Before the appeal could serve, on 3 October 1988, Franz Josef Strauß died. This did not stop the proceedings of the case, since his descendants decided to pursue it further. Although it is generally held in German jurisprudence that the dead can no longer enjoy the right to the free development of personality as it is formulated in Art 2.1 of the constitution, the right to human dignity is taken to persist beyond death (OLG München 1990: 1435; cf. OLG München 1992: 1324). On the whole the death of Strauß affected the case only marginally.

opinion of the German majority had not been against his doing so. Such an assertion was regarded as a most serious infringement upon Strauß's right to human dignity. Furthermore, the Court regarded this remark as having been made arbitrarily and not contributing anything to the substantial argument that Giordano sought to develop. Even though these statements were made in the spontaneous context of an interview, the Court assumed that Giordano had considered the issues well enough to realise the implications of what he was saying. Hence, the Court held Giordano guilty of deliberate violation of Strauß's dignity.

Nevertheless the Court of Appeal slightly revised the decision of the Trial Court. Emphasising the values protected by the constitutional right to free speech, it sought for a decision that would have minimal impact upon Giordano's freedom of speech. Rather than following the Trial Court by prohibiting Giordano's statements in general, it only prohibited the use of the exact wordings of the interview and added that it could not be said at the outset whether similar statements by Giordano in different future contexts would be impermissible. Thus phrased, it should be said this decision, moreover in no way inhibited the publication of Giordano's book, against which Strauß had not objected in any case.

Even though this verdict might have had negligible impact on Giordano's freedom of speech, he decided to appeal to the Federal Constitutional Court since the decision of the Court of Appeal nevertheless demanded him to abandon his considered statements. He submitted that in general the Court of Appeal had failed to heed properly the full extent of the defence provided by the constitutional right to free speech, ignoring in particular the context of public debate in which his statements were made. The Court of Appeal had further been mistaken in classifying his statements as malicious libel. In reaching this judgement, he argued, it had not relied on the statements Strauß had complained about in the first place, but only on the following passage - "the remaining longing for a strong man, say the federal-German version of the national-socialist führer-cult". Moreover, it had given a mistaken interpretation to this passage. The reference to national-socialism was not made as a criticism of Strauß,

but as a criticism of the "the remaining longing for a strong man". Even if this harmless reading of the passage could not be established beyond doubt, then given these doubts the constitutional right to free speech still bound the Court to uphold Giordano's claim .

### Discussion

Notably, though the law as it stands in both systems invites objections to speech to be phrased in terms of malice, it far from determines how such claims are to be dealt with. Obviously, it is extremely difficult to demonstrate malice as it is located in the writer's intentions which can be accessed only by indirect means. How can one ever demonstrate, in the words of British law, "ill will or spite towards the plaintiff or any indirect or improper motive in the defendant's mind at the time of publication"? Not surprisingly Telnikoff's claim steadily slides away from malice to raise the question of fairness and, as will be discussed below, the question of truth. It is equally unlikely that the concept of malicious libel adopted by the German courts can by itself provide sufficient ground on which Strauß can win his case.

Besides the fact that the nature of one's intention is generally not susceptible to verifiable demonstration, I think that it generally need not be of much concern in applying the basic right to free speech. The notion that the deliberate infliction of harm is a greater offence subject to more severe punishment than when the same harm is done without express intention, is primarily of relevance in criminal cases. The paradigmatic distinction illustrating this point is the distinction between manslaughter and murder. However, the question we are concerned with here is whether or not to restrict certain speech. This question can be dealt with under civil law and requires above all a weighing of the interests in the preservation of free speech, on the one hand, and those of the persons offended, on the other. The question of intent is of relevance only to determine the severity of the penalty to be imposed under criminal law (rather than compensatory damages to the victim for which even the non-malicious, but careless speaker can be held fully liable under civil law).

Rather than relying on the concept of malice, my suggestion is that challenges to speech for defamation should be based on the claim that the harm done by the speech is of a distinctive magnitude and will have a lasting effect that is unlikely to be repairable. Something similar to this emphasis on the harm done is already contained in the reliance that is put in the German definition of malicious libel on "a surplus of insurmountable degradation" that justifies restriction of speech. Moving the grounds for restriction of freedom of speech from malice to harm, has one clearly distinct implication regarding carelessness. A careless speaker who for instance in a "jokingly manner" puts some one up as a "nazi" can be excused for absence of malice, but not for absence of harm inflicted. This implication, I think, can be justified, as it is observed that even though absence of malice may serve to mitigate the penalty imposed upon the speaker, it provides no valid reason to reduce the protection due to her unlucky victim.

Of course, the principle of a "distinctive and lasting harm" is still far from being fully determined, but I believe that it provides a far more secure basis for developing further principles defining the limits to freedom of speech than the idea of malice, especially when it is embedded in a catalogue of categories of harm like the one proposed in the last section. Finally, let me add that while a distinctive harm suffices to warrant the attention of the court, it is only after a comparison of the harm done with the interests served by the statement that the court can decide in favour of the victim.

### Facts and Interpretation

Plaintiffs seeking to have free speech restricted need not merely rely on the argument of malicious libel, their claim can be greatly advanced when they can demonstrate that the statements complained of are clearly false. Both the British and the German legal system recognise the distinction between statements of fact and statements of comment. Whatever the costs recognised in the restriction of speech in general, they are perceived to be slight in prohibiting statements that can be shown to be false.

### Britain: Context and Semantics

As may be recalled, Telnikoff developed his argument against Matusevitch's defence of fair comment in three steps. Apart from asserting express malice, he also challenged the 'fairness' of Matusevitch's statements and their qualification as statements of comment rather than of fact. While the Court of Appeal firmly rejected the assertion of malice and went into great detail to uphold the statements' fairness, the last question - 'fact or comment?' - turned out to be the hardest to solve. The implication of this challenge would be that if Matusevitch's words qualified as statement of fact rather than comment, then he could no longer merely rely on the defence of fair comment but would have to carry the burden of proof of justifying the facts asserted. Though as a defendant Matusevitch could have pleaded both fair comment and justification, thus far he had based his defence solely on the former (cf. Halsbury's Laws Vol. 28: §144).

Telnikoff regarded three assertions of Matusevitch's letter in particular as statements of fact: (i) Telnikoff would have demanded that the management of BBC's Russian Service should switch from professional testing to a blood test; (ii) Telnikoff would have claimed that 'ethnically alien' staff of the BBC Russian service should be dismissed, no matter how high their standards and integrity; and (iii) Telnikoff had spread racist views and was a racist and an anti-semite [1990] 3 WLR 725 at 730. However, for Lord Justice Lloyd of the Court of Appeal it was clear that each of these statements was not a mere assertion of fact but rather "an inference from the facts on which the comment is based". Moreover, as would be clear to any "fair-minded man", the first and second assertion obviously should not be taken literally. For those reasons he had no doubt that Matusevitch's statements qualified as comment and not as statements of fact [1990] 3 WLR 725 at 732/3.<sup>73</sup>

<sup>73</sup> Following the earlier opinion of Judge Drake: "Read in the context of the rest of the letter, I think that the defendant was doing no more than to make the comments that, if the plaintiff's views as stated in his article were given effect to, then the logical outcome would be that the BBC would, when interviewing applicants to join the Russian service, concentrate on the ethnic origins of the applicant rather than their expertise as broadcasters" quoted in [1990] 3 WLR 725 at 730.

However, in reaching this opinion the Court of Appeal raised a new question: is the letter to be read in context or in isolation? During the initial hearings both parties before the Court of Appeal agreed that in deciding the question "fact or comment?" the Court was confined to consider the letter alone and not entitled to look at Telnikoff's original article. The solicitors of both parties considered that some one might well have read the letter without having read the article, or without being able to remember what the article said. The Court of Appeal challenged this view and resumed hearings to have further argument on this particular point. Only then did Matusevitch's solicitor, Mr. Garnier, decide to submit that the Court was actually entitled to take up Telnikoff's original article for the sake of constructing the content of the letter. This position the Court of Appeal actually adopted, notwithstanding the continued insistence from Telnikoff's side that the letter should be considered in isolation. Lord Justice Lloyd argued:

"On questions of construction, it is always permissible, indeed essential to, have regard to the context. In most cases it will be apparent from the publication itself whether the words complained of are comment or not. But in some cases it may be necessary to have regard to the wider context, for example to documents, which are, as it were, incorporated in the publication by reference" [1990] 3 WLR 725 at 731/2.

He added, moreover, that even without reference to Telnikoff's original article, he would have been able to decide that the letter contained mere comment and no statements of fact. This view, however, was contested by his colleagues on the Court of Appeal. Lord Justice Glidewell argued for instance:

"If, however, it were not permissible when answering this question to look at the article but only at the passage contained in the letter, then I would be of a different view. It would in my view then be arguable whether the statements in the letter were statements of fact or comment" [1990] 3 WLR 725 at 743.

Similar doubts were expressed by Lord Justice Woolf. Yet this disagreement was of little consequence as all Lord Justices agreed that "it would unduly restrict the defence of fair comment if you were not entitled to look at the material on which it is alleged that the words complained of were commenting" Lord Justice Woolf in [1990] 3 WLR 725 at 744.

Although the Court of Appeal thus unanimously decided to dismiss the appeal, their discussion provided Telnikoff with a line of argument that was to prove fruitful as he proceeded to appeal to the House of Lords. In filing this appeal Telnikoff specifically submitted that "in deciding the question whether the words complained of were statements of fact or comment, the court was confined to a consideration of the words themselves without reference to the letter or article as a whole" [1991] 4 All ER 817 at 818. Indeed, the majority in the House of Lords granted this submission and thereby overruled the decision of the Court of Appeal.

Lord Keith of Kinkel, delivering the main opinion for the House, considered that "The writer of a letter to a newspaper has a duty to take reasonable care to make clear that he is writing comment, and not making misrepresentations about the subject matter upon which he is commenting. There is no difficulty about using suitable words for that purpose" [1991] 4 All ER 817 at 823.

Moreover, he added that: "if the letter alone is looked at it would be open to a reasonable jury properly to find that the offending paragraphs contained statements of fact." Scrutinising the letter, Lord Keith found:

"As regards para (7) the words 'Mr Telnikoff is stressing his racist recipe' are undoubtedly pure comment, but what follows, 'by claiming that no matter how high the standards and integrity "of ethnically alien" people Russian staff may be, they should be dismissed', is in my view capable of being read as a fact upon which the defendant is commenting, that fact being that the plaintiff has made such a claim in his article. The reader might be the more likely to think that the plaintiff had made such a claim by reason that the words 'of ethnically alien' are placed in inverted commas, thus indicating that they are a quotation from the article (where in fact no such words appear)" [1991] 4 All ER 817 at 822.

Lord Keith's opinion found agreement among the majority of the Lords. Lord Templeman even reinforced this position by adding that "If in the letter the defendant made allegations of fact, those allegations cannot be converted into comment by the article written by the plaintiff" [1991] 4 All ER 817 at 826. The only dissenting voice was Lord Ackner's, insisting to no effect that "It is not always easy to draw the distinction between an expression of opinion and an assertion of fact" [1991] 4 All ER 817 at 827. Thus the majority of the Lords found reason to allow Telnikoff's appeal in



part. They contested Matusevitch's defence of fair comment by asserting that there was reasonable doubt whether his letter consisted only of comment.

### Germany: Context and Interpretation

The German courts also distinguish statements of fact (*Tatsachenbehauptungen*) from statements of comment (*Meinungsäußerung*; note that this is the concept used to assert the constitutional right to free speech in Article 5 of the Basic Law). Notably however, this distinction has not formally been established by statute law, but has, like the concept of malicious libel, only been developed as a 'counter-concept' (*Gegenbegriff*) to delineate a sphere of lesser protected speech from the range covered by the right to free speech. The function of the distinction is obvious: statements of fact can be so strikingly false that it seems rather ludicrous to award them special protection. According to the ruling by the Federal Constitutional Court, a statement qualifies as comment when it contains the elements of 'position taking' (*Stellungnahme*), 'belief' (*Dafürhaltens*) and 'opinion' (*Meinens*) (cf. BVerfGE 82, 272 at 281). Nevertheless, though the Federal Constitutional Court has recognised the validity of this distinction, its employment remains contested. In a leading commentary on the Basic Law, Roman Herzog, former judge on the Federal Constitutional Court and now President of the Federal Republic, has even criticised the distinction for relying on an "*objectively impossible*" distinction between reporting and accounting (Herzog 1994: 15a-17). Underlying this critique is the fear that delineating statements of fact from the protection of free speech will serve to inhibit the provision of information by the press.

No one contested that Giordano's statements qualified as comment (cf. OLG München 1990: 1435/6). That question being settled, the major problem turned out to be to determine the appropriate interpretation of these statements. The crucial passage upon which the courts were to focus was Giordano's assertion that "the remaining longing for a strong man, say the federal-German version of the national-socialist führer-cult, has not asserted itself". As the Court of Appeal read this passage as referring to Strauß, it found Giordano guilty of malicious libel. However, the Federal

Constitutional Court overruled this verdict as it considered a second interpretation of this passage. In this interpretation the passage referred not directly to Strauß but merely to a part of the German population that might look at him to satisfy their longing for a strong man. If this interpretation applied, then its defamatory effect on Strauß was open to question.

Strikingly contrary to the dominant opinion in the British courts, the Federal Constitutional Court emphasised that the meaning of the statements could not sufficiently be established on the basis of their (semantic) form and meaning in isolation, but that this required reference to the whole context, including the book Giordano had published on 'forced democrats'. At the same time the Court relied on the impression the statements would make on an unprejudiced average reader. On this basis the Court recognised that the reference to Strauß as a "forced democrat" was a sharp and exaggerated offence which severely affected his personal dignity. However, given the strong conception of the right to free speech, such a statement was not necessarily inadmissible, this would still depend on the way this statement was to be interpreted.

Thus the German courts considered two related questions which were also considered by the British courts: first, whether the statements complained of qualified as statements of fact or of comment and, secondly, whether in interpreting these statements reliance should be made on their context. The British courts sought to isolate fact from comment, and subjected the former to a strict test of truth. In Germany, on the other hand, there appeared a more general scepticism towards facts. A statement classifies as comment relatively easily, the classification of statements of fact (*Tatsachenbehauptungen*) seems to be maintained for rare cases only and is even under pressure to be dispensed with altogether (Herzog 1994: 15a-17). Moreover, no attempts were made to isolate statements from each other, instead the judges referred throughout to the context in which the statements were made to establish the different possible interpretations which they might allow. They even relied on Giordano's book which was unlikely to be ever considered by many readers of the interview in dispute. Though the British judges may well overstretch their capacity to dissect statements and be rather

inauspicious to non-literal meanings, the German approach may, by dispensing with all distinctions and its inclination to interpret all statements against their full background, have surrendered all means by which speech can be effectively criticised.

### Justifying the Statements

#### Britain: No Justification Accepted

A distinctive voice in the House of Lords was Lord Ackner's. He, as the only member of the Court, vigorously opposed the majority opinion. Notably, he adopted a rather principled interpretation of the defence of fair comment, emphasising that the freedom of speech is one of the fundamental freedoms, and finding support for this claim in the dictum of the Court of Appeal in *Lyon v. Daily Telegraph*, [1943] 2 All ER 316 at 319:

"The reason why, once a plea of fair comment is established, there is no libel, is that it is in the public interest to have free discussion of matters of public interest (...) It [the right to fair comment] is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law upon which we depend for our personal freedom, that the courts should preserve the right of 'fair comment' undiminished and unimpaired" quoted in [1991] 4 All ER 817 at 826.

This argument touches upon the grounds which, as I have argued throughout this chapter, justify the basic right to free speech, and demonstrate that these considerations can find a place in British law. Nevertheless such a principled view did not prevail in this case. While Lord Ackner's position led him to infer that "if the court is not entitled to look at the material on which it is alleged that the words complained of were commenting, it would unduly restrict the defence of fair comment" [1991] 4 All ER 817 at 830, the majority of the Court held on to a much more restrictive interpretation of the defence of fair comment and never considered the repercussions that restricting free speech might have on the more general interests of the reading public and the public good of an open culture.

This had major consequences for *Telnikoff v. Matusevitch*, which were not even fully grasped by all members of the House of Lords at the time of their decision. The majority decided to send the case back to the Queen's Bench Division of the High Court

of Justice and prescribed that it would be left to a jury to determine whether paragraphs 6 and 7 of Matusevitch's letter constituted pure comment or whether they contained defamatory statements of fact. Lord Templeman considered that "If the contents of the letter contained defamatory statements of fact, however, then the plaintiff will succeed in his action for defamation unless the statements of fact set out in the letter were true" [1991] 4 All ER 817 at 825. Lord Keith, however, appreciated that Matusevitch's case was now much grimmer, not only could he no more safely rely on the defence of fair comment, but moreover "Since justification was not pleaded the plaintiff would necessarily succeed if the jury, the issue being left to them, were to decide that these paragraphs contained statements of fact" [1991] 4 All ER 817 at 821 (emphasis added).

Matusevitch desperately sought to repair his defence and to include the defence of justification, holding that if it were found that his letter had contained statements of fact he could justify them - as well as the inferences drawn from them - as being substantially true (cf. Halsbury's Laws, Vol. 28: §144). Before the re-trial, he issued a summons for leave to re-amend his defence to this aim. Mr Justice Otten, before whom the summons was brought, refused it on the grounds that Matusevitch could and should have raised the defence of justification much earlier and that to allow the plea of justification at this stage would add extra hardship and anxiety to Telnikoff. Matusevitch pursued his case further by applying to the Court of Appeal for leave to appeal over this order. This application was refused by Lord Justices Neill and Glidewell who failed to see any ground to revise the decision of their colleague. They even added that Mr Justice Otten might have underrated the troubling impact that allowing the amendment would have on the case.<sup>74</sup>

On 10 March 1992 Telnikoff and Matusevitch reconvened for the re-trial at the Queen's Bench Division before Justice Boreham and a jury. While Telnikoff's solicitor adduced as much evidence as possible of harm suffered by his client, Matusevitch could

<sup>74</sup> This reconstruction of events relies on the judgement of Lord Justices Neill and Glidewell in the Court of Appeal, 4 march 1992. As far as I know this judgement has not been published in any official collection of court decisions, it is however available from the LEXIS-system (Transcript: Association).

do very little to limit the range of issues that the jury was to consider. Indeed, the jury found that Matushevitch had not only made statements of comment but also of fact. According to the reading submitted by Telnikoff, these statements maintained that he "(1) advocated the introduction of blood-testing as part of the recruitment test of the BBC Russian services in order to maintain racial purity, and (2) advocated the dismissal of employees of the BBC Russian service on racial grounds". Even if the jury did not exactly accept these readings, Matushevitch was unable to justify his statements of fact and was therefore sentenced to pay Telnikoff damages amounting to £240,000 (cf. Barendt 1993: 458).<sup>75</sup>

### Germany: The Benefit of the Doubt

For the 'forced democrats' case to fall under the competencies of the Federal Constitutional Court, it had to be established that the lower courts had neglected "meaning and range" (*Bedeutung und Tragweite*) of the constitutionally recognised basic rights (BVerfGE 82, 272 at 280/1). Indeed, while emphasising that it well recognised the harm Giordano's statements had done to Strauß, the Federal Constitutional Court found that the Court of Appeal had failed to pay full regard to the constitutional right to free speech. For a start, as we saw, the Constitutional Court contested the interpretation the Court of Appeal had given of Giordano's statements. More importantly, however, the Constitutional Court held that the Court of Appeal had been mistaken in qualifying these statements as malicious libel. According to the

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<sup>75</sup> Curiously the story of Telnikoff v. Matushevitch does not even finish here. Matushevitch sought to have his sense of justice affirmed by having his case reviewed under United States jurisdiction by the U.S. District Court Columbia. District Judge Ricardo Urbina ruled in favour of Matushevitch: "since there appears to be no proof that the plaintiff [Matushevitch] made the statements with actual malice, the plaintiff enjoys the constitutional protection for speech directed against public figures", relying on the fact that "Speech similar to the plaintiff's statements have received protection under the First Amendment to the Constitution and are thereby unactionable in U.S. courts". The judge summarises the differences between British and United States law as follows: "In the United Kingdom, the defendant bears the burden of proving allegedly defamatory statements true and the plaintiff is not required to prove malice on the part of the libel defendant. (...) In contrast, the law in the United States requires the plaintiff to prove that the statements were false and looks for the defendant's state of mind and intentions". He further adds that, contrary to the practice adopted in Britain, "in the United States, courts look to the context in which the statements appeared when determining a First Amendment question". I owe these references to Professor Eric Barendt who was so kind to provide me with a copy of the summary judgment of this ruling.

Federal Constitutional Court the limits of the range of protected speech under the Basic Law would only be crossed if it could unambiguously be established that the statements lacked any substantial content and that the prime motivation of the speaker had actually been to degrade his victim rather than to contribute to a public debate.

The central question thus became whether Giordano could maintain that all his statements were justified in the light of the substantial argument he sought to develop and that they were not deliberately adopted to hurt and defame Strauß. Overruling the verdict of the Court of Appeal, the Federal Constitutional Court accepted Giordano's submission that throughout the interview his primary aim had been to point to the threat posed by the people he labelled 'forced democrats' for the democratic order. Even if the interpretation of the Court of Appeal were adopted whereby Giordano's statements on the federal-German version of the führer-cult referred directly to Strauß, they could not be interpreted as deliberately aiming to hurt Strauß's personal dignity. Hence, the case was remitted to the Munich Court of Appeal.

At the re-trial on 14 December 1990 the Court of Appeal followed closely the judgement of the Federal Constitutional Court (OLG München 1992: 1324). The Court premised its verdict upon a stronger conception of the right to free speech and asserted from the start that free speech was to prevail in case of doubt about the facts under consideration. On an overall assessment of the interview, taking account of Giordano's book as well, the Court found that throughout Giordano had primarily developed his argument about the threats he perceived to German democracy. The Court of Appeal further recognised that the most objectionable passage of the interview allowed for two possible interpretations, one which established the objectionable relationship between Strauß and the Nazi-dictatorship, the other in which Strauß figured only as the person whom a part of the German population would like to see as their strong political leader. The Court of Appeal left it an open question which of the two interpretation applied. Given the possibility of the second interpretation, it remained open to doubt whether Giordano intended to maliciously libel Strauß. Hence, Giordano's claim to free speech

prevailed, the making of similar statements in the future could not be prohibited, and all claims that had been raised by the Strauß's party were rejected.

## V) CONCLUSION

Considering both cases the judges in the two legal systems raised a number of notably similar concerns: malice, factuality and whether to interpret the statements in isolation or in their full context. Still the differences between the two legal systems are striking and one may note that these go far beyond the obvious differences in statutes and the fact that in Germany the right to free speech is recognised in a written constitution while in Great Britain it is not. The comparison of these two cases confirms the impression that the basic right to free speech is (legally at least) much less entrenched in Britain than in Germany. Even though the British legal system allows for paying lip-service to the importance of free speech, there are strong grounds to doubt whether it has effectively been established as a basic right. To establish free speech as a basic right more is required than the mere recognition of speakers' interests, it requires that its value is also acknowledged to derive from the interests of the public and the common interest in the preservation of an open culture. These interests are unlikely to be sufficiently incorporated in the British doctrines protecting speech (cf. Boyle 1982: 610; Gardner 1994). The defence of fair comment is treated as nothing more than a limited privilege of the speaker alone. Nor, as our case study showed, can judges be relied upon to consider the full range of interests in free speech by themselves.<sup>76</sup> Lord Ackner's minority opinion stood hopelessly alone in this respect.

However, the significance of the decision in *Telnikoff v. Matusevitch* for free speech in Britain can easily be downplayed, as for instance in P.J. Sutherland's commentary:

"since 'unusual' defamatory metaphors such as the one in *Telnikoff* probably represent a very limited class of statements, it may well be going too far to suggest that by denying the

<sup>76</sup> The most extensive and fascinating demonstration of this, featuring all arguments that allow the British judiciary to downplay the actual impact of a right to free speech (including the 'Wednesbury/Ashbridge rules' - cf. Chs. 2 & 4), is probably provided by the opinions delivered in *R v. Secretary of State for the Home Department, ex parte Brind and Others*, [1991] 1 AC 696.

authors of such statement the defence of fair comment (unless the statement's context is reproduced) public discussion has been 'seriously curtailed' (Sutherland 1992: 280).

But is it true that we are here only talking about a "very limited class of statements"? Eric Barendt argues to the contrary: "the result of the decision is seriously to weaken the defence of fair comment in a context when it is frequently argued, namely in cases arising from allegations in a newspaper's reviews or correspondence columns" (Barendt 1993: 458/9).

Interestingly Barendt points to another libel case that came before the House of Lords shortly after *Telnikoff v. Matusevitch*. In *Derbyshire County Council v. Times Newspapers and others*, the same Lord Keith of Kinkel who had effectively demolished *Matusevitch* defence, emphasised the importance of "the chilling effect induced by the threat of civil actions for libel" [1993] 2 WLR 449 at 457. This and other arguments led the House of Lords to an unanimous decision withholding the right to sue for libel from a local authority and thus upholding the freedom of speech of the newspapers sued. Barendt perceives rather radical implications in the recognition of the "chilling effect" under British law that are bound to bear upon the defences of justification and fair comment as well. Once it is recognised that a wider range of interests is affected by deterring speech than by leaving the plaintiffs uncompensated, "it cannot be right to leave the defendants to the risk of the jury's uncertainty where the truth lies" (Barendt 1993: 456). Rather than to leave the burden of proof upon the defendant to show the truth of the facts relied upon, it has to be put upon the plaintiff to show that the statements were false.

Now Barendt is fast to point out the distinctive features of *Telnikoff v. Matusevitch* and he emphasises that it was in no way overruled by the *Derbyshire* case. Nevertheless he concedes that had the majority of the House of Lords taken full account of the chilling effect in the former case, it would have had more difficulty in reaching the decision adopted. On this basis Barendt ventures the view that "the English legal system is in a transitional period: it is moving from the treatment of free speech (and other freedoms) as merely residual to their recognition as constitutional rights" (Barendt



1993: 459). However, this optimism may need to be tempered. The decision in *Telnikoff v. Matusevitch* certainly was not an aberration under British law nor was it a last manifestation of a dissolving approach. Free speech as a basic right incorporating the interests of audiences and the common interest in an open culture as well as the speaker's interest, remains far from entrenched in British law.

It is fallacious as well, however, to think that the mere adoption of a Bill of Rights will guarantee a fully rational approach to free speech. This can be illustrated by the German case. We saw how the 'forced democrats' case was eventually decided as, with remaining doubts about the appropriate interpretation of the statements complained of, the constitutional right to free speech tipped the scales in favour of Giordano. This practice is known in German jurisprudence as the presumption-formula (*Vermutungsformel*): "the presumption speaks in favour of free speech" (OLG München 1992: 1325; BVerfGE 82, 272 at 282). The presumption-formula can be justified by relying on the argument I have set out earlier: though it is most of the time very difficult to weigh individual interests against each other, when the speaker's interest in freedom of speech confronts in a more or less equal balance the victim's interest in having the speech restricted, the claim of the former is to prevail as it gets extra weight from the interests of her audience and the common interest in an open culture.

The presumption-formula has, however, been extensively criticised with the forceful arguments that a mere presumption provides insufficient ground to decide against those harmed by speech and that thus the presumption-formula serves as an illegitimate excuse to halt legal deliberation prematurely (Mackeprang 1990: 141; Kiesel 1992: 1130). The appropriateness of these objections is illustrated by the way the Munich Court of Appeal eventually relied on the presumption-formula to decide the 'forced democrats' case. As the Court was stuck with two possible interpretations of Giordano's words, it turned to the presumption-formula and decided in favour of free speech (OLG München 1992: 1325). As said, the presumption-formula indeed serves to resolve a remaining doubt, but this concerns the specific question of the balance of individual interests of speaker and victim, there are no grounds to let it decide questions

of interpretation. Imagine, for instance, that in a live television broadcast somebody is heard to say about a politician "he is a nazi" and then pleads at her defence that she said "he is narcissist" (in the sense of narcissistic), and that even digital analysis of the tape cannot unequivocally decide one or the other, could the court then circumvent this decision by turning to the presumption-principle? I think not.

That is not to say that the German courts were eventually wrong in upholding Giordano's freedom of speech. I think this decision is justified as Giordano could adduce a legitimate interest in making his statements and, though his argument clearly put Strauß in an objectionable context, no passage degraded him outrightly. Nevertheless the arguments of the German courts display a contestable tendency in heaping up all arguments in favour of free speech, while remaining ambiguous in defining the limits to its protection. A first instance of this we already found in the very justification of the right to free speech as deriving from it being both "the most unmediated expression of human personality" as well as "essentially constitutive for the liberal democratic order" (BVerfGE 7, 198 at 208). Then in the 'forced democrats' case the Federal Constitutional Court showed no reservation whatsoever in putting Giordano's statements in the best light possible, thus downplaying the harshness of the effect his statements were likely to have had on less fully-informed readers. Finally the presumption-formula turned up as a kind of stock formula laying the basis for a decision in favour of free speech for any case with any residue of doubt.

Not without grounds, some critics have come to wonder what arguments, if any, the Federal Constitutional Court would recognise as carrying the burden of reasons against a claim to free speech (Kiesel 1992; Tettinger 1990: 1075). Obviously, the Court is committed to a very wide range of protection, but this can be justified in the light of the basic right to free speech and the interests served by it. Nevertheless something more than just lip-service would be needed to show that it still is able to take serious account of the harm speech can do.

Indeed, such evidence is available since less than two years after its decision in the 'forced democrats' case, the Court upheld a claim for damages compensating for the

harm of personal degradation by speech. Again this case had a long history and actually it involved two claims for compensation only one of which the Court upheld. The plaintiff in this case was a man who though paraplegic (paralysed down to his legs) had sought entry to the German army. Following an interview with him in a popular national weekly, the satirical magazine *Titanic* decided to include him in their regular column "the seven most awkward personalities". Added to the name of each of the persons on this list was a comment phrased as if it referred to their maiden name, the plaintiff got the addition "born: Murderer". This publication, the Federal Constitutional Court was to find, qualified as satire and enjoyed therefore special protection under the constitutional right to free speech. It was a different matter, however, with the response *Titanic* published to a protest letter of the plaintiff. Here the editors referred to the plaintiff as "a cripple, namely you". This statement the Court recognised as a degradation that could not be justified under the constitutional right to free speech. Notably, this verdict upholding the restriction of freedom of speech was reached without expressly relying on the concept of malicious libel (*Schmähkritik*) (BVerfGE 86,1).

This case shows the course of the Federal Constitutional Court to be justifiable throughout. Free speech enjoys a distinctively heavy weight, but when harm is unequivocally deliberately inflicted, thus crossing a relatively firm boundary of the open culture as a public good, and when the interests of the public addressed in its statement are open to doubt, it can still decide in favour of a restriction of free speech. The point of critique that remains concerns the lack of transparency in the principles adopted by the Court which may cause chilling and insecurity effects on speakers as well as on potential victims of speech. Several proposals have been made to overcome this problem (Tettinger 1983; Ladeur 1993). My analysis of the right to free speech suggests two directions in which clarification is to be achieved. First, by making the public good of an open culture the central pillar of the justification of the right to free speech, the interests it is to protect can be identified in a single, coherent framework. Secondly, rather than to delineate different spheres or categories of speech, the range of

protected speech is first of all to be identified on the basis of the harms speech can do. In this light, questions of 'purpose', 'intention', 'truth' and 'malice' cannot decide the case for or against speech. They only serve to specify the magnitude of the harms done and the interests involved. The primary reason to survey the limits of our tolerance lies in the harmful effects that words like "cripple", "racist", "nazi", and "bitch" can be recognised to have.

## THE BASIC RIGHT TO EDUCATION

Moving from the right to free speech to the right to education we cross a great divide, the divide between civil and social rights. Basic civil rights, such as the right to free speech and the right to freedom of association, have become deeply entrenched in liberal democracies. To the extent that their justification still occasions debate, they concern not the question whether they can be justified, but on what basis they are justified. As their justification is beyond dispute, they are often not distinguished from human rights, such as the right not to be tortured, but are taken together with them to constitute the basic canon of rights. In actual Bills of Rights, like the Universal Declaration of Human Rights, the European Convention of Human Rights, and most national Bills of Rights, social rights are also recognised to involve fundamental claims. Nevertheless, the question whether social rights are to enjoy the same normative status in liberal democracies as civil rights remains widely contested (cf. Cranston 1967). Indeed, it often appears common opinion that liberal democracy provides distinctively firm foundations for civil rights, which they may share with certain political rights, but that social rights stand on a separate, and rather more contestable, basis.

I argue in this thesis that all basic rights characteristic of the liberal democratic order, including social as well as civil rights, can be justified on similar political grounds. Though I do not want to deny that the recognition of social rights raises a set of distinctive problems that are particularly hard to deal with, I maintain that these are of a practical, not of a principled kind. I submit that, though the recognition of social rights has historically been impeded by practical problems, they are inherent to liberal democracy just as much as civil rights are. What is more, they can be given their proper status as we can conceive of ways to deal with the practical problems that remain.

In making this claim I can follow T.H. Marshall who argued in his theory of citizenship that the different categories of basic rights have become established in liberal democracies through one essentially indivisible process taking place over the last centuries which is marked by the twin characteristics of 'fusion' and 'separation'. The process of 'fusion' took place geographically as the concentration of political power in the modern nation-state occasioned the neutralisation of local differences in the allocation of claims and duties by way of national laws. The process of 'separation', on the other hand, was of a functional or institutional kind and manifested itself in the different sets of institutions that arose to administer different categories of rights: the courts of justice to uphold civil rights, parliament and councils for local government to take care of political rights, and the educational system and social services to provide for social rights (Marshall 1950: 9).

Marshall's account has been widely challenged on both historical and sociological grounds.<sup>77</sup> Though such critiques have indeed raised many valid points, I want to uphold what I take to be Marshall's basic claim - that the recognition of social rights is, as much as that of civil rights, inherent to liberal democracy. This, however, I intend to demonstrate not by revising his historical account (though I believe this can be done in the light of the historical criticisms that, though warranting such a project, have never overthrown Marshall's fundamental tenets) but by way of a complementary analytical examination of the structure of civil and social rights in actual political and legal practices.

In this chapter I analyse the basic right to education which is (with, for instance, the right to health care) among the least contested and most firmly established social rights in contemporary liberal democracies. At the same time the right to education shares with all other social rights the features that are supposed to make their status as

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<sup>77</sup> In the wake of 'citizenship' and 'nationality' becoming extremely prominent topics in both political and academic debates, Marshall's theory of citizenship has been widely revisited. Turner (1986) and Barbalet (1988) extensively examined its lasting relevance. Particularly thought-provoking critiques have been written by Giddens (1985), Mann (1987), and Somers (1993; 1994). A good preliminary conclusion to the debate has been provided by David Held's excellent essay (1989) in which he salvages the basic tenets of Marshall's theory and formulates the main revisions it requires in our age.

basic rights problematic: most notably it involves extensive state activism, requires taxation and raises intricate questions of social justice. In the first section below I critically review the main arguments claiming that social rights are essentially different from civil and political rights. Rejecting these arguments on philosophical as well as political grounds, I hold instead that the specific practical intricacies distinguishing social rights allow for constructive responses rather than to excuse their negation.

In the second section I turn to the question of the justification of the right to education: why would any one succumb to any duties for the sake of an other's education? I distinguish in particular two kinds of duties involved: tax duties and duties to forego certain distinguishing options in education. Like in the case of the basic rights analysed in earlier chapters, the question of the justification of the right to education is often answered in terms of individuals' liberty. A consistent critique of this approach has been developed from an opposing position that takes the value of equality as its core-value. I argue that both these arguments remain deeply deficient and instead I turn, as I did earlier in the cases of private property and free speech, to a public good argument. I argue that the basic justification for the right to education is to be found in the fact that it serves all members of society by securing a context in which they can enjoy worthwhile social interactions with each other and that therefore they share an interest in one another's education.

Even more than was the case with the basic rights to private property and to free speech, it is apparent in the case of the basic right to education that the public good argument falls far short of directly determining all the questions involved in the politics of education. I start section III with an attempt to flesh out the general implications of the public good argument for the right to education. Though there are thus some clear principles of general validity, the more concrete implications of the public good argument can only be made clear in actual political contexts in which one encounters a multiplicity of actors involved with their own distinctive claims. Looking into the particularly complex political context of the administrative state that handles claims to education, one finds that political authority is dispersed among many different actors

and may come to think that in such a situation basic normative principles like the right to education lose their substantial relevance and serve only a symbolic function. In the second half of the third section I seek to ward off the political scepticism this impression conveys by proposing a model, the 'gate model', from which we may still be able to derive a coherent substantive conception of the way in which the modern state apparatus administers the basic right to education.

Building upon the combination of the public good argument for the basic right to education with the gate model, section IV presents an extensive analysis of a British and a German case in which the right to education has been brought to bear upon the political decision whether or not to recognise a school. Finally, the main arguments of this chapter are brought together in a concluding section.

### **1) WHAT IS DIFFERENT ABOUT SOCIAL RIGHTS?**

The claim that social rights are essentially different from civil and political rights can basically be argued for on two distinct grounds: one of a principled, philosophical kind and the other of a practical, political kind. In the first sub-section below I review the classical divide drawn by Isaiah Berlin between negative and positive liberty as a crucial source of the philosophical argument against putting social rights on the same principled footing as civil rights. In the second sub-section I review the more political argument that claims that social rights foster 'a culture of poverty' and argues instead that social issues are better dealt with by a 'new style workfare'.

Ultimately I reject these arguments on two grounds. First, I hold their willingness to account for civil rights but not for social rights to be poor, both politically as well as philosophically. From a political point of view it is clear that social claims do not go away by not addressing them. Citizens in contemporary liberal democracies do have genuine reasons to raise these claims and this warrants that we take them seriously. The corresponding philosophical deficiency in putting civil rights on a separate standing manifests itself as 'scepticism'. This scepticism is neither



philosophically nor politically innocuous. It removes social problems out of the philosopher's domain and fosters libertarian positions.

My second claim against critics of social rights is that their diagnosis of the problems involved in state administration is deficient. It is deficient to the extent that it perpetuates the idea that injustices do disappear by not politicising them. However, injustices are not more bearable because they are transmitted through the market instead of through a deficient state policy. We probably have to accept that the state is always going to commit injustices in administering social claims, but the question to be addressed is how we can reduce these to a minimum. This question is inherently a social question, it concerns the relations between people and the claims they can effectively uphold against each other. Advocates of 'new style workfare' may claim that this question is best answered by subjecting all those who make social claims to a single particular regime. I argue, however, that such a regime is only likely to perpetuate social problems. Instead I propose in the third sub-section below an alternative diagnosis that focuses on the 'problem of classification' inherent in state administration of social claims. This diagnosis is compatible with the basic commitment to social rights and seeks to solve the administrative problems they raise from within the institutional set-up of the political apparatus by which social claims are met.

### Negative Liberty and Anti-Rationalism

Central to the principled argument against social rights is the thesis that there is an essential difference between the duties to refrain from intervention with others' claims upheld by way of civil rights and the duties to contribute to the claims of others implied by social rights. In my view, however, both categories of rights basically serve the allocation of claims between individuals by privileging certain specified interests. Both duties to contribute to the claims of others and duties to refrain from intervention with others' claims need to be justified, and I fail to perceive any *a priori* reason why a negative duty of the latter kind would need less justification than a positive duty of the

former kind. Thus I conclude that there is no difference in principle between negative and positive duties (cf. Tushnet 1992; Section 1.II above).

The terms in which the major arguments against this conclusion have generally been phrased, have their *locus classicus* in Isaiah Berlin's "Two Concepts of Liberty" (1958). Berlin distinguishes between a negative and a positive concept of liberty. The negative concept of liberty refers to "the area within which the subject (...) should be left to do or be what he is able to do or be, without interference by other persons". The positive concept of liberty refers rather to a "source of control or interference that can determine someone to do, or be, this rather than that" (Berlin 1958: 121/2; cf. Mill 1859: 16). Playing these two concepts off against each other, Berlin reaches the following conclusion:

"If I wish to preserve my liberty, it is not enough to say that it must not be violated unless someone or other - the absolute ruler, or the popular assembly, or the King in Parliament, or the judges or some combination of authorities, or the laws themselves - for the laws may be oppressive - authorizes its violation. I must establish a society in which there must be some frontiers of freedom which nobody should be permitted to cross. Different names or natures may be given to the rules that determine these frontiers: they may be called natural rights, or the word of God, or Natural Law, or the demands of utility or of the 'permanent interests of man'" (Berlin 1958: 164/5).

In other words, Berlin does not trust positive concepts of liberty to be able to preserve his liberty. Hence he argues for a negative concept of liberty that, he suggests, may even be equated with a concept of natural rights.

Though he never explicitly draws this conclusion, Berlin's argument fosters the idea that under liberalism the protection of civil rights, supposedly protecting negative liberty, is to take priority over the protection of social rights, as expressions of positive liberty. We can distinguish two strands in his argument that suggest this conclusion, a libertarian one and an anti-rationalist one, and I want to challenge both.

I do not want to quarrel with Berlin's insistence that each person is to enjoy certain absolute immunities - I would call them human rights - as, for instance, bodily integrity and freedom of thought (though we can all think of extreme situations where there may be good reasons to challenge even these goods). However, the perspective of

negative liberty suggests a sphere of immunities that is notably expansive beyond a bare minimal range. Indeed, as Berlin observes, this perspective presumes that "(t)he wider the area of non-interference the wider my freedom" (Berlin 1958: 123). Of course, the individual's area of non-interference cannot be expanded indefinitely, it reaches its limits upon the freedom of others, and even before that as other social values have to be considered. Berlin concedes that it is a matter of argument, "indeed of haggling", where exactly the area of non-interference is to reach its limits (Berlin 1958: 124). Nevertheless, as he closely follows liberal thinkers such as Stuart Mill, Constant and Tocqueville, it is strongly suggested that this area includes civil rights such as the right to free speech and freedom of association and also the right to private property.

This last move, however, I would hold to be a mistake. As I have argued extensively for both private property and free speech, one's claims to these goods cannot be justified simply by asserting that they are expressions of personal liberty and that their effects upon others are negligible. The fact is that our individual lives in society are closely related and that there are few spheres of action that allow for absolute immunities towards others as they are bound to be implicated by them. The example of freedom of speech in multicultural societies should suffice to make this point. Berlin, however, has reasons to be reluctant to allow others a say in these spheres as he recognises in any external authority the potential of oppression, if not the dark shadow of twentieth century totalitarianisms. Here we get to the second problematical strand of Berlin's argument, his anti-rationalism.

Berlin's position has been characterised as 'value-pluralism'. Typically he writes: "If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict - and of tragedy - can never wholly be eliminated from human life, either personal or social" (Berlin 1958: 169). By itself this view that the possibility of conflict is inherent to society need not be contested. Berlin's position, however, becomes disputable as he moves on to assert that "it is not merely in practice but in principle impossible to reach clear-cut and certain answers, even in an ideal world of wholly good and rational man and wholly clear

ideas" (Berlin 1958: 170). Here his anti-rationalism lurks and it is reinforced by cautioning remarks on how "absolute categories and ideals" may be preserved "at the expense of human lives" (Berlin 1958: 171).

Indeed the twentieth century rationalised genocides should make us extremely cautious in shaping political practices according to abstract categories, but I do not see how such caution legitimates the political choice to grant absolute immunity to a certain range of personal interests (negative liberty) which are thus effectively made unchallengeable irrespective of the interests which they may frustrate. As conflicts between interests are ineradicable in society, we cannot simply turn a blind eye to some of them, taking their costs for granted. Certainly, rationality has been put to use for the most despicable and illiberal ends, but that does not warrant the defenders of liberalism to abandon the use of reason in politics (cf. Taylor 1985: 216). From its very roots in the enlightenment project, liberalism has been closely allied to rationalism. Indeed, as Berlin challenges this rationalism, he plays down the rational foundations of civil rights and reduces them to a historically contingent attainment, which may in time fall victim again to the continuing conflicts between individuals' ends. However, liberalism requires reason, especially as it still has to face its own historical and social debts that concern above all significant parts of society whose life-prospects atrophy on account of poverty and social discrimination. Taking the rationalist stand, liberalism can be committed to uphold social rights as well as civil rights to meet these claims to justice, avoiding both totalitarian solutions and irresponsible libertarianism.

#### Dispensing with Social Rights

Even when it is recognised that the concerns addressed by social rights are no less legitimate than those of civil rights, worries persist about social rights. For one thing, there remains a widespread reluctance to succumb to the duties they impose: while little costs are seen in the negative duties of tolerance required by civil rights, the taxes social rights require meet with persistent opposition. This opposition is invigorated by arguments that show how social rights often lead to perverse consequences and that

even their beneficiaries often have reasons to be rather critical of them. As a consequence one might argue that even though there may not be a difference in principle between civil and social rights, the problems in upholding social rights in actual political and legal practice are so great that they warrant the abandonment of the project.

The strongest statement of this critique of social rights has become known as the 'culture of poverty' argument.<sup>78</sup> The 'culture of poverty' refers to a range of, what are generally regarded as, pathological lifestyles, including a disinclination to take up a 'regular job' and irregular and unstable family relations. Adherents to this argument maintain that the provision of social benefits under social rights serves to affirm these lifestyles, allowing them to persist and even spread among recipients. The argument further observes that the recipients' lives are increasingly separated from the rest of society, so that in the end they come to constitute a 'new underclass'.

The 'culture of poverty' argument has a notable resonance among social rights beneficiaries. Indeed, it is widely recognised that social rights often fail to meet the interests of those who are to benefit from them. While social rights mitigate symptoms, they leave the real needs unaddressed, allowing them to endure if not to worsen. That is not to say that benefits do not meet certain interests. Few recipients refuse whatever social benefits they are provided with. However, the problems they have are far more complex and the benefits they receive generally fail to improve their condition structurally, so that in the end they remain dependent upon them.

Having established the 'culture of poverty' diagnosis, one recommendation quickly follows: social rights are to be abolished since the duties the 'affluent society' has incurred for their sake have come to no - or even perverse - effects. Note, however, how this recommendation simply gives up on any attempt to meet social claims. It more

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<sup>78</sup> This 'culture of poverty' or 'dependency' argument has especially been developed by right-wing theorists in the United States, though note the interesting parallels with the nineteen-seventies leftism of Europe-born Ivan Illich (1971). Michael Katz (1993) provides an excellent genealogy of this argument. The concept of the 'culture of poverty' was introduced by Oscar Lewis (1966). Over the last decades the argument has been particularly effectively put to use by Charles Murray (1984). A thorough critique of the 'dependency'-argument can be found in the excellent work of William Julius Wilson (1987). I am indebted to Adrian Favell for my perception of this American debate.

or less complacently suggests that the poor have to carry their own responsibilities and face up to the effects of failing to do so. Thus, social claims are simply removed from the political agenda. What is left is the cynical conclusion that if the allocation of social claims in society cannot be subjected to rational political principles, it can just as well be left to mechanisms of social power.

Alternatively, some critics of social rights argue that the solution lies in a much less lenient approach towards recipients. Given that their problems are indeed entrenched in their lifestyles, liberal answers will not suffice. A structural solution is only to be found by 'forcing' the needy to be free. That is, they have to be obliged to meet certain social standards, to accept work above all and to adhere to regular family patterns. Only when they meet these requirements can they qualify for social benefits (Mead 1986). This 'new-style workfare' approach (cf. Wilson 1987: 159 ff.) clearly comes at the cost of deep intrusions into the private spheres of the needy. Little remains of social rights in the sense that rights presuppose some individual autonomy in defining one's own interests. In these proposals the conditions under which social claims can be granted are authoritatively defined.

From the viewpoint of liberalism as a political morality, obvious objections can be raised against 'new-style workfare' for violating the fundamental liberal notions of the private sphere and of personal autonomy. I want to argue, however, that the 'new style workfare' argument is already fundamentally flawed in its diagnosis of the problems of the administration of social rights it relies upon. There is good reason to doubt whether it could ever be successful, if it were fully implemented (which no country has so far done, though its ideas have been received particularly favourably by American Republicans like Newt Gingrich and British Conservatives like Michael Portillo).

When adopted, 'new-style workfare' is bound to have major problems in securing the allegiance of its recipients, as it is unwilling to even consider their claims in their own terms. Different scenarios are conceivable. Most likely, many of the people targeted will simply not enrol on the programs set up. As they will thus lose all

effective social claims, they will come to constitute a further discontented and potentially more dangerous 'under-underclass'. Alternatively, if indeed the authorities succeed in including most people in their workfare programs, upholding the obligations required and monitoring people's performance is bound to require something similar to a 'prison-regime', including the patterns of deviant inmate behaviour that such regimes are known to provoke (should I suggest the parallel with concentration camps?). In short, whatever social problems 'new-style workfare' may remove, both the 'under-underclass' as well as the 'prison-regime' scenario are bound to raise severe problems of their own.

### The Problem of Classification

Undeniably there are severe problems with the administration of social rights. However, I want to argue that they do not, and need not, warrant the rejection of the idea of social rights altogether. I propose instead to look once more at the kind of practical problems that inhibit the effective maintenance of social rights. I seek to demonstrate that the diagnosis of the 'culture of dependency' argument is inherently partial and misses the essential problem which resides within the administration rather than within the culture of the recipients of social rights. This problem I call 'the problem of classification'. To be sure, this problem does not allow for easy, straightforward solutions. However, adopting this diagnosis suggests some directions in which solutions can be found so that the maintenance of social rights can be secured.

Let us take it for granted for the time being that there are not only no principled reasons against social claims to positive duties (as I have argued above against Berlin), but that furthermore specific justifications can be given for certain social rights (as I will present for the right to education below). Under these conditions there is a basic argument to impose duties on certain people for the sake of social claims of others. In other words, the situation is that the state (which is to provide for the social claims) can justify the imposition of taxes, and possibly certain other obligations social claims require. At this point the major problem of administration arises because, depending on

their individual interests, individuals may invoke the social rights recognised to uphold widely different social claims. The right to education, for instance, can be invoked to claim education in many different subjects, at many different levels and at many different speeds. Basically each individual can put forward a unique set of education claims. To be sure this situation is not essentially different from that under civil rights. Each individual puts forward a unique set of claims to free speech, as she demands others to tolerate a unique set of personal utterances. However, while claims under civil rights are fully defined by the individuals themselves, in making claims under social rights they require the state to provide the goods that correspond to their claims. For this aim the state relies on classification.

A perceptive statement of the problem of classification can be found in the writings of that godfather of social rights, T.H. Marshall, as he considers the problems inherent to the administration of education:

"however genuine may be the desire of the educational authorities to offer enough variety to satisfy all individual needs, they must, in a mass service of this kind, proceed by repeated classification into groups, and this is followed at each stage by assimilation within each group and differentiation between groups. That is precisely the way in which social classes in a fluid society have always taken shape. Differences within each class are ignored as irrelevant; differences between classes are given exaggerated significance. Thus qualities which are in reality strung out along a continuous scale are made to create a hierarchy of groups, each with its special character and status. The main features of the system are inevitable, and its advantages (...) far outweigh its incidental defects. The latter can be attacked and kept within bounds by giving as much opportunity as possible for second thoughts about classification, both in the educational system itself and in after-life" (Marshall 1950: 39).<sup>79</sup>

In short, classification is inevitable in the administration of social rights; problems arise as classification is bound to ignore differences within groups and exaggerate the differences between them; these problems can best be handled by allowing the categories of classification to be open to revision.

<sup>79</sup> Note, furthermore, how well Marshall, writing in the late forties, anticipated the coming problems of the welfare state. Besides the analysis quoted, he warns against the stigmatising effect that social services may have and concedes that social rights can generate new inequalities (cf. Marshall 1950: 21, 32/3).



This statement of the problem of classification meets the 'culture of poverty' argument on several points. Contrary to the arguments for 'new-style workfare', the problem of classification presumes that social claims are widely divergent and that there is no single, authoritative standard by which they can be dealt with. Instead social provisions are always but limited answers to people's social situation; for some they will be sufficient, for others they will fall short and need to be complemented by other provisions. Admittedly this approach leaves certain structural conditions of social dependency unaddressed. However, against the 'culture of poverty' argument it may be held that the causes for these conditions are not so much to be attributed to the individuals' lifestyles but rather to macro-economic circumstances, which may indeed be beyond much political control (but cf. Wilson 1987: Ch. 7). What politics can do, is to take people's social claims seriously and seek to make as adequate provisions for them as possible.

Theoretically major advances towards a constructive theory of the problem of classification have come out of the encounter of Jürgen Habermas's discourse-theoretical analysis of modern politics with feminist theory. Women as a group have been particularly sensitised to the problems with the administration of social claims. Given the political-economical structure of western societies, they are generally more dependent on the state to have their social claims met, but have often found these provisions to be inadequate as the classifications employed reflected male standards or traditional stereotypes about the social position of women. Characteristically, Habermas highlights the phenomenon of 'over-generalising classification' in which a provision defined to benefit a group at large, in practice serves only a relatively privileged part of it. Typical examples are job subsidies given to employers for employing people from racial minorities. Such policies may well serve the male and better educated members of these groups but are likely to leave female and non-educated members in the cold. Such 'mis-classifications' are hard to change, especially as long as legal institutions are not made responsive to criticism. Hence, Habermas argues for a change in the understanding of legal institutions towards a 'procedural paradigm'. In the procedural

paradigm of law great emphasis is placed on need for participation of the individuals affected to scrutinise administrative classifications and the similarities and differences that they draw (Habermas 1992: 506 ff.).<sup>80</sup>

This line of examining state provision of social claims has been more extensively pursued by Nancy Fraser. Fraser highlights the political nature of the problem of classification by conceiving of it as involving a "politics of needs interpretation". She distinguishes three political moments that precede the actual deliverance of social claims:

"The first is the struggle to establish or deny the political status of a given need, the struggle to validate a need as a matter of legitimate political concern or to enclavise it as a nonpolitical matter. The second is the struggle over the interpretation of the need, the struggle for the power to define it and, so, to determine what would satisfy it. The third moment is the struggle over the satisfaction of the need, the struggle to secure or withhold provision" (Fraser 1989: 164).

I would like to rephrase these useful distinctions as posing three political questions of classification. The first question concerns the question of justification of a political principle like a social right to education, income, work, care etc. The second question concerns categorisation, or classification in the restricted sense, that is, it defines the categories within which claims are to be met by introducing relevant distinctions such as between gender, religion, ethnicity, merit etc. Finally, there is the question of application that decides over a particular claim raised by a particular individual.

Fraser further distinguishes between three major kinds of discourses through which needs are articulated. As a first kind she identifies 'oppositional' discourses. These discourses are constituted by more or less 'authentic' claims raised from within the populace to have certain needs met that have so far been ignored by the state. Thus

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<sup>80</sup> Note that Habermas in his earlier work attributed to the law an inherent tendency to distort people's genuine claims. On that argument he was led to assess the intrusion of the law in social spheres such as schooling and health care with distrust. 'Legalisation' (Verrechtlichung), he argued, was bound to alienate people from their needs, and in that respect his argument suggested that social regulations might foster something like a 'culture of dependency' (Habermas 1981-II: §VIII[3]; for a more affirmative analysis of legalisation in education see Jung & Kirp 1984; Weiler 1985). Habermas has abandoned this view as he has recently embarked upon an internal, discourse-theoretical reconstruction of the law that (through a procedural paradigm of law) allows for the possibility that the law can be opened up to criticisms of its categories (Habermas 1992: note e.g. p.150).

they challenge established classifications, possibly on all three levels: seeking to justify new principles, having categories of claims revised, or challenging the way in which these are applied. Oppositional discourses are countered by reprivatization discourses, these seek to hush the former (in other words, to keep their claims away from public acceptance, i.e. 'private') by upholding or 'naturalising' the established classifications. Finally, there are expert discourses that mediate between the former more societal discourses and the state, trying to rephrase the claims made in administrable classifications. Thus expert discourses may sometimes favour reprivatization discourses and sometimes oppositional discourses (Fraser 1989: 171 ff.).

What is basically at stake in these "struggles over needs" is to gain the public acceptance of certain claims and to have them provided for by the state. The origins of many oppositional discourses can thus be traced to the two spheres that traditionally have been regarded as non-public, non-political: the private sphere of the family and the private sphere of the market-economy. Many social claims of members of subordinated groups in these spheres have formerly been ignored by politics. Oppositional discourses serve to politicise aspects of these private spheres. Significantly, these discourses have in post-war liberal democracies been met with a complementary process from the side of the welfare state that has developed through a proliferation of agencies meant to administer different social provisions which often even blend with societal groups. Exactly these governmental agencies and societal groups co-operating in the administration of social claims constitute the sites of the struggle over needs.

Fraser lays particular stress on the fact that oppositional discourses are structurally disadvantaged in expressing their claims in opposition to the concepts of the reprivatization discourse that are deeply entrenched in the dominant political idiom (Fraser 1989: 164/5). On the other hand, she signals how certain strategies allow classifications to be challenged - and subverted - through the administration. She cites, for example, research by Linda Gordon showing how in the absence of legal regulations against wife-battering, women have got their claims recognised by turning to provisions against child abuse (Fraser 1989: 177). In the end Fraser's argument issues into a plea

for social rights under the conditions that they are open for re-definition and allow for procedures by which they may be challenged. Following a similar strand of reasoning, Habermas asserts an even a stronger and more general prospect for processes of re-classification as he perceives "a dialectic between *de jure* and *de facto* equality". He holds that once groups are formally included under legal provisions, they can through their encounters with the law push legal classifications to define the conditions required for substantive equality (Habermas 1992: §IX.II).

Hence, both Habermas and Fraser see prospects of overcoming - or at least minimising the costs of - the problem of classification and the upholding of social rights. They shun any 'naturalising' libertarianism and seek to rationalise political norms by having them challenged in participation-processes. Moreover, as Fraser (1989: 183) puts it, they are both "committed to opposing the forms of paternalism that arise when needs claims are divorced from rights claims", a position exemplified by 'new-style workfare'. Nevertheless, they recognise that the classifications adopted by the state administration may be widely contested as the administration of social claims is inherently political.

Abstracting from actual political conflicts, theories can no more than intimate the kind of principles and institutions required. As I now turn to the social right of education, a whole range of more specific issues are raised. While it will take me some considerable time to deal with them, the problem of classification will remain present throughout and I will explicitly return to it in section III where the Habermasian analysis is completed with the introduction of the more formalised 'gate model'.

## **II) JUSTIFYING THE BASIC RIGHT TO EDUCATION**

In seeking a justification for the right to education, I ask a similar question to the ones raised in the former chapters concerning the other basic rights: on which grounds can one accept the duties required for the fulfilment of other's interests in education? Compared to the many theories accounting for the right to free speech, much less work has been done so far in political theory to answer this question about the right to

education. What is more, the kind of work that has been done is of a rather distinctive kind. Ideas that figure prominently in justifications of civil rights and also of the right to private property - like liberty, autonomy and other rather individualistic notions - are far less prominent, or take on rather different meanings, in theories of the right to education. Instead the typical theoretical approach to this right starts from a general, societal ideal of some sort of equality in education. This ideal is necessarily vague and much of the theoretical work done on education (and other social rights) consists in a kind of hermeneutic exercise of interpreting what the exact implications of this ideal might be.

In my view such accounts miss out a step. They presume a moral ideal without securing its political foundations. In essence they fail to consider the question why, in the first place, one would accept the duties required for the fulfilment of other's interests in education. Indeed, an alternative view is conceivable that holds that there are few reasons if any why individuals should accept such duties. In contrast with the 'egalitarianism' predominant in social rights arguments, this view can be called 'libertarian' and, though it is way out of touch with the realities of contemporary welfare states, some of its tenets linger on in current political debates: why indeed should people accept duties to serve other's interests in education? As advocates of the egalitarian ideal in education fail to give this question sufficient thought, their ideal is liable to become politically empty.

To facilitate the discussion of these two views we may first unpack the right to education. A first distinctive trait of the right to education is that this right primarily serves the interests of children, who, however, cannot be expected to be fully capable of standing up for their own interests. One may even suggest that since children cannot be expected to adequately represent their own interests, the provisions made for their education cannot be claimed by way of right (cf. Hart 1973: 192 ff.). No one will contest, however, that each child has an interest in some kind of education. Moreover, these interests can be represented as from an early age onwards children do have some conception of their own distinctive interests and their lack of personal autonomy can to

a significant extent be compensated for by their parents. As Ruth Jonathan notes, the role of parents as adequate proxies representing children's interests can be justified by holding both that there is "an identity of interest between parent and child" and that the "parent is the person best placed and/or most strongly motivated to act as the child's trustee or agent until such time as the child becomes competent to choose and act autonomously" (Jonathan 1993: 19; cf. MacCormick 1976). Though the representation of children's interests undeniably raises some problems as parents' interests may indeed diverge in certain respects from those of their children, the right to education is effective to the extent that the children's interests can be taken to be adequately articulated, and valid reasons to meet claims to education are recognised.

A second distinctive trait of the right to education follows from the discussion in the preceding section. As claims to education have to be met by provisions ("positive obligations"), the good of education will never be fully provided. To be precise, what is delivered under the right to education is not so much "education" but rather "schooling". Education is a much broader process, that to a large extent, takes place outside of the institutions provided by the state, that is, in the family and in other social relationships. The state is only in a position to meet a limited number of claims to education. As was furthermore emphasised above, state provisions come in classes that will inevitably fall short of full correspondence to the specific needs individuals have.

The duties the state imposes for the sake of the right to education are basically of two kinds. First of all, the right is invoked to impose financial duties, i.e. the right to education justifies the exercise of the state's power to tax. The role of the state is crucial here in mediating between contributors and beneficiaries: it co-ordinates the collection of funds from contributors through general tax-schemes and then it uses these funds to establish or facilitate institutions by which individual beneficiaries can have their claims to education met. We should note that this role of the state serves to obscure the political relationship between contributors and beneficiaries. To a certain extent it is even inefficient, as part of the contributors turn out to be beneficiaries as well, these might just as well have had their claims met through a simple market transaction. What

is more, the state obscures the justificatory question as it dominates the relations with the tax-payers as well as with the beneficiaries. Thus the actors involved can no longer directly perceive the relationship between claims and duties. This may result, on the one hand, in tendencies to reluctance of the tax-payers and, on the other, in tendencies to over-demand of the beneficiaries (cf. Offe 1979; 1981).

There is a second line of duties that the state imposes under the right to education and this kind of duty is closely interrelated with the problem of classification. The state forces claims to education in a classificatory framework that sanctions certain differences but blocks others. Thus individuals find certain options in education disqualified under the right to education, or at least severely disadvantaged. Indeed, liberal democratic states are generally committed to restrict the opportunities for differences in education and have only be willing to recognise a limited number of claims for distinctive treatment, most notably religious ones. There are obvious administrative advantages to such a single-minded approach, but, more importantly, political grounds have been adduced to justify such restrictive practices. Social-democratic politicians in particular have from the very beginnings of education policies been extremely sensitive to what two analysts have diagnosed, as the "endemic problem of securing diversity without a hierarchy of institutions" (Edwards & Whitty 1992: 110). In other words, any diversity in schooling is suspected of turning into differences in educational opportunities between individual pupils, even when these differences correspond to seemingly innocuous features such as religion. Thus political parties from the left have generally stressed the demand for comprehensive education, as is evidenced by the position taken by the German Social-Democrats in the 1919 School Compromise of Weimar as well as by Anthony Crosland's initiatives, as Secretary for Education for the British Labour Party in the 1960s, towards comprehensive schooling.<sup>81</sup>

<sup>81</sup> For the German Social-Democrats and the School Compromise of Weimar see Landé *Die Schule in der Reichsverfassung* (1929). For Labour's commitment to comprehensive schooling see Crosland (1966) and the classical statements by R.H. Tawney (1931: esp. 141-6)..

The state's blocking of certain choices in education constitutes a second range of duties under the right to education besides tax duties. The primary aim of an account of the right to education is thus to justify these two kinds of duties. Obviously, these duties serve certain interests but the question is whether there are good reasons why these interests should in principle dominate interests that people may have in being free from them. Such conflicting interests are easy enough to think of: individuals may not be inclined to pay taxes nor need they be predisposed to forego the opportunities of sending their children to distinguished schools where they may benefit from the presence of their peers. A theory of the right to education has to explain the *prima facie* grounds why people should set aside these interests.

I start the following sub-sections by outlining two radically consistent positions on the question of the foundations for claims to education, the libertarian and the egalitarian argument. Both arguments, I think, can be shown not only to be philosophically deficient but also to be of limited use in directing political practice. In the final sub-section I try to move beyond both arguments by considering the respects in which education constitutes a public good from which society at large stands to benefit. This argument, I will argue, not only does a superior job in justifying the duties upheld under the right to education, it will also prove to be particularly fruitful for political and legal decisions adjudicating claims to education.

### The Libertarian Argument

The cradle of the libertarian argument is the private sphere constituted around the family (cf. Fishkin 1983: §2.4). The family provides the child with a 'natural' environment. In saying this, I do not want to challenge new forms of relational contexts in which children may grow up, what I do want to maintain is that a mother having given birth to a child does, together with the one(s) she has chosen to live with, have a prerogative over the way the child is to be brought up. Though I think that no one disputes the basic validity of this parental prerogative, it is clear that its limits are the subject of a wide range of conflicting opinions. Generally the parental prerogative is



largest during the initial years of the child's life, then for a long time it persists side by side with schooling (in accordance with certain public standards) until it finally dissolves at the child's age of maturity (cf. Parsons 1959).

The parental prerogative limits the extent to which a child's upbringing can be subjected to uniform, society-wide standards. Thus the conditions are maintained for the fostering of differences between children. Of course, children are already born with innate differences in abilities, physically as well as intellectually, that may range from genuine, medically diagnosed, handicaps, from relative differences in achievement potential to extraordinary capacities in certain fields. (Amartya Sen refers to these differences as 'internal' or 'personal' differences, Sen 1992: 1, 20).

While these differences can be taken to be fixed, education provisions are inherently entangled with 'external' differences that only develop in the course of children's upbringing. I propose to distinguish between three sources of these 'external' differences which, needless to say, are generally closely related to each other in a child's upbringing: preferences, wealth, and environment. First, parents will create different conditions under which children grow up for the mere reason that they hold different preferences in life. Secondly, differences in wealth imply that families have different amounts of resources at their disposal to facilitate the child's development. Thirdly, each child goes through a range of experiences that though closely related to the family are nevertheless beyond the parents' direct control. They depend on the living environment: the neighbourhood in which the child grows up, the other children with whom it gets in touch etc.

Being different for all of these four reasons, children can raise widely divergent demands to education provisions by the state. There are two aspects to the libertarian argument regarding these claims. The first consists in a general resistance to state provisions. The libertarian argument combines a scepticism about the state's capacity to administer certain provisions with reluctance to yield to the primary duty generally required for the sake of the right to education: the duty to pay taxes. The second, and often much less appreciated, aspect of the libertarian argument is that to the extent that

it can accept state administration of certain provisions, it demands that each child's claims should as far as possible be dealt with on its own terms. Thus this aspect opposes the second duty I distinguished to be generally imposed under the right to education: the restriction of certain choices in education.

The libertarian argument combines these two aspects to argue that educational claims are best met through the market instead of being provided for by the state. Thus the imposed duties of tax are warded off in favour of voluntary exchange relations between parents and schools. As the schools operate in the market, libertarians argues, that they will charge less as they do not have the overhead costs of state administration (cf. Friedman 1962: 95). Furthermore, schools operating in the market will be induced to respond fully to differences among the educational claims of children, offering each educational option for which there is a sufficient demand (cf. Friedman 1962: 91).

Libertarians generally recognise the need for the state to require children to enjoy a minimum of schooling. To the extent that some particularly poor families would not be able to pay for that schooling, the state could justifiably subsidise them (Friedman 1962: 87). In a much debated alternative proposal, libertarians concede public financing of schooling for all but aim for the withdrawal of the state from the administration of schools. This aim is to be attained by the granting of school vouchers to all pupils which they can redeem at any approved school of their choice. In turn schools would then receive state funding according to the quantity of vouchers received. While the state might maintain certain minimum standards for approving schools, beyond these minimum standards schools could be set up to meet all possible interests (Friedman 1962: 89; cf. Mill 1859: 117 f.).

If the school voucher plan, even more than thirty years after its first statement, remains utopian, there have been more incremental reforms advocated by the libertarians which concern the facilitation of parents' options to choose to send their child to a non-state school. This step is greatly inhibited as long as the state fully provides for state schooling but leaves all the costs of an alternative, private schooling to be borne by the parents. Instead the state could at least re-allocate the money

normally invested in a child's public education to pay for the fees required for private schools. Libertarians perceive a number of important advantages in fostering private schooling which, they hold, is to serve the school system as a whole. The argument is well summarised by Milton Friedman:

"a combination of public and private schools (...) would permit competition to develop. The development and improvement of all schools would thus be stimulated. The injection of competition would do much to promote a healthy variety of schools. It would do much, also, to introduce flexibility into school systems. Not least of its benefits would be to make the salaries of school teachers responsive to market forces" (Friedman 1962: 93).

While these claims have a lasting echo in contemporary political debate on education, they remain notably contested on empirical as well as political grounds

Libertarians generally regard differences between pupils as innocuous. Indeed, they are disposed to foster differences by catering for as many interests as possible. The only possible exception may be differences of wealth, the effects of which the libertarian seeks to mitigate by individual subsidies or by granting all an equal amount of school vouchers. A major commitment of the libertarian argument is to allow for the full recognition of differences in preferences and differences in abilities. Pupils with different preferences or different abilities should not by the standardised state system of schooling be forced to attend the same schools. Turning to differences in life environment, we hit upon a notable blind spot in the libertarian argument. Libertarians may recognise that the life environment of a slum puts a child in a disadvantage in having her educational interests fully met, compared to a child in a high-income suburb. They deal with this, however, by insisting that such disadvantages can be overcome by the effective exercise of 'consumer choice', that would allow the child to go to school in whatever neighbourhood she chooses and that (depending on the demand) could even facilitate the establishment of better schools in poor environments (cf. Friedman 1962: 92)

The persistent emphasis in the libertarian argument on options for individual choice is problematic since it downplays the inherent inequalities in options that exist between individuals and the ways in which individual choices are interrelated (cf.

Jonathan 1993). The value of choice is unobjectionable as long as it can be restricted to options that only meet differences in preferences that are of equal value. Ideally such would, for instance, be the case in differentiating between a Protestant, a Catholic and a Muslim school. Choice becomes a problem, though, when it comes to relate to differences in abilities and differences in life environment (I leave differences in wealth aside, these are even more problematic, but I take it that libertarians would be willing to do everything to minimise their impact). Increasing diversity in these respects disproportionately serves the interests of some, rather than others. They predominantly allow choice to those with better abilities and from the wealthier (in the broadest sense of the word) life environments, while leaving the minimal option for those with lesser abilities and from poorer life environments.

One might want to argue that the mere increase of options for the better off need not by itself detrimentally affect the worse off. However, this denies the ways in which individual choices in education are socially interrelated. Draining the most able and the pupils with the wealthier backgrounds from the classes of the worse off has significant effects on the kind of education that is left for the latter. As was found by the famous Coleman-study of educational inequality in the United States, the "educational backgrounds of fellow students" is one of the most significant factors accounting for differences in educational achievement (Coleman 1966). Finally, individual choices in education are inherently related to the extent that education is a "positional good", i.e. the value of one's education depends to a large extent on the education enjoyed by others (cf. Jonathan 1993: 20, referring to Hollis). The value of an education for becoming a business secretary may be high in a society in which most people have not even gone to college but may be low in one in which there is a surplus of university graduates in business administration who fill most of the interesting jobs.

Thus it appears that the benefits some will enjoy from having their options in education increased comes at significant costs of others: "the exit of some diminishes the chances of others" (Edwards & Whitty 1992: 108, referring to Murnan). In this way the libertarian argument systematically favours those who have more opportunities in

education in the first place, and does not recognise how the exercise of these opportunities backfires on those who were already worse off from the start. The problem with the libertarian argument is that it consistently ignores the costs it imposes on the worst off groups and makes little attempt to justify them. The libertarian simply fails to recognise any reason why any one should limit her or his claims to education for the sake of others.

### The Egalitarian Argument

In contrast with the libertarian argument the egalitarian argument presumes that individual's options can justifiably be restrained for the sake of the interests of others. It departs from the axiom that people are basically equal and that any advantages given to some of them have to be justified to the others left behind. Obviously enough, however, individuals are not all the same, so equality in a certain respect can often only be achieved by allowing inequality in other respects. As Amartya Sen has put it: "The demand for equality in terms of one variable entails that the theory concerned may have to be non-egalitarian with respect to another variable". Thus "central equality" in one variable may entail inequality in another. The primary question any egalitarian analysis has to answer is thus 'Equality of what?' (Sen 1992: ix). In the field of education the main answer proposed to this question has been "equality of educational opportunity". But before dealing with this concept we should quickly consider two well-known contrasting egalitarian arguments: 'equality of educational provisions' and 'equality of the value of life prospects'.

Equality of educational provisions - often called 'equality of resources', or in typical administrative-scientific jargon, 'equality of inputs' - is probably the most straightforward concept of equality (cf. O'Neill 1976; Coleman 1968: 24 ff.). It is, however, bound to leave the committed egalitarian dissatisfied. Given that pupils enter education with differences in abilities and social backgrounds, they are to different extents capable of taking advantage of the same provisions. Provisions will favour some pupils over others as they relate better to their respective backgrounds. If an equal

educational standard is to be applied to all, then education is bound to privilege some social backgrounds over others and either to frustrate those with more abilities and more favourable backgrounds or, what is more likely in practice as well as more disturbing to the egalitarian ideal, to skip over the needs of those with less of all this.

Egalitarians require something more than mere equality of provisions, they aim for some kind of equality in results, something which I think is probably best specified as 'equality of the value of life prospects'.<sup>82</sup> What does this mean in terms of education? For a start this egalitarian concept of equality can concede that different educations may nevertheless be equal in terms of the value of life prospects they open up. Imagine, for instance, that individuals can choose between two different educations, one in engineering and one in law. By making a choice for either of the two educations we close off all prospects of entering into the career pursuant upon the other education. Here equality of the value of life prospects may be attained as long as one education does not lead into less valuable careers (in terms of salaries, social status, opportunities for choice, or otherwise) than the other.

The major question raised by the concept of equality of the value of life prospects concerns the terms on which we compare different educations, how can their equal value be determined? Though there may be certain terms that allow for such a comparison and show some alternatives to be more adequate than others, it is hard to conceive how overall an objective comparison could be attained. The reason for this is that perceptions of value are bound to subjective positions that may contradict each other.<sup>83</sup> People having enjoyed a legal education may, for instance, take a great liking to a legal career and abhor the idea of a career in engineering, but for the engineers it may be exactly the other way around.

<sup>82</sup> The same idea is expressed by the phrase 'equality of life chances', which is discussed by James Fishkin (1983: §2.3) and Amy Gutmann (1987: 131 ff.).

<sup>83</sup> The basic problem here is the problem of inter-personal comparisons which is best presented in the classical essay by Donald Davidson (1986; cf. Elster & Roemer 1991). Amartya Sen's theory of "functionings" and "capabilities" is, so far I know, the most sophisticated and successful attempt to retain objective standards of individuals' standard of living. Sen's approach acknowledges the limits to inter-personal comparisons but shows that valid principles can nevertheless be adopted to decide a significant range of political questions (Sen 1992: esp. Chs. 3 & 4).

This suggests an alternative way of determining the equal value of life prospects by subjectively comparing social positions or 'lots': life prospects are of equal value, or at least not of unequal value, as long as no one would prefer the life prospects of another to one's own (Rae et. al. 1981: Ch. 5). However, this method raises the question what exactly is to be compared (what are 'lots'?) and which factors are supposed to remain constant. In a weak version of the subjective comparison one would focus on the enjoyment of a certain good, like education, and consider whether one would have been better off having enjoyed the provisions enjoyed by another. In a strong version one would compare one's social position overall, and consider whether one would have been better off in another's position taking on board the other's social background, abilities and predispositions as well, i.e. one would have to imagine "becoming" the other (demanding in turn the shedding of one's own identity including the capacity to judge from one's own position). While this latter version is obviously too demanding as it requires the shedding of all personal differences, the former test is too weak for the egalitarian's purposes as it limits the alternatives too much: even though there may be no point to a university education for somebody with limited abilities, that need not imply that the limited education he has been offered instead allows for life prospects that are of equal value to the ones of those who do benefit from university education.

Egalitarians generally avoid this kind of problem by holding on to some kind of objective standard of equality. Between the too poor concept of equality of provisions and the too demanding idea of equal value of life prospects, the idea of 'equality of educational opportunity' has gained wide popularity as a practicable egalitarian ideal in education. Most importantly James Coleman has extensively examined the implications of this idea in the American context (Coleman 1966; 1968; cf. O'Neill 1976; Gutmann 1987: 128 ff.). The first thing that is noteworthy about Coleman's treatment of the concept of equality of educational opportunity is that he does not seek to determine its implications as some universal arithmetic, rather he recognises it as a cultural notion the meaning of which may vary across time and place. Pushing this point, Coleman suggests that for some societies the concept of equality of educational opportunity may

even have no political relevance at all. However, for contemporary liberal democratic societies, or at least for the case of the post-war United States that he is looking at, Coleman proposes the concept of equality of educational opportunity as most aptly reflecting society's basic political sentiments regarding the distribution of claims to education.<sup>84</sup>

The central focus of the contemporary concept of equality of educational opportunity has, according to Coleman, moved away from mere equality in resources towards the effects of schooling (Coleman 1968: 23 ff.). However, Coleman avoids analysing these effects in the general terms of the 'value of life prospects' as he restricts his attention to the technical standards provided by standard school achievement tests. Coleman's main interest concerns differences between students in terms of life environment, in particular he focuses on the differences between pupils from 'white' and from 'black' backgrounds. His main findings are that, on average, 'whites' score consistently better than 'blacks' on the achievement tests across the whole of the school career. The measure of equality of educational opportunity that this yields for Coleman is the extent to which in the course of education the achievement scores of groups from different life environments are brought to converge. Duties in the realm of education, i.e. taxes and restrictions of choice, can thus be upheld as they serve this objective.

One way to challenge Coleman's argument would be to challenge the validity of the standards of equality he adopts. Egalitarians may dispute whether school achievement is really the good that has to be equalised. Individuals of equal achievement may, for instance, still have life prospects of unequal value because of other intervening factors. There is, moreover, a questionmark over the technical validity of the standards Coleman adopts: do they measure achievement in the right, neutral

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<sup>84</sup> There is a striking parallel between Coleman's claim that the idea of equality of educational opportunity best expresses prevailing political sentiments regarding education in the United States and Ronald Dworkin's argument that a specific idea of equality, that each individual is equally worthy of concern and respect, has as a moral idea been constitutive of 'liberal' political institutions (Dworkin 1978; 1977: esp. Chs. 6, 9, & 12). The problems Coleman's egalitarian argument eventually encounters also suggest some major arguments against Dworkin's claims. Particularly problematical is the fact that Dworkin's egalitarian account presents liberalism as a political morality that relies primarily on its moral appeal while its political force beyond the adherents to this morality has to remain limited (cf. Rawls's (1993) account of political liberalism).



way?; do they not unduly favour certain kinds of capacities over others?; put pointedly for the racial differences that are central to Coleman's concern, do they not presuppose a 'white' standard of achievement?

Besides these more methodological questions, Coleman himself points to a more fundamental problem in applying his concept of equality of educational opportunity to the provision of education: it can only be brought to full effect if all factors affecting pupils' school achievement are fully controlled. As long as all pupils are not subject to a boarding school regime, 'out-of-school' influences continue to have a significant impact upon their achievement in school. Even if such a school system were practicable, there would be an obvious normative question: do we want the school, and indirectly the state, to fully control pupils' education?

Put before this option Coleman is quick to emphasise the value of freedom, freedom to enjoy one's own private life outside of school in the family and freedom to choose between schools. But as he himself notes in the case of Rawls's theory of justice, followed consistently the egalitarian argument leaves little or no space for such freedoms:

"If Rawls's just society is to equalize educational opportunity in this sense, the equalizing institutions must invade the home, pluck the child from his unequalizing environment, and subject him to a common equalizing environment" (Coleman 1974: 41/2).

Thus Coleman reaches the conclusion that "full equality of educational opportunity is not a proper collective goal".

This finding that the egalitarian argument, even when stated in the sophisticated terms of equality of educational opportunity, turns out to be intrinsically limited, raises some general problems. Coleman's conclusion suggests that his hunch - that the concept of equality of educational opportunity aptly represented contemporary society's political sentiments regarding education - may have put his whole analysis on a faulty basis. The value of equality has a natural place in democracies to the extent that it affirms the tautological fact that all human beings are equal in the basic respects that make them human beings (Williams 1972: 110 ff.). It is moreover inscribed in the democratic principle of "one (wo-)man, one vote" and in the principle that "all (wo-)men are equal

before the law". However, the egalitarian argument moves much further and turns the value of equality into a political imperative that is to apply also to those respects in which human beings obviously are not equal, reaching the point where their basic equality somehow requires that these inequalities are as far as possible undone. Once committed to the value of equality, the egalitarian argues that it is to prevail on all fronts. At no point, however, does this argument answer the interests there may be in other values which may even be served by certain inequalities. In other words, beyond its moral appeal, egalitarianism offers no political justification for the duties it requires.

We find that to make some idea of equality the sole foundation for the distribution of claims to education turns out to be both out of touch with the actual politics of education in liberal democracies as well as normatively undesirable. Undeniably, there are certain values relevant to the politics of education that the egalitarian argument fails to accommodate, above all the value of liberty. Thus we are bound to look for an alternative framework.

### The Right to Education as a Public Good

We have found that to base the justification of claims to education solely on the value of liberty implies turning a blind eye to the costs that are thereby imposed on the worse-off. On the other hand, to follow the value of equality consistently leads beyond the boundaries of what duties can justifiably be upheld, especially as it suggests deep incursions into the private sphere. One way to deal with this situation may be to accept that there are multiple values governing the claims on education and that they need to be balanced for each single political or legal decision required. Such is for instance the position eventually adopted by James Coleman:

"Each of us has an interest in decreasing the inequality of educational opportunity; each of us has an interest in maintaining our freedom of choice of school; and each of us has an interest in maintaining a cohesive society. We should each weigh those interests within ourselves and reach a collective decision based on the outcome of these private calculi, rather than binding ourselves to an ordered set of principles that can create results which no one desires" (Coleman 1974: 43/4).

Obviously there is something strange about Coleman's sudden introduction of two other values, freedom of choice and social stability, that bear upon the political evaluation of educational claims next to equality of educational opportunity. Especially problematic is the "pluralist", or "intuitionist", nature of his argument; it expressly avoids imposing any order upon these values, thus leaving all political questions rationally undetermined (cf. Rawls 1971: §7; Section 1.II above). While Coleman tries to rationalise this position by expressing a fear for some kind of terror of principles, there are good reasons to think that his relying on the mere aggregation of individual preferences may well deliver sub-optimal results. Notably it seems unlikely that the idea of equality of educational opportunity will play a major role in individual calculi.

The problem with any "pluralist" argument is that it plays down the role of principles but cannot get around the fact that the actors involved (whether political representatives or individuals) have nevertheless to reach certain decisions and that for that aim they will generally seek some order among diverse principles. Though the tools of the theoretical observer are, of course, limited in dealing with complex political questions, I do not think she or he needs to back away from such questions. Indeed, I believe a major role for theory is to elucidate the principles involved and to show how they might possibly be brought into order. Hence, the question we are facing is: is there a principled argument that takes account of the values of both liberty and equality and avoids the pitfalls of the radical directions which both can take?

The way in which I propose to answer this question is by starting from the libertarian argument but to take seriously the interdependencies between claims to education. Claims to more egalitarian measures in education policy can be justified when they can be shown to serve common interests or, as I will phrase it following the line of argument developed in earlier chapters, to the extent that the provision of education constitutes a public good. This argument lays the foundation of the basic right to education. I will not argue that this basic right thus defined can resolve all conflicts between educational claims, but I do believe that it constitutes a foundation which is normatively justified (in contrast with the libertarian argument), politically

secure (in contrast with the egalitarian argument), and, moreover, relatively transparent in dealing with many of the basic questions in the politics of education.

The basic features of the argument for the right to education as constituting a public good are indeed recognised by the libertarian Milton Friedman:

"A stable and democratic society is impossible without a minimum degree of literacy and knowledge on the part of most citizens and without widespread acceptance of some common set of values. Education can contribute to both. In consequence the gain from the education of a child accrues not only to the child or to his parents but also to other members of the society. The education of my child contributes to your welfare by promoting a stable and democratic society. It is not feasible to identify the particular individuals (or families) benefited and so to charge for the service rendered. There is therefore a significant 'neighbourhood effect'" (Friedman 1962: 86; cf. Hayek 1960: 376 f.).

Interesting enough much of Friedman's following argument can be read as aiming to reduce the impact of any "neighbourhood effects" education may have to the absolute and indisputable minimum. For example, I noted already above Friedman's failure to account for the negative externalities that individuals' choice for distinguished schooling imposes on those left behind. It is, as often in libertarian arguments, the general tendency of Friedman's account to downplay all indivisible and social features of education and to reduce it as much as possible to an individualisable commodity.

Thus we are led to examine in more detail the "neighbourhood effects" of each child's education. Notably such effects have often been recognised particularly in political and economic relationships. Education serves to make effective citizens and consumers.<sup>85</sup> As historical sociologists have pointed out there is a close relationship between the increase of territorial mobility brought about by increasingly dynamising economies, the rise of the administrative state, and the emergence of public education (de Swaan 1993: Ch. 3; cf. Parsons 1959). Even without accepting the functional explanation suggested here, these functions can still be brought to bear upon the contemporary political decisions regarding education. A basic knowledge of reading, writing, arithmetic and geography is required for every one who wants to be an

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<sup>85</sup> - and soldiers, as Friedrich Hayek argues: "Historically, the needs of universal military service were probably much more decisive in leading most governments to make education compulsory than the needs of universal suffrage" (Hayek 1960: 528, note 2).

effective player in an economy in which the division of labour is well-advanced and in which transactions take place in ever widening circles. What is more, more advanced economic actors have an interest in the education of their (potential) counter-parts and consumers.

The importance of education to make effective democratic citizens is, as was already illustrated by the words of Milton Friedman, generally recognised in current arguments about education politics. To be a effective citizen in modern-day democracies requires a minimum of education. This argument has most recently been developed by Amy Gutmann who argues for a "democratic threshold principle", upholding "a moral requirement that democratic institutions allocate sufficient resources to education to provide all children with an ability adequate to participate in the democratic process". Notably she adds: "the [democratic] standard demands more of democracies than supplying an absolute minimum; the threshold of an ability to participate effectively in democratic politics is likely to demand more and better education for all citizens as the average level and quality of education in our society increases" (Gutmann 1987: 136, 139; cf. Dewey 1916).

Gutmann indeed bases her theory on the single value of democracy. "Democratic education", she writes, "is best viewed as a shared trust, of parents, citizens, teachers, and public officials, the precise terms of which are to be democratically decided within the bounds of the principles of non-discrimination and non repression [that preserve the intellectual and social foundations of democratic deliberations]" (Gutmann 1987: 288, 14). Consistently following this line of argument she reaches the conclusion that "political education - the cultivation of the virtues, knowledge and skills necessary for political participation - has moral primacy over other purposes of public education in a democratic society" (Gutmann 1987: 287).

The political arguments justifying the duties to be imposed for the sake of all to be educated to a minimum, democratic standard are apparent enough. Above all, the insecure prospect of leaving the sake of politics to an illiterate mass has an obvious force against all opposition to a basic right to education. This argument makes apparent

the extent to which education is indeed a "trust" shared by society at large. However, there is a difference between the demands implied by this political argument and Gutmann's position. The argument is politically persuasive to the extent that a right to education enables all citizens to have well-informed political preferences and to cast their votes on that basis. Gutmann tends to push the argument further by suggesting that democratic education requires that all citizens should be able to participate "effectively" in the making of politics. In other words, beyond educating "passive citizens" Gutmann argues for education geared towards "active citizens". However, Gutmann's arguments for a richer education are not particularly geared to convince those who can be expected to have to bear its costs. Mere education for "passive citizenship" need not require more than a rather poor education. To get beyond this point, Gutmann invokes democracy as a moral ideal in a way that is at times reminiscent of the 'zoön politicon' ideal familiar from the work of Aristotle and its more contemporary advocate Hannah Arendt (cf. Gutmann 1987: 20/1).

There are persuasive political reasons for an education policy that provides for more than mere informed acquiescence among the populace. However, these reasons cannot simply be derived from the single value of democracy. They require that we look beyond the realm of politics to how in social interactions in general fellow members of society benefit from each other's education. The education enjoyed by others first of all serves to make such interaction more secure, as it embeds it in certain minimum standards of shared principles, both of a procedural kind, that serve to regulate the interaction, as of a substantive kind, that provide a basis of common understanding. Secondly, the fact that others have enjoyed a certain education serves to make our interactions inherently more interesting, not simply for the knowledge they have acquired through education but above all because education fosters one's ability to articulate and communicate about one's knowledge and experiences. Following from this, we may add that education serves to make communications more effective from a more instrumental or result-oriented point of view. Education facilitates one's ability to

take initiatives towards people, to negotiate and to enter into functional interactions with them.

The finding that a general right to education constitutes a public good as it enriches society by making for worthwhile social interactions in general and effective citizens and consumers in particular, provides a basic reason to acknowledge the duties other's education requires. Upholding an individual's claim to education provisions serves not only the interests of the person to be educated, but also those of the people who interact with her. Eventually, all members of contemporary societies are implicated in the interactions benefiting from a general right to education (cf. Jonathan 1993: 16 f.).

Thus the public good argument for the basic right for education markedly diverges from the libertarian and egalitarian arguments considered above. In contrast to the libertarian argument it emphasises the extent to which individual's claims to education are interrelated with each other. It highlights the interests all have in some political co-ordination of these claims. Even those with plentiful resources to secure an optimal education for their own children stand to lose by having their social environment impoverished if certain educational provisions are not made for those with less resources. As an implication, both tax duties and the blocking of certain options in schooling can be justified. In any case the public good argument suggests a much wider range of arguments in favour of such duties than is commonly recognised by libertarians.

Contrasted with the egalitarian argument the public good argument has much more political bite. It does not rely on some intuitive moral ideal of equality but derives a set of requirements for mutual obligations in the sphere of education from the conditions of modern societies. The public good argument justifies the duties that the basic right to education requires by pointing to a set of concrete interests of members of society. These interests also provide meaningful criteria to determine in what respects equality is required and where differences can be recognised.

### **III) RECONSTRUCTING THE RIGHT TO EDUCATION**

The public good argument for a basic right to education provides us with a particular range of political considerations regarding the claims and duties for education. However, these considerations fall short of determining directly which claims can be upheld and which not. They only specify the range of interests that needs to be taken into account when considering such claims and ascribe a certain value to them. Whether an individual claim is to be upheld depends on the particular mix in which these considerations are involved and how they relate in the particular political context.

This section is to provide a bridge between the general insights of the public good argument for a right to education - as set out in the preceding section - and actual decision-making over individual claims to education - instances of which will be analysed in the following section. For this aim I propose two kinds of arguments. The first one pursues the public good argument further and seeks to flesh out some substantive distinctions that may be of relevance in applying this argument in actual political decision-making. In particular I will focus on its implications for tax duties and government's restriction of certain options in education, and on the four categories of differences I distinguished earlier.

To these substantive considerations I then add a second argument that concerns the structure of political decision-making in modern liberal democracies. Decision-making in liberal democracies, I argue, is in a constant flux. This becomes particularly apparent when complex political issues are raised and when provisions are required that can only be administered through a big state apparatus, as in the case of education policy. No political actor, nor any single set of principles can completely control the decisions to be taken. Rather decisions are the particular outcomes of interactions between different actors and the political considerations they raise. Nevertheless I believe that these decision-making processes cohere in a certain structure in which general principles such as the basic right to education can effectively be brought to bear upon individual decisions and can in turn be informed by the particularities of the social problems encountered. Drawing on work by Bernhard Peters and Jürgen Habermas I



propose to analyse this structure of political decision-making in terms of what has been called 'the gate model'.

### Categories of the Public Good of Education

The main implications of the public good argument for the basic right to education are twofold. First, it justifies the imposition of tax duties as it points to the interests that people have in others being educated. Secondly, it lends strong support to claims to diversity on the basis of (mere) preferences. To the extent that one has a clear interest in there being well-trained plumbers or macro-economists, one has good reasons to contribute to their education. Such reasons are, however, less clear when it comes to education in different religions or in subjects that appear less socially productive, like philosophy and the arts. Nevertheless I think that society at large has as much a common interest in diversity in political and cultural affairs as in diversity in economic roles. Societies in which political and cultural differences are respected offer their members room for learning from each other and for the making of autonomous choices between different political and cultural positions. Thus the public good argument provides strong pre-emptory grounds to meet claims to diversity in education with adequate educational provisions, and to impose taxes for that aim, if there are no compelling considerations against doing so.

As education constitutes a public good, thwarting diversity may come at severe "neighbourhood costs" (as a counterpart to the "neighbourhood effects" that Milton Friedman ascribes to education, Friedman 1962: 86). A lack of diversity in education may have as a consequence that certain economic and social roles cannot adequately be fulfilled in a society. Society is further impoverished as distinct ways of life vanish for lack of recognition in the educational system. The bottom line is, of course, that a society that educates its members following a single pattern frustrates each individual's interest to have her personal identity and abilities recognised. Here we find a parallel to the "demoralisation effect" and the "chilling effect" identified in the cases of the rights to private property and to free speech: the rejection of claims to diversity in education

may as a general effect cause the withdrawal of individuals from social interactions and inhibit the development of their personal capacities in which society as a whole takes an interest.

While the public good argument for the basic right to education primarily serves to favour the recognition of diversity in education, there are also distinctive societal risks to such diversity. Firstly, to develop a point I raised above against the libertarian argument, granting distinctive options in education for some may impoverish the options of others. Pupils with fewer abilities and from low social status backgrounds are for various reasons likely to benefit from being educated together with pupils who are more socially advantaged. When the latter are allowed to segregate themselves in their own schools, the options of the former are effectively restricted (cf. Jonathan 1993).

Comprehensive schooling, suppressing diversity, is furthermore not only in the interest of pupils with less social resources, allowing them to catch up with the more advantaged. It can also be argued that all pupils derive distinctive benefits from being educated together with others who are different. Much is to be learned from the actual confrontation with people who are strikingly different, not simply by exchanging certain practices and insights but in particular by the very practice of dealing with the confrontation of differences in the first place: how can we communicate with people from different backgrounds, with different preferences, different abilities or of a different class? In this sense, every one stands to lose something from having educational provisions diversified along certain lines of classification.<sup>86</sup>

Finally, drawing directly on the public good argument for the right to education, we may observe the risk that at a certain point diverse education may foster alienation

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<sup>86</sup> As Professor Ladeur pointed out to me, at some point pupils may not be simply different but be so deviant that their class-members only suffer from their presence. In such a case, insistence on comprehensive schooling might imply that the educational interests of the more advantaged pupils are simply thwarted for the attempt to socialise the less advantaged, deviant ones. Though I recognise that comprehensive schooling may have its (short term) costs for socially more advantaged students, I am reluctant to accept such arguments as I think that they tend to downplay the extent to which the interests of all students are inherently related (in the long run, any way). Of course, there is a bottom line of what kind deviant behaviour can be tolerated in the school, in particular delinquent behaviour need not be put up with, but pupils can be shielded from these cases by means of criminal law.

between social groups and thus undercut the security and effectiveness in interactions that can be attained from a common education.

The balance between the societal interest in diversity in education, on the one hand, and its societal risks, on the other, may be determined by turning to the different categories of differences that this diversity may reflect. The public good argument for the right to education unequivocally favours diversity as long as it reflects mere differences in preferences. In contrast, diversity will be objectionable when it reflects less innocuous differences such as differences in wealth and life environment. These categories delineate differences that cannot be recognised in the provision of education. Finally, differences of ability remain caught in the dilemma of societal interests and risks, and require a more sensitive approach that considers them in their specific context.

Clearly, as regards school differentiation on the basis of differences in wealth, it is apparent that such differentiation comes at a cost for those not able to enjoy the more expensive options and, one might even argue, impoverishes the education of the children privileged by isolating them from parts of society (cf. Tawney 1931: 141 ff.). Thus there are compelling considerations against such differentiation that outweigh the claims of more wealthy parents to be left the freedom to purchase a more privileged education for their children.

Essentially the same considerations apply against recognising differences of life environment in the provision of education and there is little problem in forbidding schools to refuse pupils for reasons of class or social background. However, these differences are often unwittingly affirmed as local proximity is the primary ground on which a school is chosen. As families from different backgrounds gather in different neighbourhoods, the schools in these neighbourhoods will generally reflect these differences.

Interestingly the recognition of the fact that schools persistently reflect the particular life environment of the neighbourhood in which they are based has led to political initiatives to mitigate the reflections of such differences in school composition.

Classically the United States government has sought to correct such social segregation of pupils by supporting 'bussing' schemes to allow children from different backgrounds to be educated together. Regardless of how one evaluates the success of this policy, it is undeniable that it responds to the genuine political problem of unjustifiable differences in education that come not only at the cost of the pupils involved but eventually of society at large.

Though it is conceptually quite easy to distinguish differences in wealth or life environment from differences in preferences, in practice it often happens that the recognition of differences of preferences disproportionately benefits pupils from wealthier backgrounds. Whatever kind of schooling distinct of the general state standard (and catering for a similar level of ability) is recognised, it is more likely to attract pupils from wealthier backgrounds as they generally have more resources to exercise effective choice between schools. Thus all differences within the school system are likely to indirectly affirm differences in wealth and life environment. Given the interests identified in diversity in education, this finding should not lead us to oppose all diversification in schooling. It should, however, serve as an important cautionary note to every decision to recognise claims to diversity. It further warrants the careful examination of the mechanisms by which wealthier pupils come to choose the distinctive schools as well as of those by which less wealthy pupils fail to appreciate their options to choose.

Applying the public good argument for the basic right to education to claims to calling for differences in ability to be recognised in schooling raises a number of particular problems. For a start, it has to be recognised that the whole of society stands to benefit from having certain special abilities of people developed. However, difficulties arise because 'ability' is extremely hard to ascertain. Though we tend to think of it as an innate characteristic, its actual manifestation is highly dependent on cultural conditions; pupils who appear of low ability in one context may suddenly start to flourish in another. The very act of segregating more able pupils from the less able early on in the educational process is likely to neglect the abilities of those who for

cultural and social conditions suffer serious disadvantages in developing their abilities. Moreover, as I noted before, pupils of less abilities have a distinct interest in learning together with those of more ability and, added to that, there are also valuable lessons to pupils with more abilities in having to co-operate with those of less abilities. In actual politics these competing considerations are recognised as a balance is struck between them by having all pupils start in comprehensive schooling and recognising differentiation according to abilities only at a later stage of the school career.

Summarising the argument of this sub-section we find that claims to diversity in education can in principle be justified as expressing differences in preferences, except when the differences they express can be regarded as differences of wealth or differences of life environment or, up to a set age limit, as differences of ability. Thus these categories of differences define limiting conditions upon the recognition of diversity in education. Financial considerations raise some further limits. The basic principle here is that diversification in education should be cost-neutral and not increase the burden on the tax-payer. The main exceptions to this principle that can be justified concern differences in ability. If pupils for lack of ability are bound to fail to reach the minimum level of education society requires, extra expenditures can be justified. In turn, however, some judgement of proportionality is required to put a limit to such further expense.

There are two final observations to be made when it comes to applying these categories in actual legal and political decision-making. First, the recognition of diversity of schooling is eventually also limited by considerations of the quality of education. Quality is then taken to provide a relatively objective, technical standard of the minimum criteria any school is to meet. Naturally, quality may well turn out in practice to be a political issue. It can (to some extent) be depoliticised by assessing it only on the basis of pupils' achievement in specified subjects when they have finished the school and to refrain from an assessment of the methods by which this achievement is acquired. A practical problem here is, of course, that such an assessment cannot actually be made before some pupils have actually been allowed to enjoy the education

at issue. The maintenance of diversity in schooling thus remains an open-ended process, that requires certain risks to be taken, and in which decisions always need to be evaluated on their effects and may have to be revised (cf. Ladeur 1990).

Finally, the societal advantages in diversity in schooling need not be directly opposed against the risks of unwarranted segregation of pupils. Typically it has been argued that these two values can be harmonised with each other as the diversity of schools will foster a form of "healthy competition" that will induce them to learn from each other's successful features. This argument was already proffered by Milton Friedman:

"a combination of public and private schools (...) would permit competition to develop. The development and improvement of all schools would thus be stimulated" (Friedman 1962: 93).

As Ruth Jonathan observes, this claim depends on "a faith in the benign workings of the market: on believing that though a hierarchy of quality between schools will be exacerbated, quality at the lower end will be greater than in a less differentiated system" (Jonathan 1993: 18).<sup>87</sup> Following this train of thought, one may even observe that such competition may deal with certain allocative questions that are otherwise fully subject to governmental regulation (cf. Ladeur 1990). Obviously, it remains extremely difficult to ascertain such effects of competition or learning among schools and to ensure that they do not merely induce unwarranted segregation. Nevertheless, as will also appear in the case studies below, it is a popular argument among political decision-makers that diversification which disproportionally benefits certain social classes rather than others can be justified to the latter when competition can be shown to have indirectly advantageous effects on their schooling as well.

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<sup>87</sup> This argument provides an interesting illustration of how Rawls's famous difference-principle, holding that inequalities are only justified if they can be shown to "be to the greatest benefit of the least advantaged members of society", turns up in actual political argument (Rawls 1993: 6; 1971). Though the finding of this argument lends force to the validity of the difference-principle, this example also shows how in dealing with actual political issues philosophical insights have soon to give way to more concrete, political and technical considerations.

### Decision-Making in the Disaggregated State

Though the public good argument for the basic right to education establishes its validity for liberal democratic societies in general, there are clear limits to the extent to which its implications can be determined. Recognising the basic right to education raises such questions as what minimum level of education each member needs to receive (what Amy Gutmann refers to as a "threshold principle", Gutmann 1987: 136 ff.; cf. Coleman 1974: 43), at which stage differentiation according to ability is required, and the correct proportionality between extra expenditures for less able pupils and the benefits they derive from these. However, though these questions have to be addressed in all societies that are committed to provide education for their members, they do not allow for universal solutions. What they require depends in important respects on the particular context provided by the particular society involved. Similarly, contextual features are crucial to determine the point at which mere differences in preferences turn out to affirm differences in wealth or life environment or, at an even more concrete level, in finding the right answers to the many questions regarding schools' curricula and their budgets. There is no single formula by which these questions can be answered. Though the general arguments deriving from the public good argument set out so far serve to direct the decisions required by individual cases, they generally fall short of fully determining them.

Just as the politics of education cannot simply be the working out of one grand design, nor can it simply be controlled by a single political actor. Political processes rely instead on a multiplicity of different actors, each of which deals with different questions in which it enjoys a certain political autonomy. To put it in one phrase: politics in liberal democracies unfolds under conditions of "disaggregated sovereignty".<sup>88</sup> In this sub-section I seek to show how sovereignty is disaggregated in

<sup>88</sup> I borrow this resounding concept from Anne-Marie Slaughter; similar notions are being widely developed in contemporary policy analysis. Particularly interesting in this respect are theories of the European Union in which sovereignty has of course been disaggregated from its very inception, thus giving full force to an experience, that - rather than being peculiar - may be characteristic to all contemporary liberal democratic polities. I intend to show that the gate-model is particularly suited for the analysis of political processes in the European Union in a

the field of education and to propose some tools for analysing political decision-making for which I heavily rely on a model, the 'gate model' developed by Bernhard Peters (1993: Ch. 9) and Jürgen Habermas (1992: Ch. VIII). In doing this I will refer mainly to the political systems of Germany and Great-Britain which will also be involved in the case-studies to be presented in the next section.

The politics of education raises so many questions that it not only eludes the authority of one single actor but also the guidance that can be provided by a fixed system of principles. This need not imply that authority and principles lose their relevance in such a complex policy context, but it does require us to re-think their meaning. For this aim we can follow upon work done by Bernhard Peters who has build his theory of politics in complex policy fields around the contrast between an institutional centre and a social periphery (Peters 1993: Ch. 9).<sup>89</sup> The centre is where political authority ultimately resides. It is the task of the political actors to authorise the main political principles governing society, like for instance a basic right to education. Thus major actors in the political centre are for instance Parliament, the Minister or Secretary of State and the Supreme Court. The primary functions of the political centre are limited to the formulation of the basic political principles, to the facilitation of their implementation and to the society-wide co-ordination of political activities.

In their most general form the principles guiding the politics of education are established by law or even inscribed in a Constitution. In Germany, for example, the basic principles regarding schooling are laid down in the Basic Law, including the assertion that "the entire schooling system shall be under the supervision of the state" and a guarantee of the "right to establish private schools". Similarly Article I.1 of the Education Act 1993 for England and Wales provides that "The Secretary of State shall promote the education of the people of England and Wales".

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paper that has preliminarily been entitled "A perspective on democracy and citizenship in the European Union".

<sup>89</sup> The gate-model clearly draws on various sociological theories of the policy process like David Easton's work on the political system (Easton 1971), Niklas Luhmann's system-theory of politics (Luhmann 1981), the research of agenda-building (Cobb & Elder 1971), and John Kingdon's (1984) theory of policy windows.



Already within the political centre we find that the authority in the field of education is dispersed over various actors whose activities are to complement each other. In Germany, for instance, the Minister of Education is probably the main agent for the Constitutional guarantees for education. His activities are, however, subject to approval of the German Parliament. More distinctive of the German situation is the political role claimed by the Federal Constitutional Court (*Bundesverfassungsgericht*) that as the highest judicial authority in Germany has been authorised to review any decision by the legislator (as well as any other political body) on the grounds of its reconcilability with the Basic Law. Similarly in Great Britain the Secretary of State for Education cannot claim complete sovereignty over the field of education, even though given the majoritarian parliamentary system and the absence of a Constitutional Court, his authority is less directly curtailed at the centre of national politics. The Secretary of State's authority is primarily limited by his dependence on local authorities that have to implement the national policies at the local level.

These examples show that in no way can one political actor control all the decisions that the administration of education requires in a modern society. Decision-making powers have to be delegated to other agents within or outside of the formal state. Thus local councils often perform crucial tasks in the administration of education, as do, in important other respects, schools. As Peters's analysis well brings out, such peripheral actors are not simply hierarchically subject to the political centre (in contradistinction to some of the connotations of the term 'periphery'). They command a certain political autonomy in exercising their specific political tasks, and in the end it is they who decide whether or not policy intentions come true. The periphery maintains the legitimating 'basis' for the authoritative exercise of power in the political centre, on the one hand by giving concrete effects to political decisions and on the other by providing it with dispersed political claims that warrant the re-consideration of the basic political principles (Peters 1993: 330, 340).

The actions of the more peripheral political actors are, of course, subject to the general principles adopted by the central authorities. Most of the time political actors

can reach their decisions following routines that have been sanctioned by the central actors. Such routines define a set of typical categories which, following specified rules, are applied to the issues brought to the political actors involved. However, routines are bound to be underdetermined relative to the decisions with which political agents are faced.

Whenever a routine procedure is found to fall short in addressing a specific issue - when some kind of problem in the decision-making of a political authority is found to persist - procedures move to another mode of decision-making, which Peters calls the 'problem-mode' (Peters 1993: 346 ff.). At this point the political agent can no longer rely on her routines but is forced to reach a decision on the basis of an extrapolation of the political principles obtaining and her best understanding of the case before her. What is more, with the failing of the routines in the problem mode, the decision reached by a peripheral political agent loses much of its authority. Peters analyses such a situation as opening a 'gate' towards the political centre (*Schleuse* in the original German which literally refers to floodgates); the authority of the more peripheral agent is revealed to rely on its place in the political system, and perceiving this, it is open to the parties involved in the decision to appeal to more central authorities. Compared to more peripheral actors that are bound to follow routines, more central actors have increasingly more leeway in not only reviewing the way in which a decision has been reached but also in interpreting, revising or even overruling the routines involved, or even to challenge the basic principles underlying the policy. This becomes apparent when one compares, for example, the limited powers that lower Trial Courts possess in the face of the law with those of a Supreme Court.

As relations between central political actors and peripheral actors may be structured to a greater or lesser extent, 'gates' turn up in many different guises. A well-structured periphery allows for regular contacts between peripheral and more central political actors, a well-defined distribution of authorities between them, and well-defined procedures that come in operation as the problem-mode requires so. If these conditions are met, it is possible to distribute authority across a high number of layers.

each with a gate to a more central one. Typically, such a structure of distribution of authority operates between political institutions on different territorial levels. Local councils rely on regional governments, which in turn rely on national government whose authority is finally superseded by supra-national governments like the European Commission. An even better defined structure can be detected in the way the judicial system is organised. Lower courts are relatively widely dispersed throughout different countries. Following strict procedures they submit a number of their cases to more centralised Courts of Appeal. Generally, countries then have an even more authoritative instance, a Supreme or Constitutional Court, closely attached to the national government before which an even more limited number of cases can be brought.

A third well-known way to structure the political periphery is through corporatist institutions in which peak organisations secure access to the political centre. In turn these peak organisations are organised along a centre-periphery dimension. In the field of education such a structure can, for instance, be found in teachers' unions that operate on different levels: within the schools, in negotiation with local governments, and on the national level.

Finally, much of the periphery remains much less structured. However, even here channels exist through which access to the political centre may be found. The actors operating here can be conceived of as 'social movements'. In the field of education we can locate here the representation of interests of the parents and pupils. These often lack institutionalised contacts with the political centre. Most of the time they are in the process of organising and articulating certain political interests. Only at certain points in time do the problems that they signal find their way into the political centre. These occasions need not even be marked by formal contacts between the groups involved and representatives of the political centre. The latter may, for instance, pick up the problems via the media. In such cases, moreover, the causes which are critical for passing the gate of the central political institutions may well be rather dispersed. The efforts of social movements are likely to combine with media messages and concerns raised via formal and informal political canals.

The virtue of the gate model is that it outlines a possibility to affirm the viability of a liberal democratic politics of principle under conditions of wide dispersion of political power. The basic principles the central political actors have, as representatives, adopted for society are normally made effective through well-defined routine procedures. Nevertheless when the outcomes of these routines are found to fall short of the commitments expressed in these principles, they can be brought under the scrutiny of a more central political agent. Thus the number of decisions that has to be made by the political centre is kept within limits, while it still manages to secure a substantive political foundation inscribed in the routines of other political agents and open to amendment by gate-transgressing actions.

Peters's gate model outlines a critical ideal of how liberal democratic politics might operate under conditions of dispersed authority. The model indicates how political actions of different actors combine to raise an issue to a more public political agenda and suggests that the more problematical an issue is, the more gates it will pass towards the political centre before it will be adequately dealt with. This suggestion only holds, however, under the condition that all political actors are apt to exercise the routine tasks ascribed to them and that gates open exactly when questions of substantive justice so warrant. Thus the model points at two ways in particular in which actual political practices can deviate from the ideal: either the gates open too quickly or too late. If the gates open too quickly, power is in effect not delegated, and even though powers are ascribed to a peripheral agent, its decisions are fully monitored by more central powers. This undercuts the authority of the peripheral agency while it imposes an extra burden on the central agency rather than lightening its task, thus diminishing its efficiency. Alternatively, if the gates open too late, substantive injustice may be allowed to persist and decentralisation has led to the delegation and corresponding loss of central power to effectively uphold certain political principles. Such a situation issues into a loss of political legitimacy.

#### **IV) APPLYING THE RIGHT TO EDUCATION**

With the public good argument set out, including the major questions that it requires to be answered, and a general conception of how general principles such as the basic right to education still serve a crucial role under conditions of dispersed sovereignty, we can now analyse some actual cases of political decision-making in the field of education.

The cases focus on one particular, but important, question in the politics of education: the question of recognising schools outside the mainstream of the system for basic education. This question enjoys currently particular attention in liberal democracies as it is widely suggested that throughout such societies there has been a sharp increase in the demand for choice in basic education. As a recent OECD report comparing schooling for basic education in a great number of liberal democratic countries testifies:

"In many countries the idea of going to one's local school as the institution that will deliver a standard educational product is being widely questioned. True, most parents and pupils still prefer the closest school, but they make more demands on it than in the past" (Hirsch 1994: 49).

Adding the conclusion:

"no school system can ignore completely the growing desire of parents and pupils to make choices that affect their educational opportunities" (Hirsch 1994: 49).

This growing desire of parents and pupils to make choices in education challenges the established structure of education systems. The OECD researcher concedes that as yet most parents and pupils claim their choices within, rather than between, schools, but he indicates that this may change in the (near) future.

The challenge posed by demands for an expansion of choice in basic education does not solely concern the practice of recognising schools as exercised by the relevant political authorities. In other words, it goes beyond questions of application. These demands challenge the very categories that have come to define the politics of education. In particular they challenge the terms in which the disadvantages of unwarranted segregation of pupils have been balanced against the interests in diversity in schooling. In the final analysis these demands also force us to re-consider the basic

aims underlying the politics of education and the basis on which a basic right to education can be justified.

In the following sub-sections I shortly introduce the cases under consideration. Then I analyse the ways in which the questions they raised have been dealt with in three distinct, but related political arenas. First, I sketch how central political actors have thus far addressed the issue of choice in education. Then I look at the ways in which the claims raised in the cases were initially dealt with by the relevant administrators. Finally, in the third sub-section we find these cases being brought before the courts.

### Case 1: Stratford Secondary School

The British case (*R v. Secretary of State for Education and Science, ex parte London Borough of Newham* 1990) concerns Stratford Secondary School, a co-educational 11 to 18 county comprehensive school based in the London Borough of Newham, "a deprived inner city area". Although the school has a capacity for 1,195 pupils, at the end of March 1990 there were only 765 pupils on the roll, and, reflecting the general situation in the borough, this figure was on the decrease. As the Local Education Authority of Newham (LEA) was faced with an increasing number of surplus secondary school places, it proposed closing Stratford School, thus giving effect to the national commitment to remove surplus places in basic education (Chancellor of the Exchequer 1987: 198). A further consideration supporting the closure of the school was that the school operated on a split site with two buildings about 1,000 yards apart, one being the upper school and the other the lower school. If the school were closed, one of its sites could fill the need to accommodate a new primary school in the area.

However, parents of the children in the school protested vigorously against the LEA's proposal. They praised the school for being "a happy one in which by and large the different ethnic groups mixed well". This opinion was supported by the fact that attendance rates were relatively good compared with the rest of the borough. A group of parents initiated a campaign to have Stratford School opting out of LEA control to become grant-maintained, i.e. sponsored directly by the national government. They

raised the signatures of more than 20% of the parents of the school, which meant that a ballot had to be held on the issue. It turned out that the majority of parents supported the conversion of the school into a grant-maintained one, although, as opponents would later assert, this support was not overwhelming, "at best lukewarm" (*Newham* 1990 at 12)<sup>90</sup>.

At this point it was up to the Secretary of State for Education either to support the proposal of the LEA to close the school and make the site available for the accommodation of the primary school, or to support the proposal of the parents to retain the school by awarding it grant-maintained status.

### Case 2: Freie Schule Kreuzberg

The German case concerns the approval of a primary school in Kreuzberg, Berlin. On 13 June 1980, following the official procedures, an application to have the *Freie Schule Kreuzberg* approved was made to the Berlin Minister for Education on the basis of the claim that the school represented 'a special pedagogic interest'. This school was to give places to around 20 children and was to be organised along lines that markedly deviate from the way that normal, German state-organised schools are run. Although the plan submitted was not meant as an attack of the aims and the basic principles that underlie the national school-program, the prospective school management believed that these values could be better met by elementary education organised in the way they proposed.

In this they oriented themselves in particular towards the ideas developed by the French movement 'École Moderne' founded by the pedagogue Célestin Freinet who argued that primary education has to facilitate the development of children in cultural, social, and emotional respects instead of focusing exclusively on cognitive learning. Correspondingly, the school was to provide an all-day setting in which learning would be integrated with the other needs and experiences of the children, including work, free-

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<sup>90</sup> In the *Newham* case references refer to the page-numbers of my print-out of the transcript by Marten Walsh Cherer of the decision in this case of 19 December 1990. This transcript has not been officially published but can be accessed through the LEXIS-system.

time and entertainment. Teachers and educators would have to foster the learning-process of each child with advice and support, and to make learning-material available so that the child itself would be able to formulate its learning-aims and to evaluate its achievements. These aims could not be achieved by a strictly planned educational program. Instead, education would be structured mainly around projects, the nature of which could be determined on the basis of the needs and interests of the children.

### Central Debates

#### **Britain: Grant-Maintained Schools**

In Britain major political initiatives addressing the need for choice in education have come from the heart of the political centre, the national government. Already in the Education Act 1981 the Conservative government expressed a commitment to restructure basic education. The main conditions under which choice in basic education could expand were, however, created with the Education Reform Act 1988, as it introduced grant-maintained schools. A grant-maintained school 'opts out' of local authority control to be financed directly by the Secretary of Education and to be run exclusively by the school's governing body. Thus the school is supposed to increase its freedom as the administration costs of the LEA are no longer subtracted from its budget and it is able to take a wider range of decisions into its own hands.

Cynical observers hold that the education reforms of the Conservative Party were not motivated at all by perceived needs but solely by power politics, aiming to dissolve the power of the Local Education Authorities (LEAs) that controlled basic education policy at the local level, administering a significant budget out of the reach of Whitehall, and enjoying the reputation of being the bulwarks of progressive hacks. Indeed, bypassing the LEAs appeared a crucial ingredient of the new national policy on basic education, and the question is whether policies to increase choice in basic education would not have been conceivable through the administration of the LEAs. However, without the legitimating force of the substantive argument for choice the



reforms most certainly could not succeed. To achieve the kind of restructuring in basic education that the Conservative government envisages, it will have to depend on many other actors and at least to establish some credibility of the substantive considerations that motivate its moves.

The Secretary of State for Education, Kenneth Baker, defended his proposals, asserting that

"the establishment of grant-maintained schools will prove to be a stimulus for higher standards at all maintained schools. Grant-maintained schools will compete on equal terms with the local authority sector, and will be funded on the same basis as other schools in their neighbourhood" (DFE 1988: §2).

Thus it is not merely the argument for choice that justifies the introduction of grant-maintained schools. Echoing Milton Friedman, it is also claimed that these schools will serve to raise the quality of other schools by exposing them to competition and compelling them to employ their resources as effectively as possible (cf. Friedman 1962: 93, quoted in section II and IV). All this with the implicit presupposition that the government will not need to raise expenditure on basic education. Rather, as LEAs will have increasingly fewer functions to fulfil, they will press less on the budget. Further, the Secretary announces a firm intention that grant-maintained schools will not enjoy financial privileges over other state schools. The only extras offered to grant-maintained schools are 'special purpose grants' for specific activities that would otherwise have been administered by the LEA. Thus fairness between the different types of schools is secured.

Although these ideological presuppositions may already have been strongly contested at the time, the actual proposal of grant-maintained schooling was met by relatively little principled opposition. One reason for this may have been that the government itself was far from clear about its exact aims. However, this situation changed in 1992 when Baker's successor, John Patten, published the White Paper *Choice and Diversity, A New Framework for Schools* anticipating the Education Act 1993 that was to set out comprehensively the new structure of British basic education.

This paper probably contains the most coherent statement of the Conservatives' views on basic education. Its basic presuppositions are set out in the opening paragraphs:

"More and more secondary and primary schools are becoming grant-maintained (GM), and thereby enjoying the freedom and real sense of ownership that GM status brings. Limited opportunities and limited choice have been replaced by greater choice and greater access. (...) More diversity allows schools to respond more effectively to the needs of the local and national community. The greater their autonomy, the greater the responsiveness of schools. Parents know best the needs of their children (...)" (DFE 1992: 1/2).

These claims introduce the Five Great Themes the government invokes to guide the process of educational change: quality, diversity, increasing parental choice, greater autonomy for schools, and greater accountability.

At this point the opposition gathers around the counter-argument that the emphasis on choice reduces parents and pupils to consumers and education to a commodity. This argument is well set out in 'an Alternative White Paper', *Education: a different version* (n.d.), by the think tank of the opposing Labour Party, the Institute for Public Policy Research. The Institute characterises the ideology underlying the government policy as follows:

"The two principal beliefs are, therefore, that the consumer knows best and that he or she, not the professional educator, determines through the exercise of choice, where children should be taught, and secondly that, even where the consumer has limited control over the ends to be achieved, the need for the producer and seller to attract the consumer means that only the best quality will survive. Competition keeps retailers on their toes" (IPPR n.d.: 14).

What is contested is exactly whether consumer choice will actually give rise to better education. Labour's intellectuals doubt this. Their basic argument is:

"What is taught, the values that are promoted, the relationships that are established, are geared as much to the public good as they are to private fortune, and it would be naive to see public good as simply the natural consequence of each pursuing his or her own private benefit" (IPPR n.d.: 15).

Labour's intellectuals emphasise that education is a public good and that this is insufficiently grasped by the values of choice and diversity. They claim instead that the values that lie at the centre of the educational system as a public good are fairness and co-operation (IPPR n.d.: 16). Parental choices are unlikely to express these values

adequately (cf. Jonathan 1993). The Institute shows itself to be an ally of the Local Education Authorities which, given that they are "democratically accountable at local level", are best suited to secure education as a public good. To the extent that reforms are needed, they have to concern the (re-)definition of the role of the LEAs to enable them to secure this good through co-ordinating parental choices and school admissions (IPPR n.d.: 25/6).

Although there thus appears to be a huge cleavage between the protagonists and antagonists of grant-maintained schools, their differences should not be exaggerated. While Labour has recently taken up an offensive stance on basic education policy it has fallen silent over its severe rejection of grant-maintained schools (some suggest that this could have something to do with Labour leader Tony Blair sending his own children to one) (cf. *Daily Mail* 5/12/95: 1 & 8). As the party's focus is on the quality of education and its main instrument is the Local Education Authority, it is not unlikely that, if the party actually comes to power, it would tolerate the persistence of grant-maintained schools, incorporating them into a new framework of tasks and authorities between schools, local and national authorities.

If that is so, many of its concerns would converge with those faced by the Conservative government, which is currently facing a situation in which the state administers basic education through two parallel institutional frameworks. Though the number of grant-maintained schools has increased steadily, it has fallen far short of what the Conservatives had hoped for. By January 1993 little more than 300 grant-maintained schools were operating throughout the country, while another 200 were well into the process of acquiring the grant-maintained status. Although opting out is open to both primary and secondary schools, size conditions have limited the move predominantly to secondary schools. According to the calculations of Halpin, Fitz and Power, more than 10 percent of the state secondary schools have made moves to become grant-maintained (Halpin, Fitz & Power 1993: 15 ff.; Fitz, Halpin & Power 1993: 34). While the grant-maintained sector has thus come to make up a substantial

part of the basic education system, it has clearly not wiped away the Local Education Authorities.

### Germany: Private Schools

The government initiatives in Britain contrast sharply with the situation in Germany where the education administration appears more like an immovable, well-gated fortress. The issue of choice in education has not made the agenda of the federal government so far. Basic education policy is seen to fall primarily under the authority of the *Länder*. As a consequence the substantive arguments concerning the expansion of choice in education are structured altogether differently across the policy agents. For a start, while in Britain the government regards the introduction of grant-maintained schools as a means towards a more manageable budget, the German *Länder* fear that rising numbers of private schools will give rise to claims on their budgets which they will not be able to control. This defensive attitude can moreover be justified with the argument that expanding the options for choice will generate undesired differences between pupils in basic education.

For sure there is an increasing public demand for choice in basic education in Germany, even though commentators contest its size. In 1988 only one percent of all pupils attended elementary education in private schools in Germany, of which about one hundred existed throughout the country (Vogel 1989: 300). However, since then these numbers can be said to have significantly increased since interest in private schooling has been registered to rise steadily and initiatives to found private schools have been taken throughout the country (cf. *Der Spiegel* 1989/2: 65; Lemper 1989). This increase in demand for alternative schooling may be explained by a dissatisfaction with the level of education currently provided for by public schools and by a more general trend in society towards a diversification and pluralisation of ways of living. In any case, it is at the moment still unclear whether the contribution of private schools to elementary education will in the near future simply multiply to 3 or 5 percent, or whether they will become an equal competitor with public education, providing up to

20 per cent (Vogel 1989 tends to the former prognoses; Eiselt 1988: 215 rather fears the latter).

As the German politicians have not taken up the issue, unlike their British colleagues, and administrators have shown themselves unwilling to open the gate for claims to choice in basic education, such claims have eventually found another channel, the courts. This channel turns out to be rather promising as claimants of choice can invoke paragraph 7.IV of the German Basic Law that guarantees the right to found private schools. The full text of this paragraph and the following one, that concerns basic education in particular, are as follows:

7.IV The right to establish private schools shall be guaranteed. Private schools, as a substitute for state schools, shall require the approval of the state and shall be subject to the statutes of the *Länder*. Such approval shall be given where private schools are not inferior to the state schools in their educational aims, their facilities and the professional training of their teaching staff, and where segregation of pupils according to the means of the parents is not encouraged thereby. Approval shall be withheld where the economic and legal position of the teaching staff is not sufficiently assured.

7.V A private elementary school (*Volksschule*) shall be permitted only where the education authority finds that it serves a special pedagogic interest, or where, on the application of persons entitled to bring up children, it is to be established as an interdenominational school or as a denominational school or as a school based on a particular philosophical persuasion (*Weltanschauungsschule*) and a state elementary school of this type does not exist in the commune (*Gemeinde*).

While paragraph 7.IV, by guaranteeing the right to erect private schools, defines the general framework for private schools, paragraph 7.V is particularly important as it specifically lays down the two conditions under which private elementary schools can be recognised.

These two paragraphs bear the traces of a long and contorted political history that goes back to the 1919 Weimar School Compromise. This compromise reconciled the different views on basic education of the Social-Democrats, on the one hand, and the Christian-Conservative parties (*Zentrum* and *Deutsch-Nationalen*), on the other. The Social-Democrats regarded education as an important means to secure equal (starting) opportunities for all citizens in society. Hence they strove after the

harmonisation of all elementary education according to the general model of one *Volksschule*. The Christian-Conservative parties, on the other hand, were eager to maintain religious diversity in the school system and defended the interests of church-organised basic education. The Compromise was struck with the parties agreeing that in principle elementary education was to be provided by a single public school (*Volksschule*). The Social-Democrats got their way to the extent that schools were officially prohibited from selecting pupils on the basis of ability (*Vorschule*) or the wealth of their parents. However, to satisfy the Christian-Conservatives, measures were taken to allow for the expression of religious differences in the education system. Each *Land* was to decide individually whether the standard school was to be of a religious nature or not. Moreover, depending on parental demand, private schools had to be recognised if schools for a certain religion were not yet available in a locality. Finally, the Weimar Constitution included a general provision that private elementary schools could be approved when 'a special pedagogic interest' in them could be recognised (Landé 1929; Richter & Groh 1989: 279).

In the post-war Basic Law of the Federal Republic (1949) the two paragraphs quoted above are preceded by paragraph 7.I, which asserts the primacy of the state as supervisor over the school system:

7.I The entire schooling system shall be under the supervision of the state.

Contemporary commentators interpret this provision in the light of the constitutionally entrenched commitment of the German state to social justice (*sozialer Rechtsstaat*); beyond the maintenance of the rule of law the state also has to further social justice (GG. Art. 20.I & 28.I; cf. Hesse 1975: §6; Vogel 1989: 302; and also the court decisions considered below: OVG Berlin: 1e; BVerwGE 1986.32: 277/8; BVerfGE 88,40 at 49/50). When it comes to basic education, we find that in restricting the conditions under which private elementary schools can be approved, Article 7.V of the Basic Law (as quoted above) echoes the "constitutional priority of the public school system" asserted in the Weimar School Compromise. The primary justification for this

now being that it serves as a check against the fostering of differences in basic education that cannot be reconciled with the idea of social justice.

Private elementary schools can be recognised on either one of the two grounds provided by paragraph 7.V of the Basic Law. For a long period the latter condition - allowing schools of different religious character - was the most widely applied to. However, in pushing for the expansion of choice in education, claimants appeal nowadays to the provision of the 'special pedagogic interest' they claim to serve. The main authority in determining how the different considerations contained in Article 7 are to be weighed against each other is the Federal Constitutional Court. When presented with the case of the 'Free School Kreuzberg', this Court conceded that pupils may get better opportunities at a private school than others going to a public school. However, the Court also found grounds in the Basic Law that might justify such inequalities. It argued that private elementary schools may be approved under 'a special pedagogic interest' in the expectation that their presence will give an impulse to the school system at large:

"A 'special pedagogic interest' as a justification for the exception from the principle of 'schools for all' (cf. *Volksschule*, BC) presupposes merely a meaningful alternative to the existing provision of public and private schools which enriches the pedagogic experience and benefits the development of the schooling system at large. With the guarantee of the right to establish private schools in Art. 7.IV/1 the constitution-makers had exactly so-called reform-schools in mind. (...) The impulses which private elementary schools - oriented towards the 'average pupil' - can give to the schooling system at large can be taken as sufficiently outweighing the risk of selective differentiation of the pupils" (BVerfGE 88,40 at 53).

### Discussion

The slogan of the British Conservative party, "choice and diversity", may well be taken to open the way for the recognition of a basic right to education. However, the distinctive libertarian bias of the Conservative ideology becomes quickly apparent as its policy leaves little space for considerations of equality, justice, communality, and neighbourhood effects. Labour, on the other hand, required quite some time to

formulate a credible alternative. Interestingly, this alternative does not simply affirm the value of equality, which in the earlier times of R.H. Tawney and Anthony Crosland would have been the obvious line to take (cf. Crosland 1966). Instead, the Institute for Public Policy Research invokes, in a rather general way, the public good character of education, observing that "a democratically accountable system should recognise the interdependence of people and the social richness on which each individual draws". More specifically, it stresses the values of co-operation in education and of fairness, which requires, it states, that "[e]ducational provision must justify differences of treatment, in so far as these differences affect the quality of life" (IPPR n.d.: 17).

The reading of this debate as a head-on clash is further mitigated when it is observed how in practice both parties share in each other's concerns. For a long time the Conservatives met Labour's concerns about emerging differences of treatment by insisting that a change to grant-maintained status would not coincide with a more restrictive admissions policy. According to the Education Reform Act 1988, schools 'opting out' could only apply for a change of status after a considerable period of time had lapsed. However, these guarantees did not by any means suffice to reassure the government's critics. They pointed out that when facing over-subscription, grant-maintained schools would be free to select 'covertly' according to their own criteria, without being checked by the Local Education Authority (IPPR n.d.: 14/5; Whitty 1990: 311). Moreover, in an attempt to increase the appeal of 'opting out', the Education Act 1993 opened the opportunity for schools to propose a significant change in character and size as part of the application for grant-maintained status. Thus the general perception was fuelled that grant-maintained schools are 'better class schools'.

Labour, on the other hand, cannot simply deny that parents and pupils show an increased desire for choice in education. Indeed, the IPPR Alternative White Paper acknowledges this and proposes a number of policies to meet this desire, such as granting parents 'rights' to information (something which is also promoted as part of the Conservative policy), furthering parents' involvement in schools, and the formation of parent councils (IPPR n.d.: 42). What is more, much suggests that if the Labour Party



actually came to govern, it would actually tolerate the persistence of grant-maintained schools as these do meet certain genuine demands for choice, while seeking to mitigate undesired inequalities through institutional checks set up between schools, local and national authorities.

The balance between choice and undesired differences in education is thus to be re-drawn in both Great-Britain and Germany to allow for more choice. Crucial to the arguments that hold that such a move need not necessarily imply an increase of undesired differences in education, is the claim that differences between schools may, through "healthy competition", stimulate a general concern for quality in all schools. After having encountered this claim in Milton Friedman's work and in the 1988 proposals for grant-maintained schools in Britain, one also finds it invoked by the Federal Constitutional Court:

"The impulses which private elementary schools - oriented towards the 'average pupil' - can give to the schooling system at large can be taken as sufficiently outweighing the risk of selective differentiation of the pupils" (BVerfGE 88,40 at 53).

Compared to Friedman and the British Conservatives, the Constitutional Court is probably more cautious in using this argument, thus emphasising that it is indeed part of a balance. The Court emphasises that private schools cannot be accepted if they turn out to be selective schools (they are to be oriented towards the 'average pupil'), and adds moreover that the priority of the public school system is to be affirmed; independent schools have to justify their status as an exception.

From the perspective of the public good argument for a right to education that I outlined earlier in this chapter, there appears more to be said on the side of the reforms advocated by the German Federal Constitutional Court than for those of the British Conservatives. For a start, the gains in terms of choice for citizens that derive from the establishment of grant-maintained schools are far from obvious. The main respect in which these schools differ from those controlled by the LEAs concern matters of administration.<sup>91</sup> Choice becomes a relevant value here solely to the extent that grant-

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<sup>91</sup> This is different for the 'City Technology Colleges' which have been launched at around the same time (cf. Whitty 1990).

maintained schools serve to relieve dissatisfaction with the LEA schools. But the fact that opting out turns out to be significantly less popular among parents than the Conservative party might have hoped, suggests that either the politicians have grossly exaggerated this dissatisfaction or that the public has little trust that turning grant-maintained is indeed the solution needed to relieve this dissatisfaction. In the end, the strongest argument that the Conservative government has for the introduction of grant-maintained schools is probably the efficiency argument. Supposedly, grant-maintained schools can employ their budgets more efficiently, and, with the LEA bypassed, allow for a more direct and better communication with Whitehall. Whether these arguments hold has yet to be seen. However, some institutional developments that will be discussed shortly suggest a sceptical answer.

While the gains in grant-maintained schools appear to be slight, the Conservative government seems to have strikingly little consideration for the societal risks thrown up by its initiatives. Though it conceded certain precautions against grant-maintained schools rapidly evolving into 'better class schools', these have been depreciated step by step in its eager pursuit of the expansion of consumer choice in education. Without denying the value of choice, one may note here, with the Labour Party, that the Conservative policy risks missing out completely the public good arguments stressing the costs of undesired differences in basic education.

In Germany, on the other hand, arguments against undesired differences have been deeply entrenched in the Basic Law. So deep indeed that it requires considerable effort on the part of the Federal Constitutional Court to address the demands for more choice. This effort can, however, be based upon the provisions in the Basic Law that explicitly recognise the right to erect private schools and allow private schools to be approved for a 'special pedagogic interest'. In relying upon these provisions the question thus becomes what is to count as a 'special pedagogic interest'? The first issue that it raises is whether this interest is of a public or a private nature, that is: is the bearer of the interest meant to be an individual having a ("special pedagogic") interest in the private school, or society at large? Most interpreters of the concept interpret it as

referring to a public interest, because if it referred to a private interest it would dissolve all grounds not to approve a private school; whenever any one claimed a "special pedagogic" interest in a private school, such a school would have to be approved (Hess. VGH 1983: 237; BVerfGE 88,40 at 51/2 (b); but cf. Richter & Groh 1989: 282). On the other hand, a 'special pedagogic interest' should not be interpreted too narrowly, equating it with the interest of the state administration. Rather its content has to be derived from the major principles by which German society has conceived of itself as a democratic society. Frank-Rüdiger Jach thus proposes to regard the public interest in private schools as "a societal interest of a democratic community which guarantees the identities of cultural minorities" (Jach 1990: 510; cf. Ladeur 1990). This interpretation gives considerable space to the recognition of diversity in elementary education.

As the 'special pedagogic interest' points to a public interest in a certain diversity in the basic school system, it has to be brought in a balance with another acclaimed public interest, the maintenance of equal opportunities between pupils as expressed in the priority of the public school system (OVG Berlin 2/2/84: 1e; BVerwGE 1986.32: 278; BVerfGE 88,40 at 52 ff.). The Federal Constitutional Court clearly holds that the contemporary context warrants that this balance is redrawn in favour of expanding of options for choice. At the same time, however, it seeks to secure that the emergence of undesired differences in basic education will be kept to a minimum by holding the expansion of choice liable to a number of strict principles.

As the gate model leads to suggest, in both Germany and Britain the problems in determining an adequate conception of substantive justice that satisfactorily balances the demands of choice against the risk of undesired differences in basic education, are reflected in problems of institutional co-ordination between the various parties involved in the administration of education. The first problem of this kind faced by the British Conservatives is the somewhat disappointing enthusiasm with which parents have responded to the possibility of opting out. The government has sought to overcome this set-back by various proposals that were aimed at increasing the attractiveness of grant-maintained status. Thus already from the start the Conservatives generously employed

the instrument of 'special purpose grants', enabling grant-maintained schools to make extra investments in their facilities. In 1990 the pre-condition of a minimum size of 300 pupils was waived for opting out. The Education Act 1993 introduced further measures to ease transition to grant-maintained status, reducing the claims of LEAs on grant-maintained schools and establishing the possibility to apply for grant-maintained status in a cluster of (small) schools (DFE 1992: Chs. 7 & 12).

A second institutional problem that arose in Britain was that, notwithstanding the fact that opting out did not take off on an extremely wide scale, the demands aspiring grant-maintained schools made on the National Department of Education turned out to be rather high. At the same time it had to be acknowledged that self-governing schools cannot fully manage by themselves all the tasks required for their functioning. For this reason the Education Act 1993 established a new statutory body in the field of basic education: the Funding Agency for Schools (DFE 1992: Ch. 3). The tasks of the Funding Agency are firstly to calculate and pay the grants due to the different grant-maintained schools and, secondly, to secure that there are sufficient and suitable school places available in all localities for all children of compulsory school age. While operating side by side with the LEAs, the Funding Agency seems in many respects very likely to develop into something rather similar to the former. Basically they administer the same tasks. What is more, when the number of grant-maintained schools grows further, the Funding Agency is expected to set up regional offices to administer its tasks, so that many of its activities will take place on the same level as the LEA. The main remaining difference is then that the members of the LEA are appointed locally, while the members of the Funding Agency are appointed directly by the Secretary of State. The Conservative push for central control emerges further in the stipulation that the Funding Agency will operate strictly under regulations and guidelines made by the Secretary of State (DFE 1992: 20/1). Ironically, we find here the Conservatives pursuing choice and liberty through increased centralisation, while Labour submits that undesired differences are best prevented by strengthening the LEAs at the local level.

In Germany, institutional problems of co-ordination reflecting the persisting inability to maintain the required new balance between choice and undesired differences in basic education, are particularly apparent in the persisting tension between the Federal Constitutional Court and the administrators of the *Länder*. While the Court's authority served to amplify the demands for choice in basic education and to rule out certain restrictive practices of the *Länder*, it fell short of restructuring the policy commitments of the administrators. The persisting conflict is particularly apparent in measures concerning the financing of private schools.

The approval of private schools raises directly a financial issue. If the government did not subsidise them then they would very likely develop into rather exclusive schools that would only be accessible to those who would be able to pay fees that would fully cover the costs of education. Hence, the *Länder* are obliged to give financial support to private schools, even if they may be reluctant to do so because, compared to the public schools, they have far less control over the private ones. The financing of private schools and their relative standing to state schools is determined in the Private School Law of each *Land*. The Private School Law of Berlin, for instance, provides that approved private schools receive about 75 per cent of the budget of comparable state schools. In some cases these provisions have been adapted to favour certain kinds of private schools. Thus the Berlin Private School Law was amended in 1974 to include special privileges for schools on an anthroposophic basis (*Rudolf Steiner Schule/ Waldorfschule*). However, by a decision of 8 April 1987 concerning the Hamburg Private School Law (BVerfGE 75,40) the Federal Constitutional Court ruled that such a differentiation among private schools cannot be reconciled with the constitutional provisions on education in relation with the equality-formula of Article 3.1 of the Basic Law which simply rules:

3.1 All persons shall be equal before the law.

Once the political decision is made to support private schools, the administration is bound to treat all of these schools along exactly the same lines, since there are no valid grounds for differentiating between them (BVerfGE 75,40 at 71; cf. Weiler 1985: 76/7).

This ruling, in combination with the steady increase in private school initiatives, has led to a nation-wide revision of private school laws, since politicians recognised that increasing numbers of private schools would make considerable demands on their ever tighter budgets. The budgets for private schools were all brought down to the same level, which was mostly the lowest formerly available, if not even lower. Some *Länder* have moreover decided to freeze their budgets for private schools. Others have introduced a considerable testing period of a number of years before they qualify for state finance. Most radical was the idea raised in the *Land* of Swabia to support private schools only by granting them the teachers and buildings that come available as public schools tighten up (*Der Spiegel* 1989/2; Lemper 1989).

Ultimately, however, all attempts of education administrators to withstand claims to choice in basic education, are kept in check by the rulings of the Federal Constitutional Court. As a bottom line the Court has asserted that the constitutional right to education does not allow a sinking of the budgets of private elementary schools to a level at which they are no longer able to fulfil their function - in particular, it has to be avoided that private schools require fees so high that only the more wealthy can send their children to them (BVerfGE 75,40 at 65 f.).

### Deciding Peripheral Cases

We now move back to the periphery of the policy field of education to analyse the two cases concerning the recognition of schools. In both Britain and Germany the decision whether or not to approve a school needs to be authorised by the political head of the school administration, the Secretary of State for Education in Britain and the Minister for Education in German *Länder*. This decision is clearly recognised as a political decision that can only to a limited extent be determined on the basis of a single set of pre-defined routines. This is reflected by the fact that in both countries great reliance is put on the consultation of all parties involved.

### **The British Secretary of State**

Section 12 and 13 of the Education Act 1981 have assigned to the Secretary of State for Education the authority to close schools without imposing any specific conditions upon his decision, leaving it as a discretionary power. Similarly, Section 62 and 73 of the Education Reform Act 1988 assign him the authority to approve proposals for grant-maintained status. In considering the case of Stratford Secondary School, the Secretary of State faced the choice to use either of these two powers assigned to him. Before reaching his decision, however, both powers require him to consider any objections submitted against either decision, in particular if these are raised by the governing body of the school involved and the Local Education Authority concerned.

From April to August 1990 the Secretary of State for Education received the various opinions of the parties involved in his decision on the future of Stratford School. For a start he received 15 letters supporting the proposal for grant-maintained status, followed by a petition in favour of grant-maintained status signed by 1,302 residents (parents and non-parents) of Newham. In contrast, the LEA, the school's governing body and the Newham Teachers' Association filed their objections against the proposal. The Department for Education showed active interest in the school when the Minister of State, Mr Eggar, met with the prospective governors of the grant-maintained school with the aim of ascertaining their awareness of "the hurdles they would face and to examine what steps they would take to ensure effective management".

On 9 August 1990 the Secretary of State sent a letter to the governors of Stratford School and to the Local Education Authority indicating that he was of a mind to approve the proposal for grant-maintained status and therefore to reject the proposal to close the school. This led to a final offensive from the opponents of grant-maintained status. On 31 August ten of the fourteen governors of Stratford School met with the Minister of State to express their belief that the granting of grant-maintained status to Stratford School "would lead rapidly to an unmanageable situation in which the school would be unable to provide a proper education of its pupils". They continued by

maintaining that Stratford School would "not be viable as a grant-maintained school in view of the limited parental support in the opposition of the majority of the governors and the opposition of the teaching staff" (*Newham* 1990 at 1). It was, moreover, indicated that their opposition was shared by the Local Education Authority, the National Association of Head Teachers, the Newham Teachers' Association, and the local Member of Parliament, Mr Ron Leighton MP.

The Secretary of State did not share the expectations of the current governors and the LEA regarding the prospects of Stratford School as a grant-maintained school. He recognised that "the school had a number of problems and that these problems would leave a legacy to the prospective governors if grant-maintained status were approved". Considerable legal difficulties, falling rolls, and problems of continuity as a significant part of the former staff intended to leave the school, added to the challenges the prospective governors would have to face. It had to be recognised, moreover, that these governors were inexperienced. However, as the Minister for Education had found in meeting them, they showed themselves to be aware of the task ahead (*Newham* 1990 at 4). The Secretary of State believed that once grant-maintained status was attained, the school could make a fresh start and could be expected to attract new staff-members and pupils. He waved aside as unfounded "[f]ears that a grant-maintained Stratford School would divide the local community and undermine the multi-cultural comprehensive education currently being provided" (*Newham* 1990 at 4). Rather he took the petition with 1,302 signatures as an indication of the considerable support on which the school could count (cf. *Newham* 1990 at 13/14). Thus he came to decide in favour of the proposal for grant-maintained status.

The LEA found this decision faulty. It went to court to have the Secretary of State's decision reviewed, submitting two substantive reasons (besides another two of a more procedural kind). The first, and most concrete, of these grounds was the Secretary of State's own declared intention to reduce surplus places (Chancellor of the Exchequer 1987: 198). The LEA pointed out that its proposal to close Stratford School was meant



to give effect to this policy. Given that, in rejecting this proposal, the Secretary of State clearly had failed to appreciate this policy aim, his decision was open to revision.

Secondly, the LEA maintained that the argumentation given by the Secretary of State was demonstrably faulty. It relied in particular on the following passage in the affidavit presented by the Secretary's solicitor:

"There was also, in his view, a need to provide local parents with a greater degree of choice. Clearly, in an area of social deprivation such as Newham, it is beyond the means of most parents to contemplate private education for their children. A grant-maintained school would, however, provide an alternative to one maintained by the local education authority. A grant-maintained school, which broke the mould of local education authority control would, in the Secretary of State's view, not only provide greater choice for the parents of pupils in the immediate vicinity of Stratford school, but for parents throughout the London Borough of Newham. Thus, even if some parents withdrew their children from Stratford school in the short term, the Secretary of State considered that there was every possibility that the school would attract pupils from a wider area in the longer term, as it gathered momentum and was seen to thrive. The Secretary of State took the view that greater parental choice was of particular importance in a deprived inner city area, and that he owed it to the children of Newham to provide such choice for them in so far as it was within his power to do so. (*Newham* 1990 at 5)"

Regarding this argument the LEA noted that there were no reasons at all to think that a grant-maintained school would widen the range of the choice in the nature of secondary education on offer in Newham. Hence, it held: "The reference to choice can in this context therefore be no more than a reference to having another school open. The closure of any school reduces choice" (*Newham* 1990 at 11). Moreover, the solicitor of the LEA objected to the expressed need to break "the mould of local education authority control". This need lacked any ground as there had been no offence on the side of the Newham LEA that could reasonably have given rise to it.

#### The Berlin Minister for Education

The Berlin education authorities gave extensive consideration to the application of the 'Free School Kreuzberg'. On 4 August 1980, two months after the application had been made, administrators met with representatives of the school to discuss their plans. On the basis of that meeting a decision was drafted with the intention of rejecting the

application. However, the Minister for Education was unwilling to authorise this decision as he was minded to approve the private school. Deliberation continued. A second meeting with the school representatives was held on 15 May 1981 and in turn the school sent a letter to the authorities submitting a slightly amended version of the school's proposal. Only then, little more than a year after the initial filing of the application, was the decision taken to reject the application of the school. This decision no longer met the opposition of the Minister for Education, since recent elections had led to his displacement.

The principal basis on which the education authorities reached their decision was paragraph 7.V of the Basic Law which stipulates the two conditions under which private elementary schools can be approved: either on religious grounds or if they serve 'a special pedagogic interest'. It was on the second ground that the 'Free School Kreuzberg' had applied for approval and the education authorities came to reject this application precisely because it did not recognise such a special pedagogic interest. While the 'special pedagogic interest' points to a public interest in a certain diversity in the basic school system, this interest has to be reconciled with the affirmed public interest in the priority of the public school system so as to avoid the emergence of unjustifiable differences in basic education (OVG Berlin 2/2/84: 1e; BVerwGE 1986.32: 278; BVerfGE 88,40 at 52 ff.; cf. Jach 1990: 510).

As the case of the 'Free School Kreuzberg' demonstrates, in this interpretation the approval of private schools on the ground of 'a special pedagogic interest' is likely to occur only rarely. When considering whether this condition applied, the Berlin school administrators observed that many of the ideas in the proposal were already being practised in public elementary schools. Thus the school would mainly distinguish itself by bringing many of these 'progressive' pedagogic ideas together in one school. However, such a school operated already in another neighbourhood in Berlin and for that reason it was concluded that there was no 'special pedagogic interest' apparent in the school's aims.

The decision of the Berlin Minister for Education left the representatives of the 'Free School Kreuzberg' dissatisfied and they went to court, arguing that it would be in the public interest to allow several private schools to explore new learning methods so that their results could be compared with one another. This school promised this possibility and, hence, the decision to reject its application was mistaken and needed to be overruled (OVG Berlin 2/2/84: 1c/d).

### Discussion

Though the British Secretary of State and the Berlin Minister followed rather similar procedures of consultation, there are important differences in the way they reach their decision. Notably the Secretary of State appeared rather predisposed to effectuate his own policy of expanding the grant-maintained sector by recognising Stratford School as a grant-maintained school, and was thus quite willing to side-step fears that the prospective new governors of the school were not up to their tasks. Similarly he seems to see little point in assessing the risk that the establishment of a grant-maintained school in Newham may drive a wedge in the community's education, dividing people from different class and ethnic backgrounds. Most striking, however, is his argument for the need for a greater degree of choice in basic education in Newham. He presents the grant-maintained school as an alternative to private schooling, which most parents in this neighbourhood would never be able to afford. Underpinning this argument is a strong confidence that, as a grant-maintained school, the school is bound to thrive in the longer run. However, questions of quality aside the Secretary makes the rather crude point that there is a need to break "the mould of local education authority control", suggesting that parents are bound to gain from any alternative school to choose outside LEA control. The objections the LEA raised against this latter remark - adducing that choice in this sense refers merely to quantity and that there was no reason whatsoever to justify this kind of aggression towards it - seem fully in place. It remains to be seen, however, whether they suffice to necessitate the revision of the Secretary of State's decision.

In the German case political preferences also turned out to play a crucial role, as the decision against the 'Free School Kreuzberg' was only taken when a new Minister for Education had taken office. The predispositions of the administrators were, however, clearly consistent: they were reluctant to recognise the school. This disposition could be justified on the basis of phrases in the Basic Law that historically have induced a rather restrictive approach in recognising private schools. In a way, then, the administrators simply stuck to the established routines while showing themselves little sensitive to political signs, as for instance expressed by the earlier Minister for Education, that the time was ripe for a more generous approach towards the recognition of private schools. Within the institutional set-up, the administrators' disposition was further reinforced by the fact that private schools, operating outside their direct control, constitute for them an insecurity both in financial and administrative terms.

#### Judicial Review

Under the circumstances described, in which political debates have by no means reached a stable conclusion, it is not unlikely that the administrative decisions will leave some of the actors involved dissatisfied. For them satisfaction can be sought by moving to other channels to have these decisions reviewed. As it turned out, in both these particular cases the decision reached by the primary administrators did leave one of the parties involved feeling that its claims had insufficiently been considered. They therefore moved to another channel, the courts, to have the initial decisions reviewed, with strikingly different success. The interesting question the gate model raises in this context is whether the procedural rules that the courts employ for reviewing a decision can actually correspond to the substantive merits of the cases brought before them.

#### **Britain: The Trial Court**

The Local Education Authority of Newham went to court to have the Secretary of State's decision reviewed. With the gate-model in mind we may say that the LEA sought to open a gate to move to a different track to have justice done. However, the

precise problem the LEA encountered was exactly to make its case for accessing the legal track. As there was no actual statute or precedent stating any specific directions to which the Secretary of State's decision could be held liable, the question was on what basis the court could claim authority to review the Secretary of State's decision.

Notwithstanding this absence of legal provisions, the LEA submitted a number of considerations to which, it held, the Secretary of State's decision had been subject and which it had in fact failed to meet. The first two of these, already discussed in the last sub-section, relied on the national policy aim to reduce surplus places and on the hollow arguments invoked by the Secretary of State. Additional to these the LEA submitted two arguments of a more procedural kind. The first one of these challenged the way in which the Secretary of State had registered the support for a grant-maintained school. It argued that his decision was unlawful to the extent that it relied on the petition in favour of grant-maintained status. The law provides a determinate ballot procedure to assess the local support for grant-maintained status, and its status cannot be taken over by a petition put together following methods which have not been legally laid down. The LEA's final argument submitted that even if this petition was considered as lawful evidence, then procedural fairness had required the Secretary of State to inform the LEA about the value he attached to it and in turn to offer it the opportunity to hold a counter-petition.

One by one, however, the judge denied that these arguments the Secretary of State should have yielded to these arguments and accepted the grounds adduced by the Secretary of State for why he had acted the way he did. For him the central question in this case was what authority, if any, the court could claim over the Secretary of State's decision. In dealing with this question he relied on the decision of Lord Justice Nicholls in a similar case that had been ruled half a year before, *R v. Secretary of State for Education and Science, ex parte Avon County Council* 1990. Typically, Lord Justice Nicholls had emphasised the fact that it had been decided by law to entrust the decision whether or not to close a school to the Secretary of State and to no other authority. He argued:

"By appointing the Secretary of State as the decision-maker in this way, Parliament has given him the responsibility of 'weighing' the conflicting considerations, in the sense that the degree of importance (or 'weight') to be attached to these considerations has been made a matter for his judgement. It is not for this court, in the exercise of its jurisdiction judicially to review the Secretary of State's decision, to substitute its own evaluation of these considerations for that of the minister. Furthermore, as one would expect, step after step of the Minister's reasoning involves an assessment by him of imponderables on which different minds, including minds skilled in the educational field, may well reach widely differing conclusions" (Nicholls LJ in *Avon County Council* 1990 referred to in *Newham* 1990 at 6/7).

It cannot be denied that the decision about the closure of a school ultimately requires an element of judgement to determine which interests are to prevail. This, however, need not warrant the inference that the Secretary of State's decision can in no way be reviewed. Even if the Secretary ultimately enjoys a certain discretion in deciding, this decision can still be held subject to certain principles.

In fact, the Court did recognise that it could have the decision revised if it were found that:

"The minister's decisions were so outrageous in their defiance of local or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*Newham* 1990 at 14, referring to Diplock LJ in *Council of Civil Service Unions v. Minister for the Civil Service* 1985).

Obviously, this criterion poses a rather extreme requirement, and the judge's opinion that the LEA's objections in the *Newham*-case came "nowhere near" meeting this criterion need not be disputed (*Newham* 1990 at 14). For the rest, the court relied on the fact that "(p)arliament has not given the Secretary of State any express directions on the importance he must attach to this or that factor" (Nicholls LJ in *Avon County Council* 1990 referred to in *Newham* 1990 at 6), and decided in favour of the Secretary for Education. Thus the court firmly closed the gate through which the LEA had hoped to be able to challenge the Secretary of State's decision.

### Germany: Administrative Courts and Constitutional Review

Just like the Newham LEA, being faced with a negative decision by the education authority, the 'Free School Kreuzberg' sought to open the gate to the legal track to have this decision reviewed. Moreover, at first the 'Free School Kreuzberg' also encountered similar difficulties as the LEA as the courts refused to review the administrative decision. On 10 June 1982 the Administrative Court rejected the school's complaint, considering:

"The decision by the authorities is only to a limited extent open to judicial examination. Since the education administration is professionally more competent and most familiar with the educational field over which it is in charge, it is, in deciding about the recognition of a special pedagogic interest, granted some sphere of discretion in reaching this decision."  
(quoted in OVG Berlin 2/2/84: 1b/c).

The Free School Kreuzberg persisted by bringing an appeal against this decision. The Berlin Administrative Court of Appeal confirmed, however, the decision of the Administrative Court, emphasising the fact that Article 7.V GG. explicitly assigns the recognition of 'a special pedagogic interest' to the education administration. It argued, moreover, that in no case could there be an objective answer to the question whether 'a special pedagogic interest' applies and that, any way, there are no legal criteria that allow the assessment of the special pedagogic knowledge required in making this decision (OVG Berlin 2/2/84: 1e). A further appeal to the Federal Administrative Court was rejected on the same grounds (BVerwGE 1986.32: 278). Thus, we find that the German administrative courts are, like the British court, reluctant to review administrative decisions, relying on the argument that the administrative decision requires professional and pedagogic knowledge which the administration may command, but the courts do not possess.

However, these opinions were overruled when, a decade after the initial administrative decision, the case came before the Federal Constitutional Court. Contrary to the opinions of the earlier courts the Federal Constitutional Court considered the case under paragraph 19.IV of the Basic Law:

19.IV Should any person's rights be violated by public authority, recourse to the court shall be open to him. (...)

Note that this provision translates very well into the framework of the gate model, providing an open gate through which the revision of a decision can be pursued under the condition that some one's rights are at stake. The Federal Constitutional Court argued that the decisions of the administrative courts violated this provision as they withheld a full revision of the administrative decision (BVerfGE 88, 40 at 56 ff.; cf. OVG Berlin 2/2/84: 1f; BVerwGE 1986.32: 279; Schmidt-Aßmann & Groß 1993).

The main right that the Constitutional Court regarded as having been violated in this case was the right to erect private schools as asserted by Article 7.IV of the Basic Law. Given the value constitutionally ascribed to the right to education, the Federal Constitutional Court argued that the education administration cannot be allowed

"unlimited discretion in deciding to what extent she will allow private schools to develop.

The concept of a 'special pedagogic interest' rather provides an objective condition for the approval of private elementary schools. Whenever it applies, the education administration has to recognise it." (BVerfGE 88,40 at 50; cf. OVG Berlin 2/2/84: 1e).

Thus, overruling the decision of the Federal Administrative Court, the Federal Constitutional Court asserted that the concept of 'a special pedagogic interest' is fully open to judicial review (cf. Weiler 1985).

Here, however, the Federal Constitutional Court introduces a distinction between the concept of 'a special pedagogic interest', which is fully open to judicial examination, and the application of this concept by the education administration in deciding about the approval of a private school. Applying the concept of 'a special pedagogic interest', concedes the Court, requires a certain degree of discretion. Hence, to the extent that the decision of the administration cannot be determined by law, courts must indeed refrain from reproducing the work of the administration. Nevertheless, the practical difficulties in examining the administrative recognition of private schools should not be exaggerated. The Basic Law imposes strict limits upon the discretion of the administration and, even though professional standards may be disputed, the knowledge and experience that is required for the assessment of a pedagogic concept can generally be made available to the courts, either by reports of the administration itself or by experts (cf. Herzog 1992; Ladeur 1990; Schmidt-Aßmann & Groß 1993).



One might well wonder whether this distinction between conceptual determinacy and indeterminacy in application is not highly artificial and can be upheld in practice (cf. Schenke 1988: 323). However, the Federal Constitutional Court does effectively bind the administration and the lower courts as it outlines the considerations that have to be relied upon in deciding whether a private school serves 'a special pedagogic interest'. Decisions that fail to heed these considerations remain open to revision. Thus, only a specified number of arguments is left to the education administrations by which they can justify the rejection of an application. For instance, the argument that a similar private school already exists in the *Land* is found to be invalid for rejecting an application (BVerfGE 88,40 at 53). Similarly the Federal Constitutional Court restricts the grounds on which courts can reject an appeal by sifting considerations that it holds to be open to full judicial examination from those that are not. Asserting the 'complexity' of the subject matter will, for instance, not suffice to overrule an administrative decision, since the court is expected to be able to inform itself sufficiently (BVerfGE 88,40 at 58; cf. Geis 1993: 26 ff.; Schmidt-Aßmann & Groß 1993). The main possibilities that the Federal Constitutional Court allows for rejecting an application are the demonstration by the education administration that an approval would either have a detrimental effect on the quality of the public school system or that there are no significant differences between the pedagogic concept and the existing public elementary schools. It is precisely these considerations that courts are expected to be least able to examine.

### Discussion

Among the different courts encountered, the German Federal Constitutional Court stands out for the prominence it claims in the German debate on choice in basic education and the extent to which it regards the revision of political and legal decisions as a desirable and viable enterprise. In marked contrast, the British Trial Court sought to restrict judicial review so much that it became virtually non-existent. Notably, it conceded as an ultimate bottom-line that the Minister's decision could only be

effectively challenged if it had been "so outrageous in [its] defiance of local or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". In this case the issue of judicial review is complicated by the fact that the decision was made by the Secretary of State, who, because of his position at the political centre, carries great authority. However, the fact that the discretion ascribed to him is taken to imply that there are no criteria at all to which he is bound, and that therefore none of the substantive points at issue between the LEA and the Secretary of State were open to revision, leaves him almost completely unaccountable and denies that the political question under consideration is so multifaceted that it is bound to elude the capacities of a single political actor (cf. Jung & Kirp 1984: 635 ff.).

If instead the Trial Court had taken its reviewing task more seriously, it might have contributed to the legitimisation of the grant-maintained schools policy which, as we found earlier, remains open to political contest. I am not saying that it should have re-considered the decision of the Secretary of State completely, but it could have tried to flesh out the principles which guided the weight he assigned to the different considerations. For this the practice of the Federal Constitutional Court in making sense of the concept of 'a special pedagogic interest' may serve as an example. A particular point on which the Newham case warranted clarification was, for instance, the relation between the government policy to remove surplus places and its commitment to increase the number of grant-maintained schools.<sup>92</sup>

The Federal Constitutional Court appears to be the legal authority most sensitive to the new demands for choice in basic education. In contrast, we may not how little the

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<sup>92</sup> For the importance of this point in the further development of basic education policy in Britain, consider the following finding:

"For those schools for which we have data, nearly one half (107/227) were identified by their LEAs in connection with reorganisation schemes even though they were not necessarily subject to a Section 12 or 13 proposal at the time of the parental ballot [as was Stratford School, BC]. This indicates that, in some cases, the mere discussion of possible closure or change of character may have been enough to trigger the GM process. It indicates too that probably a greater proportion of schools than has hitherto been thought chose to try for GM status because they thought their futures were under threat" (Halpin, Fitz & Power 1993: 18).

In other words, serious initiatives on the side of the LEA to remove surplus places by school closure or reorganisation are all too likely to be obstructed by the schools concerned opting out.

Berlin administration and the three administrative courts that considered the case earlier anticipated the reasons which the Constitutional Court eventually brought to bear upon the case. The first hearing at the Berlin Administrative Court served to clarify certain points and its decision further led the appellants to restate their case. However, the other two administrative courts more or less restated the first adjudicative dictum. Here the question is raised whether authoritative powers are efficiently allocated, or whether in effect little delegation is achieved between the Federal Administrative Court and the Administrative Court of Appeal. Considering that having an administrative decision reviewed already constitutes a form of appeal, after which another three authorities went over the decision, so that in the end the case was considered at five instances, one may come to think that some instances in this chain of appeals may well be redundant. However, our analysis of one single case surely does not put us in a position to reach a definite conclusion on this issue.

In turn, however, the distinctive stance adopted by the Federal Constitutional Court might well lead her into conflict with other authorities. The Court probably succeeded in preventing such conflicts with legal authorities, as the cautious way in which it settled its decision served to confirm its authority over the other courts. However, as we saw earlier, things did not run that smoothly in its communication with the political authorities in the *Länder*. The difficulties these latter still seem to have in adopting a stance more favourable to demands for choice in basic education point not only towards persisting substantive problems regarding the right to education but also to more institutional problems in the way authority has been allocated among the political agents involved in the administration of this right.

## V) CONCLUSION

What sense does it make to talk about a basic right to education in Great Britain and Germany? At first sight it does not seem to make any sense in the British context. There is no British Bill of Rights in which the basic right to education has been recognised. Notably British courts combine a reluctance to recognise any such right with a

reluctance to review decisions of political or administrative authorities (cf. *R v. ILEA, ex parte Ali and Another* 1990; Lonbay 1993). Still the concept of rights is far from foreign to the political discourse on education. Indeed, it appears to fit rather well with the political moves made by the Conservative government to widen choice in basic education (cf. Jonathan 1993).

The arguments of the first three sections of this chapter, in which I outlined the theoretical underpinnings of a basic right to education, can be used for a critical assessment of the policy adopted regarding grant-maintained schools. In many respects the British commitment to diversity in basic education can find support in the theoretical arguments I outlined. Expanding pupil's options to choose in basic education allows them the opportunity to express the diversity of their claims instead of subjecting them to a single, authoritative standard. What is more, I argued extensively that there is a common societal interest in diversity in education, under the condition, however, that this diversity merely expresses differences in preferences and can be warded off from reflecting differences of wealth or differences of life environment or, up to a set age limit, differences of ability.

In this light the grant-maintained policy raises two critical questions. Firstly, there are reasons to doubt whether the Conservative government indeed initiated grant-maintained schools to meet a distinct range of preferences among pupils. Rather its initiative appeared mainly to be motivated by narrow political motives to disempower the Local Education Authorities. So far the public has only expressed a limited interest in grant-maintained schooling. Indeed, much of their popularity among pupils and parents appears to derive mainly from strategic motivations, as opting out offers a way to avoid cut-backs required by surplus-places and tightening budgets (Halpin, Fitz & Power 1993: 18). The integrity of the grant-maintained policy is further put into question by the second point that regards the political need to secure that diversity in schooling will not unwarrantedly exacerbate differences in wealth and ability. Though we noted that the Conservatives initially inserted some precautions against grant-maintained schools developing into 'better class schools', they have pointedly failed to

address these concerns in more recent debates. It appears instead that the Conservatives are willing to neglect these precautions if that will make the grant-maintained project into a political success among those who flee comprehensive education, even if this will severely disadvantage for those left behind.

These considerations also bear upon the assessment of what was decided in the case of Stratford School. Undeniably there was a sympathetic ring to the Secretary of State's words when he considered that there was a need to provide local parents with a greater degree of choice in an area of social deprivation such as Newham in which it is beyond the means of most parents to contemplate private education for their children. Though his decision certainly served the interests of the parents who sought to retain Stratford School, it may be disputed to what extent the change to grant-maintained status indeed offers a substantively different option in education. The main effect achieved by the Secretary of State's decision is probably its obstruction of the intentions of the Local Education Authority and this may well reflect detrimentally upon the interests of the pupils in the other schools under its control.

Thus the openness of the British political system towards social claims turns out to be clearly biased in favour of claims that serve the Conservatives' ideology of expanding consumer choice. Problems appear when it comes to individual and societal interests in comprehensive schooling. The main representatives of these interests in the political debate are the Local Education Authorities which the government seems determined to oppose in every respect possible. The authority of the LEAs is further limited as the British courts show themselves unwilling to review the Secretary of State's work. Nevertheless the British case also shows how no central authority can simply claim complete sovereignty in a policy field. Notwithstanding the Conservatives' effort to undermine their powers, the LEAs remain crucial actors in the field. Moreover, the complexity of the field has induced the government to found the Funding Agency that with its regional offices establishes new potential political sites with which the government will still have to contend. In one way or another such, more

peripheral, sites will continue to raise social claims and force them to the attention of more central political authorities even if they do not fit the Conservative agenda.

In Germany a basic right to education has been entrenched in Article 7 of the Basic Law. From its original conception in the Weimar School Compromise onwards, this article has recognised both the societal interest in one comprehensive school system that does not allow for the fostering of unjustifiable differences between pupils, and the interest in certain kinds of diversity finding expression in the school system. Thus this basic right to education does not lay down a hard formula but is itself an attempt to reconcile a number of considerations that are in potential tension. What is more, as society changes, different considerations contained in the basic rights may come to the fore in turn, and this is exactly what we witnessed in the case analysed. While for a long time the provision regarding 'a special pedagogic interest' has remained of secondary interest besides the provision for religious diversity in basic education, this changes when claims are raised like the one by the 'Free School Kreuzberg'. And while administrative authorities may not immediately be prepared to consider such a claim seriously, the guardian of the principles contained in the Basic Law, the Federal Constitutional Court, is to make sure that the public interest in a certain diversity in basic education is given sufficient weight.

Indeed there seems little reason in the case of the 'Free School Kreuzberg' to fear that it would generate unjustifiable differences in wealth or class between pupils in and outside of its walls, especially since the commitment to the priority of the public school system appears so firmly entrenched in the political system. At the same time a too single-minded approach to the public school system may well become desensitised to pupils who do have genuinely distinctive preferences, and may well dampen all incentives to continuously search for better forms of schooling (cf. Ladeur 1990). It is these considerations that were cautiously raised by the Federal Constitutional Court.

However, it is one thing to have a Constitutional Court that is able to formulate a careful balancing of the considerations involved in the recognition of private schools, it is another step to have the whole political system administer a coherent policy

throughout society. Most disconcertingly no German political authority seems able to initiate a structural re-consideration of the administrative practices regarding private schools. On the one hand, the Federal Government seems to acquiesce in the understanding that the politics of basic education can mostly be left to the *Länder*. On the other hand, the politicians and the administrators in the *Länder* seem to lack both the political courage and the financial lee-way to give full effect to the policy direction indicated by the Federal Constitutional Court. Thus far their moves have mainly been defensive, to the disadvantage of private schools.<sup>93</sup>

Comparing the analysis of these cases with those considered in the former chapters yields probably the most precise answer to the question 'what is different about social rights?'. Obviously the decisions required to decide over claims in education appear to be considerably more complex than those involved in, for instance, the right to free speech, as they involve numerous considerations that are rarely fully transparent. However, just as the last chapter demonstrated that questions of free speech do not allow for simple answers, so have I sought to demonstrate in this chapter that it is still possible to consider questions of basic education by rational political argument. Such rational argument is possible when we have a clear conception of the basic political principles that can be justified in each case. Just as in the cases of the basic rights to property and to free speech, I argued that the basic right to education can essentially be justified because the satisfaction of claims to education serves a public good. This public good is the security and the value all members of society derive from having each other's capacities developed through education.

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<sup>93</sup> In recent times the Social-Democratic factions in some of the German *Länder* have taken the initiative to give more autonomy to state schools, most notably in the 'city-states' of Hamburg and Bremen. As more autonomy will widen the extent to which schools can vary from one another, these proposals may serve to widen the range of choice pupils have in basic education. Interestingly, critics of these initiatives have held it against the Social-Democrats that they appear to follow the British New Right example. I owe this information to Professor Ladeur.





## CONCLUSION AND PROSPECTS

Basic rights, I have argued, are best justified by demonstrating that each of them constitutes a public good in which all members of liberal democratic societies can be taken to share an interest. In the case of the basic right to private property this public good was identified as the market economy, the basic right to free speech constitutes the public good of an open culture, and the basic right to education secures the public good of a societal environment in which worthwhile and effective interactions are possible. Thus basic rights provide security to certain ranges of action that not merely serve the self-interests of the actors involved but in which society at large takes an important interest.

Basic rights appear as a distinctive category of norms that secure a wide range of public goods that enrich the daily lives of citizens in liberal democracies. A range of norms that includes the right to private property as well as classical civil rights and twentieth century social rights. But, as we may note further, also a range of rights that should not be taken to correspond to a universal idea of human welfare, to the essence of human dignity, or to a set of universal human rights. Basic rights reflect a set of particular needs and interests members of particular, liberal democratic, societies have developed in the course of their particular histories.

The way the public good argument accounts for basic rights, moreover, also deviates strongly from many alternative approaches. For each basic right analysed the argument has, for instance, been made that it may also be accounted for as corresponding to the value of liberty. However, it generally cannot be made clear what exactly liberty requires: liberty may require private property but also the fulfilment of social needs, it may require freedom of speech but also protection against harmful defamation, it may require freedom of choice in education but also the provision of

facilities. In short, values like liberty often remain indeterminate. Furthermore, in pursuing libertarian arguments it often turns out that these are particularly insensitive to the ways individuals' actions interrelate and how one's desires may impinge upon the interests of others.

By relying on the interests one directly or indirectly has in the protection of certain claims of others, the public good argument puts basic rights on rather firm political foundations. It does not rely on a particular set of values or on a particular morality that, even if they are actually endorsed by people, may still fall short from actually motivating them to bear certain duties. The public good argument provides a rational reconstruction of the reasons basic rights provide for yielding to certain duties, even if one may not recognise their validity at first sight.

Such a rational reconstruction is warranted time and time again, in each individual case in which basic rights are applied, to make sure that all interests involved are taken into account. That way it can be ensured that a claim under a basic right is not regarded merely in isolation but that interests of "third party beneficiaries" and the common interests in certain public goods are regarded as well. Third party beneficiaries are those actors that can directly be identified to have an interest in having the claim of the claimant protected. In the case of the basic right to private property, third party beneficiaries may be related to the proprietor as buyers or users. In the case of the basic right to free speech, they constitute the audience of the speaker. In the case of the basic right to education, they are the fellow citizens with whom the pupil will ever interact.

The common interest in the preservation of the public good constituted by the basic right plays a special role in every case in which claims protected by basic rights are challenged. Withholding such a claim comes at the extra cost of threatening the security of the public good. Thus we found in the case of the right to private property that withholding claims to property may induce "demoralisation effects" on other proprietors that may cause them to reduce their input into the market economy. Similarly, restrictions of free speech may have "chilling effects" which inhibit participation in the open culture. Finally, withholding claims to education may have

"neighbourhood costs" that impoverish society by reducing social and cultural diversity and cause general insecurity in social interactions.

While the public good argument thus serves to secure that all relevant interests favouring claims upheld by basic rights are taken into account, basic rights are not rightly applied if serious consideration is not also given to the interests that may motivate conflicting claims. Basic rights cannot be invoked to simply brush aside the kinds of claims that may conflict with the claims protected by basic rights. Opposite to private property there are, for instance, genuine claims to public facilities (like infrastructure) and claims of social need that merit consideration. Free speech may have to be limited when people oppose it as they are harmed by it. Claims to education have to give way as there are limits to the taxes that can reasonably be charged to provide for all wishes and as diversification in education imposes severe costs on those pupils who have less resources to exercise a wide range of choice.

Hence, basic rights are no absolutes. They are subject to reasonable limits. The interests of all involved in conflicts about basic rights as well as the sense of security that is required for each public good constituted by basic rights require that such limits are defined as clearly as possible. The categories of conflicting claims that may give rise to a feasible challenge of claims under basic rights have to be clearly delineated to give *locus standi* before the courts. Such an approach can be developed most clearly in the case of the right to free speech, for which I argued that categories are to be defined in terms of the different kinds of harm speech may do. In the cases of the right to private property and the right to education, the state operates as a crucial mediator between conflicting claims. With private property my main aim was to demonstrate that interventions in private property, besides the provision of public facilities, may also be justified for recognised social needs. In the case of the right to education I focused on the distinction that can be maintained between diversification in education for the sake of differences in preferences, on the one hand, and diversification reflecting differences in wealth and life environment, on the other.

Basic Right	Public Good	Claimant	Third Parties	Public Costs (Insecurity)	Competing Claims
Private Property	Market-Economy	Proprietor	Buyers, Users	Demoralisation Costs	Public Facilities Social Need
Free Speech	Open Culture	Speaker	Audience	Chilling Costs	Harm
Education	Effective Society	Pupil	Fellow Citizens, Producers	Neighbourhood Costs	Finance

Table 5.1: Structural comparison of the characteristics of three basic rights.

As important as it is to lay down clear principles defining the importance attached to different interests relative to each other, they do not determine a clear decision in all individual cases of conflict between claims. Each case requires judgement in imagining the nature of the interests at stake and comparing them against each other. What judgement in this sense requires can only be directed by principles but cannot be determined by them alone. From this perspective the independent value of the cases that I have considered becomes apparent. As it is only in dealing with actual cases that our sense of judgement is invoked in considering the actual interests of the actors involved, they are more than mere illustrations of the theoretical ideas developed.

De Rothschild Ltd. saw its property claim - to have its preference for an alternative scheme requiring the compulsory purchase of its land duly considered - withheld. Under British law, once the need for a compulsory purchase was recognised, the interests of the proprietor counted for little and no concern at all was given to the possible "demoralising" impact such treatment might have on the security of proprietors in general. In Germany we found the claims of a proprietor of an allotment structurally hollowed out as much value was attached to the preservation of allotments in general and to the security of the interests of allotment-holders in particular. At times the implications of the German allotment policy turned out to be too wide-ranging and too severe to be reconcilable with the constitutional right to private property. In the course

of a couple of decisions by the Federal Constitutional Court and several legislative initiatives, new regulation developed drawing a new balance in which the special protection of allotments was more finely attuned to the specific aims it was to serve, its range of application restricted, and the protection of allotment-proprietors as far as possible restored.

That speech may hurt was demonstrated by the cases of Vladimir Telnikoff and Franz Josef Strauß. The statements concerning Telnikoff that Vladimir Matusevitch had published in the *Daily Telegraph* - qualifying the former as a "racialist" and accusing him of advocating the introduction of blood-testing as part of the recruitment test of the BBC Russian service in order to maintain racial purity and the dismissal of employees of the BBC Russian service on racial grounds - were found by the British courts to lack justification, and severely punished. This case showed that under British law such a case of defamation is mainly regarded as a private conflict, involving merely the personal interests of the two actors opposing each other. Little recognition is given to the wider social interests there may be in the freedom of speech, particularly those of "third parties" and those in the secure preservation of an open culture. In contrast, the German courts eventually declined to punish Ralph Giordano's statements that labelled Strauß as a "forced democrat" and associated him with the "federal-German version of the national-socialist führer cult". Indeed, in Germany, the concern with the many values served by free speech is so great that at times one may even wonder what harm speech would have to do before it was recognised as intolerable.

Finally, I considered two cases involving the recognition of schools. Here the British political system suggested a place for rights as choice and diversity have become central concerns in recent Conservative policy. The parents of pupils of Stratford School in London were successful in retaining their school by converting it to grant-maintained status. However, as neither the values of choice and diversity, nor the legitimacy of competing considerations of social integration and fairness in schooling opportunities have been legally entrenched, the protection of interests in education turns out to depend not so much on principles (like a basic right to education) as on the

ideological predispositions of the government. In contrast, the German case of the 'Free School Kreuzberg' demonstrated the impact the formal recognition of the basic principles underlying the right to education may have. Not only did the Federal Constitutional Court challenge the decision to uphold the rejection of the application of this school, it also pushed for a widening of the options of choice in basic education as it was warranted by the combination of constitutional principles and current social developments. This case also shows, however, that as certain claims can only be met through a big and complex administrative apparatus, it becomes ever more difficult to deal promptly and justly to new, distinctive claims. Even though it has been recognised that the basic right to education warrants the widening of options for choice in basic education in Germany, administrators have clear difficulties in adapting, and, for the time being, German citizens have experienced little change.

Although stereotyping has to be avoided, considering the ways these different basic rights are maintained in Great Britain and Germany also suggests some general observations on the status basic rights enjoy in these countries. As regards Great Britain, for a start, one cannot avoid the impression that, in the absence of a Bill of Rights, the legal instruments are lacking to secure a full protection of the interests at stake in basic rights (cf. Zander 1985; Dworkin 1990; Lester et.al. 1990). In court conflicts of claims that involve basic rights are often reduced to the mere balancing of the personal interests of the plaintiff and the defendant. Thus insufficient consideration is given to the additional interests that weigh on the side of basic rights, those of "third party beneficiaries" and the preservation of the public good, and, correspondingly, the costs of withholding a claim protected by a basic right are under-appreciated. This, I think, became particularly clear in the cases of *de Rothschild Ltd.* and of *Vladimir Matusevitch*.

Besides the lack of substance of the concept of basic rights in British law, their maintenance is further hindered by the reluctance of the courts to substantially review the decisions of political and administrative decision-makers. In all British cases the only principles that the courts deemed themselves authoritative to apply were the

Wednesbury/Ashbridge rules that limit the court's overruling of political decisions to those extreme cases in which the decision-maker has acted demonstrably unreasonable (*Ashbridge Investments Ltd v. Minister of Housing and Local Government*, [1965] 3 All ER 374; *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*, [1948] 1 KB 223, [1947] 2 All ER 680; Wade & Forsyth 1994: 399 ff.).

Though British law appears rather resistant to radical change, there are certain significant signs that indicate a growing inclination to employ broader principles, such as basic rights, in adjudication and to review political and administrative decisions. The former development may be illustrated with Lord Ackner's speech in *Telnikoff v. Matusevitch*, [1991] 4 All ER 817 at 826 ff. (cf. Section 3.IV above). The latter development appears as an unavoidable consequence of the mounting number of government decisions that are brought to court, like in the cases of *De Rothschild* and *Stratford Secondary School*, and the expansion of the body of administrative law, the latter notwithstanding strong opposition among politicians (cf. Sueur 1996).

In Germany, on the other hand, the Basic Law turns out to be an instrument of extraordinary power in preserving basic rights. Besides giving formal recognition to basic rights, it also concedes their limits, and serves as the central reference point for debates about which values and interests these rights are meant to serve. Furthermore, it has in the Federal Constitutional Court a guardian that yields great legal and political authority and shows itself impressively capable in matching the law to its contemporary social context.

Nevertheless there are two general points of concern regarding the preservation of basic rights in the Federal Republic. First, there is the recurring danger that the constitutional rights laid down in the Basic Law are sanctified and turned into (near) absolutes. This danger became particularly apparent in the case of the right to free speech. Possibly under influence of the myths with which the U.S. First Amendment has become embroidered, the right to free speech in the German Basic Law has come to be regarded to serve a wide range of values all of paramount importance to a liberal democratic, civilised society, ranging from personal dignity to strong democracy.

However, as I have repeatedly argued, when a basic right takes on such a social impact, it may well hinder the recognition of social claims that may stand in tension with it, for instance people's objections to certain degrading and offensive speech. However, much to the credit of the Federal Constitutional Court, it generally demonstrates itself well aware of the limits of basic rights and the need to deal with individual cases by carefully balancing all the interest involved.

The second problem in the German context similarly points beyond the general formulation of basic rights and their surveillance at the highest judicial level. The sheer size of Germany, its federal structure, and the expansion of the state apparatus, obviously complicate the way in which the insights embodied in basic rights can directly be brought to bear upon the whole range of political decision-making taking place. As became particularly apparent in the case of the 'Free School Kreuzberg', when basic rights warrant a change of policy, it can only come into effect extremely slowly as each administrator's capacity to change is inextricably intertwined with political factors that are beyond her immediate control. While the Federal Constitutional Court plays an invaluable role in picking up signals from society and initiating change, to succeed such initiatives require highly effective means of co-ordination between different political agents. At the moment there appears a real need to critically evaluate the existing structure of administrative co-ordination and to search for ways in which it may be updated.

The ways basic rights are preserved in different countries are, of course, subject to mutual influences. I have already noted the way U.S. First Amendment jurisprudence bears upon the preservation of free speech throughout the liberal democratic world. It is reflected in the decisions of the German Federal Constitutional Court (e.g. BVerfGE 7,28 at 208) as much as in Lord Ackner's speech in *Telnikoff v. Matusevitch*, [1991] 4 All ER 817 at 826 ff. (cf. Barendt 1993). Great Britain and Germany are, moreover, subject to converging pressures as they are major partners in the process of European integration. Basic rights play a central role in the process of political integration as they can represent the basic principles that are equally recognised in all member states of the



European Union. This, however, sounds easier than it is. Although one may turn both to the European Treaties and to the European Convention of Human Rights to find evidence of the recognition of basic rights, a continual struggle over authorities between the national governments as well as among the different European institutions has left their status and the ways in which they are actually to be preserved in a state of flux (cf. Schwarze 1986; Rodriguez Iglesias 1992; Grimm 1995; Joerges 1996).

Especially in the European context, I would hold on to the thesis that, while basic rights are ultimately applied by political and adjudicative authorities, their fundamental meaning derives from the moral perceptions of people in the societies in which they are upheld. Thus the formal conceptions of basic rights in liberal democracies must be oriented towards the views held in these societies. The dependency of the formal conceptions of basic rights upon citizens' views is the greater as, as I suggested in the last chapter, authority has in modern democracies become disaggregated so that authoritative power is yielded by many different actors that are to different degrees subject to full scrutiny by the central political authorities. The application of basic rights cannot be controlled by one central agency, like a Supreme Court, but is eventually in the hands of many different authorities.

In this light we may finally turn to some rather topical political issues that bear upon the place of basic rights in contemporary liberal democracies: their relation to democracy; the way they may be affected by the "multiculturalisation" of modern societies; and the prospects for new basic rights.

## **1) BASIC RIGHTS AND DEMOCRACY**

If basic rights can be regarded as a founding idea for liberal democratic politics, it shares this position with an other concept: representative democracy. Written constitutions reflect the importance of these two concepts as they generally contain, on the one hand, a Bill of Rights and, on the other hand, a set of regulations defining the functioning of the representative institutions. Violations of basic rights or disrespect of representative institutions are the main marks by which any domestic or foreign

political actor excludes her- or himself from the liberal democratic community and turns into its enemy. However, while these two ideas are closely related historically, a number of tensions have appeared between them in the practice of current liberal democracies.

The value of representative democracy relies on the idea of democratic self-government: in liberal democracies the citizens are governed by themselves. The value of basic rights suggests, on the other hand, that citizens' capacity to govern themselves is substantially restrained by rights as principles (Michelman 1988). Political theorists often seek to affirm the priority of one of these two values over the other. Under influence of "republican", "majoritarian" and "proceduralist" theories, primacy has been given to representative democracy over basic rights (Barber 1984; Dahl 1989; Ely 1980). On the other hand, authors have been accused of holding on to basic rights at the cost of democracy under the influence of "constitutionalism" and "liberalism" (Rawls 1971; Dworkin 1977; 1981a). This debate has a concrete point of focus in the practical question whether courts are to have the authority to review decisions adopted by parliament: how can one subscribe to the value of democracy if one allows its results to be subject to the opinions of unelected judges interpreting the general phrases of the law? what justification can there be for allowing the courts such a role? (cf. Brest 1981).

The weddedness of representative democracy and basic rights in liberal democracies raises the challenge of how the tensions between them can be resolved. As Frank Michelman has observed: "if we are sincerely and consistently committed both to ruling ourselves and to being ruled by rights, there must be some sense in which we can think of self-rule and rights-rule (if not exactly 'people' and 'rights') as amounting to the same thing"<sup>94</sup> (Michelman 1988: 1501; cf. Habermas 1992: 129 ff.; Waldron 1993f). The fear of rights among democrats is, I think, mainly a reaction to rather rigid conceptions of rights as side-constraints or rules (cf. Section 1.I above). Conceiving of

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<sup>94</sup> I have inserted "rights" where Michelman writes "laws", but this does not distort his intention, I think [BC].

rights as reasons suggests viable ways to integrate them into the democratic process. However, I want to argue further, against rigid conceptions of democracy, that basic rights play an essential role in liberal democracies, that no representative institution can substitute for, and that they therefore warrant special recognition.

Those who criticise rights in the name of democracy often appear to suppose that in parliamentary democracy we command an uninhibited realisation of the democratic ideal of the people's sovereignty that can only be distorted by institutions like judicial review (cf. Walzer 1981: §§V-VII). However, liberal democracies are constituted by way of institutions which, even though they may be extraordinarily effective, are bound to remain imperfect realisations of this ideal. The main reasons for this are practical constraints of time and capacity. Not all citizens can be consulted for each political decision, they would not even want to be. The representative institutions that have been devised as an alternative to complete and infinite political participation allow, however, for distortions of the people's will. Representation is unlikely to fully and equally reflect all interests in society, the presence of some groups may be disproportionate relative to others. What is more, the institutions of parliamentary democracy are liable to manipulation, most notably through such practices as strategic voting and log-rolling, so that the results they produce will not reflect the original balance of interests (cf. Riker 1982). I am not arguing that representative democracy is in the end nothing else but the dirty game of power-politics, the point I want to make is that the institutions we identify with democracy cannot be taken as the perfect embodiment of the people's sovereignty and that "checks and balances", as provided by basic rights and judicial review, may therefore be justified (cf. Waldron 1993g: §10).

One may even challenge the very ideal of organising the institutions of representative democracy to perfectly reflect the people's will. That ideal ignores the possibility that there is a sense apart from the people's will according to which it may be held wrong or unjust. This sense appeals to an idea of reason that, though finding expression through people's wills, need not coincide with their sum. Following Jeremy Waldron, we may consider that behind the value of the people's sovereignty, liberal

democracy is eventually driven by a deeper ideal, namely "to make authority answer at the tribunal of reason". The viability and desirability of life in a liberal democracy derives from the fact that "its principles must be amenable to explanation and understanding, and the rules and restraints that are necessary must be capable of being justified to the people who live under them" (Waldron 1993b: 44; cf. Nino 1991b). Reason does not manifest itself except in people's wills. However, to give primacy to reason over people's wills serves to recognise that the latter are fallible as well as open to correction. People's wills may change and among all the factors that may induce such change, reason appears as the ultimate arbitrator.

Reason does not yield any determinate answers, it is not a value that can simply be invoked to decide a political issue one way or the other. Appealing to reason serves to make the basic point that democracy is not an ultimate value for its own sake but always subject to substantive views of justice. In dealing with political affairs people's opinions should not be taken as given so that the public choice can be deduced by way of a straightforward calculus or procedure. Rather in democratic politics it has to be conceded that people's wills are open to revision and, indeed, that political action in search for common interests requires this to be so. As people's wills may be fallible, decisions based upon them may be fallible as well, even under perfect democratic conditions. Therefore it will always make sense to check them against the insights of reason.

Throughout this thesis I have sought to demonstrate how basic rights can be regarded as attainments of reason. Basic rights should not be regarded as conservative fetters upon current decision-making; they need not be preserved as a ritual payment of respect to the outworn wisdoms of founding fathers. Through the history of liberal democracies basic rights have emerged as reasons that retain their value across many different situations. If it turns out that they have lost their relevance in the current context, then they might well be abandoned. However, as their validity remains open to rational reconstruction, they merit consideration in every political decision to which they are relevant.

Nor should basic rights be regarded as restraints on the democratic process (Nino 1993: 825; Chambers 1993; cf. Nozick 1974; Dworkin 1977). They cannot be imposed if the reasons they provide cannot be recognised by the people. However, the opposition to basic rights among democrats risks depriving liberal democracies of the substantially rational foundation they have acquired (cf. Dworkin 1981a). It ignores the potential of liberal democracies to learn by experience and to institutionalise this learning in basic rights (cf. Eder 1985).

Rights need not challenge people's capacity to exercise will and judgement. Far from distorting the proper exercise of democratic deliberation and judgement, basic rights as reasons are essential means in directing them. Thus, instead of seeking to reconcile democracy and basic rights by way of a functional argument in which rights are taken as procedural preconditions for the effective functioning of democracy (cf. Habermas 1992: Ch. 3), I take them as giving substantive guidance to democracy. Basic rights require a special place in the political process as the insights they provide may be lost and, more particularly, since they point at interests that need not be directly apparent ("third party interests" and the interests in the preservation of certain public goods), and that therefore are likely to be insufficiently expressed through the people's wills.<sup>95</sup>

The presence of basic rights in the democratic process may be secured through different devices that having different degrees of impact. The most basic step is, of course, to give explicit and official endorsement to their recognition by way of a Bill of Rights. On the other end of the spectrum, to assign the protection of basic rights to special constitutional courts with the authority to reject political decisions, like in the United States and Germany, is the most radical way to secure their consideration. One can, however, also think of alternative ways that, instead of relying on the polarisation

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<sup>95</sup> Instead of a rigid conception of democracy that focuses on the authorities of parliament, I endorse a wider conception of democracy that combines an emphasis on the practice of deliberation (cf. Manin 1987; Cohen 1989; Benhabib 1994; Gutmann & Thompson 1995) with an appreciation of the ways different political institutions can be taken to complement each other in increasing the democratic character of political decision-making. (The latter characteristic may be elaborated by way of the gate-model as introduced in Chapter IV).

of legislature and judiciary, make the consideration of basic rights an integral part of the parliamentary process by, for instance, imposing extra procedural safeguards on the adoption of laws affecting basic rights or opening opportunities for administrative appeal to citizens. Thus different institutional set-ups may express the value of basic rights besides that of representative democracy (Jaconelli 1980). Whether these two ideas can be reconciled depends in the end not so much on the way authorities are formally allocated across different institutions, as on the willingness of the people exercising these authorities to consider and respect each other's considerations, and to appreciate that together they serve the common goal of making "authority answer at the tribunal of reason".

This position strikingly conflicts with the vehement opposition Jeremy Waldron has expressed (in another article than the one referred to above) against any form of judicial review. Waldron asserts that on every defensible conception of democracy

"decision-making on matters of high importance by a small elite [a constitutional court] that disempowers the people or their elected and accountable representatives is going to score lower than decision-making by the people or their elected and accountable representatives. It may score higher in terms of the substantive quality of the decision. But it will not score higher in terms of the respect accorded to ordinary citizens' moral and political capacities" (Waldron 1993g: 39/40; cf. 1993f; Walzer 1981).

Waldron objects to the idea that people's wills as expressed through representative institutions may be fallible and open to correction. His view in this article depends, however, on a rather static view of the political process in which a decision is taken at either one place or an other.

The alternative view I argue for allows that political institutions may mutually influence each other and that together they may genuinely seek to determine the best possible decisions. Judicial review should never issue in a situation in which the courts seek to drain as much authority as possible from parliament. Indeed, actual practice suggests that courts are most careful in ensuring that they can justify their decisions to the people. What is more, as the classical example of the U.S. Supreme Court's contribution to the civil rights movement as well as the more mundane decisions of the German Federal Constitutional Court in the allotment-cases and

regarding private schools analysed above bear out, judicial review may well serve to break through some inhibitions in the representative institutions to initiate legislative action.

Ultimately, the tribunal of reason is constituted by the people. Democracy is to ensure that their will eventually takes effect. Participation and representation as well as basic rights play indispensable roles in developing the people's will. Basic rights may be democratically and justifiably rejected in certain cases as faulty reasons. However, as the sediment of reason, rights are to be regarded as valuable attainments providing a secure and substantial basis for political decision-making. For this reason their preservation merits to be an integral part of the political process. By way of basic rights, liberal democracies secure knowledge of good reasons so that mistaken judgements need not be repeated and injustices, once recognised, need not persist.

## **II) THE CHALLENGE OF GLOBAL MULTICULTURALISM**

Basic rights are recognised in particular societies. Obviously, the composition of these societies, the kind of people that live within them, the interests they have, and the worldviews they endorse, bear upon the system of basic rights that can be justified. Currently liberal democratic societies seem to be undergoing a severe transformation in their composition. Under influence both of immigration as well as of certain internal social dynamics, there appears a resurgence of numerous cultural identities affirming their differences from other members of society and raising distinctive cultural claims. Thus current liberal democracies seeking to preserve basic rights face the challenge of multiculturalism. What implications does this have for basic rights?

The system of basic rights may be taken to give to each individual member of society a status in relation to the others and to the state, it defines certain terms on which interactions can take place. This status may be identified as "citizenship". To rely on the famous essay by T.H. Marshall:

"Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed." (Marshall 1950: 18).

However, besides defining certain terms on which individual members of society can interact with each other, citizenship is often taken to consist of something more, of a sense of belonging, of identity, of being tied to the other citizens by some kind of community bond. In Marshall's words, "Citizenship requires [...] a direct sense of community membership based on loyalty to a civilisation which is a common possession". His account of this sense of membership is further markedly devoid of any romantic flavour: "It is a loyalty of free men endowed with rights and protected by a common law" (Marshall 1950: 24). If a feeling of patriotism may derive from this sense of membership, it is bound to be as controlled and unromantic as the "constitutional patriotism" Jürgen Habermas has argued for in recent years (cf. Habermas 1994).

Of course, this sense of membership attached to citizenship has generally been associated with much stronger sentiments than a mere "loyalty of free men endowed with rights and protected by a common law". In its most affirmative forms it expresses itself through nationalism, invoking, beyond the bond of law, bonds of blood, of a shared tradition and of worldviews (religious and political). Indeed, as Habermas observes: "Built into the self-understanding of the national state, there is this tension between the universalism of an egalitarian legal community and the particularism of a cultural community join[ed] by origin and fate" (Habermas 1995: 31).

Multiculturalism disrupts national bonds and brings to light that the *political* community need not correspond to the community with which one primarily identifies oneself (Kymlicka 1989: 135; Habermas 1994; Raz 1994c; cf. Raz 1986; Chan 1995). Of course, politics has always had to mediate between different identities. In line with that, I emphasised already in Chapter 1 (Section I) that basic rights are not inherently related to one particular way of life. Rather they can be justified as valid across a wide range of different ways of life as long as these share in the common interest in certain public goods. However, in the contemporary world political principles have to be upheld to mediate between people who are not related to each other by any bonds *but* the one established by politics itself. Nevertheless, I hold that basic rights can still be



preserved in contemporary multicultural societies and that they may even become of wider validity.

Complementary to the resurgence of multiple cultures within the realms that were formerly regarded as relatively homogenous nations, we witness a process of transnational political integration. Thus, at the same time that cultural identities are more and more affirmed in sub-national groups, citizens come to perceive the "loyalty of free men endowed with rights and protected by a common law" on a widening international scale. The internationalisation of the political community may primarily be identified with such developments as the ever-closer European Union and other, mainly economic, treaties that reduce the meaning of national boundaries. At the individual level, however, the emergence of a global polis is primarily experienced in the range of claims one can successfully uphold across boundaries. By now I know my claims to private property, free speech and even to education to be equally secure in Italy as in the Netherlands, and many of these claims I may even trust to be able to uphold if I were on the very other end of the globe.

The concept of rights has transcended national boundaries like no other political concept (cf. Jakopson 1996: Chs. 4 & 5). This is above all testified to by the Universal Declaration of Human Rights (1948) and the many other international treaties in which rights have been recognised. The rights protected by these treaties are above all human rights, they are to ensure that all people, everywhere in the world, can be secure in having their human dignity respected. The breadth of contemporary human rights discourse is well sketched by Yasemin Soysal:

"Human rights are now a pervasive feature of global political culture. They are the object of much public debate and social action and organization, enveloping and engendering a wide range of issues - from the protection of ethnic minorities and their cultural heritage to the right to development and employment; from political participation and sexual politics to the right to enjoy peace and access to the amenities of a 'better life' and a 'healthy environment'. The media images of the United Nations' 'peace' missions, the Human Rights Awards distributed by the Reebok Corporation, and Amnesty International's mega rock concerts on behalf of humanitarianism further cultivate the legitimizing moral message of human rights discourse in everyday social space and routines" (Soysal 1994: 42/3).

As promising as the pervasiveness of the language of rights may appear, it clearly does not directly issue in an equally widespread respect for these rights. Nevertheless, as Soysal points out, the spread of rights discourse is not without actual political impact. First, the language of human rights provides people all over the world with a language to articulate certain claims and to hold them to be justifiable. Secondly, the language of human rights serves as a focal point for the establishment of institutions that guard their preservation. Not only do human rights issue in conventions and other legal instruments, they also motivate activities of social movements (like Amnesty International) as well as official bodies (like the U.N. Commission for Human Rights) (Soysal 1994: 44). One may add that human rights also take effect as violations of them meet with sanctions by the international community, stimulating the exit of people and resources from under the regime responsible and denouncing any relations with it.

While the language of human rights conveys through all the world our agreed-upon convictions about the essential nature and value of each individual's human dignity, continuing globalisation also raises the need to recognise basic rights on a transnational level. Though we may not agree with them, regimes that fail to recognise claims to private property, freedom of speech, and education need not by virtue of that be taken as violators of the universal moral principles of human dignity.<sup>96</sup> However, as we interact on ever wider scales, our interests become entwined with those of people everywhere. Observing these developments, Seyla Benhabib writes:

"If in effect the contemporary global situation is creating real confrontations between cultures, languages and nations, and if an unintended result of such real confrontations is to impinge upon the lives of others, then we have a pragmatic imperative to understand each other, and to enter into a cross-cultural dialogue" (Benhabib 1996: 25).

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<sup>96</sup> To argue that violations of freedom of speech need not be taken as equally objectionable as violations of genuine human rights may give rise to some objections. One may argue that there is a universal and uncompromisable moral ground for freedom of speech. As I have argued before, I think the status of freedom of speech is likely to be exaggerated in contemporary liberal democracies (cf. Raz 1992: 137; 1994b). To appreciate this it is important to distinguish the right to free speech from the right to freedom of thought. While the latter qualifies indeed as a human right, the right to free speech cannot simply be taken as a necessary extension of it (cf. Mill 1859: 17). The human right to freedom of thought warrants universal recognition and does not allow for any exception. The basic right to free speech may, however, meet with strong objections in certain particularly sensitive societies that, I think, may justify it not being fully recognised.

This directly bears upon basic rights. As global interactions cause our interests to be highly transnationally interdependent, the international recognition of basic rights is warranted to provide a framework in which the distribution of claims upheld and duties imposed between each other can be justified. Looking at individual basic rights, there is remarkably little difficulty in recognising the benefits - both in terms of public goods and as concrete third parties - that individuals can derive from their recognition at international levels. It has long since been recognised that nations stand to benefit from other nations recognising the right to private property as this facilitates the expansion of the public good of the market-economy. Interests in free speech are similarly internationally shared, as is well illustrated by the global dimensions of the Rushdie affair. And, finally, given our increasing need to communicate with people all over the world, we have an indisputable interest in their seeing that their claims to education are met.

Although global multiculturalism does not dissolve the grounds on which basic rights may be justified but instead suggests the need to do so on international levels as well, it obviously also comes with a number of problems that not only hinder the viability of effective international recognition of basic rights but also threaten their continuing efficacy at the national level. For a start, as political relationships increasingly move beyond the national level, there is no state apparatus to match it. What is more, it seems very unlikely that a political structure will ever come to be established at an international level resembling the centralised nation-state. Notably, the old nation-states themselves stand in the way of such a development as, however much of their sovereignty they will have to give up, they are unlikely to completely subject all their authorities to an international body.

One might analyse this development in terms of the "disaggregation of authority" that I relied upon in Chapter 4 to develop the 'gate model'. An alternative formulation is coined by Yasemin Soysal, who refers to this development as the "emergence of multi-level politics" engendering "new frameworks for collective

mobilizing and advancing demands within and beyond national boundaries". Soysal is particularly interested in demonstrating the promises of this development:

"The diffusion and sharing of sovereignty among local, national, and transnational political institutions, enables new actors, opens up an array of new organizational strategies, and facilitates competition over resources and definitions. Transnational courts and the institutions of the European Union, as well as various nation-state agencies, national courts, subnational (local) governments, become targets for diverse claims and political action" (Soysal 1996: 13/4).

However, severe difficulties arise from the fact that for the time being we lack clear and definite conceptions about how different political relations are to be checked by the adequate authorities (cf. Habermas 1995: 35 f.). While, on the one hand, internationalisation allows a whole range of political relations to go unchecked, we find, on the other hand, that a lot of political effort is wasted as long as the authorities of different political agencies (of a different kind or at different levels) have not been effectively delineated from, and attuned to, each other.

A second problem haunting the continued preservation of basic rights is that with more varying identities, the chances increase that basic rights cannot be relied upon to mediate between them. Difficulties arise in particular as certain identities may be constituted in opposition to certain public goods that are generally secured by way of basic rights. Claims to free speech are, for instance, extremely hard to justify to people that object to an open culture. Another example are claims to private property that may carry little force against people who identify the market-economy primarily as inducing the ruthless exploitation of people and natural resources. Indeed, as our political community expands and the world changes, we may have to come to appreciate the public goods constituted by basic rights in new ways and may even have to define new basic rights to suit our common interests better.

This brings us to the final problem which is that the resurgence of multiple cultural identities may itself be a symptom of a severe discontent with the expansion of the world we are connected to. From this perspective one's cultural identity serves in a way as a protected sphere in which we can ignore the infinite number of options, demands and responsibilities that are put before us. Indeed, the security that people find

in their own culture is an interest that merits political consideration just as much as any other. The question is how it is to be provided for. Maybe this could be done by way of new basic rights.

### **III) NEW BASIC RIGHTS**

According to T.H. Marshall's theory of citizenship, basic rights were established in successive waves. Civil rights were established from the late Medieval period onwards and culminated in the American and French revolutions of the end of the eighteenth century. Throughout the nineteenth century the working classes and women fought for the recognition of political rights for all. Then the twentieth century was marked by the establishment of the modern welfare state and the recognition of social rights. Marshall regarded the establishment of social rights as "the latest stage of an evolution of citizenship" (Marshall 1950: 7). However, as societies change, the question recurs whether there are prospects for new basic rights.

The establishment of basic rights is always bound to meet with resistance as people are unwilling to yield to the duties they serve to uphold. Such resistance can be overcome if these basic rights can be demonstrated to serve certain public goods in which all have an interest. Eventually, this relation between the recognition of basic rights and people's interests in certain public goods has to be born out in actual social experiences. However, the theoretical reconstruction of this relation that I have sought to provide may, besides serving the purpose of mere understanding, also be re-incorporated in social action to serve critical as well as constructive purposes (cf. Section 1.III above). The theory may be used to determine a set of conditions that claims have to meet to warrant protection by basic rights. In turn we may use these conditions to consider certain claims that currently warrant political attention to assess the prospects for them to result in basic rights.

The distinctive feature of basic rights is that they serve to constitute certain public goods in which all can be taken to have an interest, even if it obliges them to certain duties. So the question is what the constitution of such public goods requires.

Ultimately they require rights to have an "institutional effect" in that the security they provide for a certain range of actions makes a whole distinctive configuration of interactions conceivable (cf. Section 1.I above). This is exactly what the basic right to private property does with the market economy, and the basic right to free speech does by way of an open culture. We found the basic right to education to have a similar effect, though it may be symptomatic of the more disputed status of this right that this effect lets itself be less easily identified with a determinable public good.

On a less abstract level basic rights require the presence of "third party beneficiaries" who, through prospective interactions, share in others' interests in being able to put through certain claims. Finally, it is a relevant requirement that there are primary actors to claim security in performing certain actions before political or legal authorities. Here more is at issue than the merely formal question of *locus standi*. The claimant has to qualify as the ultimate authority in raising and defining the claim at stake. Thus we can assess the prospects for new basic rights on three points: institutional effect, third party beneficiaries and authoritative claimants.<sup>97</sup>

### Cultural Basic Rights

The importance of culture only becomes apparent as certain people undergo the experience of a loss of culture. Such a loss may be occasioned for various reasons (Kymlicka 1995a). The most widespread reason is probably migration by which people leave their own cultural context to start a new life in another country. Another reason, that historically has been of particular relevance, is conquest by which a conquering group curbs the culture of the conquered, the classical case being the violation of the culture of the native Americans by the early modern European pioneers.

Following Will Kymlicka, we may hold the essential value of culture to be that it "provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life,

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<sup>97</sup> Let me emphasise that I take each of the different claims dealt with in the following paragraphs most seriously, but that my aim is not to consider them on their substantive merits, but primarily whether there are any prospects to deal with them in terms of basic rights.

encompassing both public and private spheres" (Kymlicka 1995a: Ch. 5, p.76). In a similar vein Joseph Raz writes:

"Only through being socialized in a culture can one tap the options that give life a meaning. By and large, one's cultural membership determines the horizon of one's opportunities, of what one may become, or (if one is older) what one might have been. Little surprise that it is in the interest of every person to be fully integrated in a cultural group" (Raz 1994c: 71).

Raz further argues that a culture, besides providing the context that determines one's opportunities, plays an equally crucial role in determining the nature of one's most intense personal relationships and of one's sense of identity. Thus, when one's culture is threatened, one risks losing some of the most important means to give meaning to one's life (cf. Margalit & Halbertal 1994).

The aim to protect one's culture may be served by many different claims. Consider, for instance, the following list, adapted from Kymlicka (1995b: 7):

1. anti-racism educational programs
2. workplace or school harassment codes preventing racist (or sexist/homophobic) behaviour
3. recognition of, and provision for, religious holidays
4. revising dress codes so as to accommodate religious beliefs
5. revising the history/literature curriculum
6. funding of ethnic cultural festivals and ethnic studies programs
7. mother-tongue services for adult immigrants
8. bilingual education programs for the children of immigrants
9. black focused public schools
10. affirmative action programs

While debate is quite possible on particulars, this list is roughly organised to show increasing severity of the duties that these claims require to be imposed upon others; ranging from the mere avoidance of the imposition of unwarranted harm (1, 2), via the toleration and accommodation of particular practices (3, 4), active recognition (5), financial support (6), special public provisions (7, 8, 9), to political and economic representation (10) (cf. Margalit & Halbertal 1994: 498/9).

The debate about rights to culture has often been overshadowed by questions about the crucial role that the collective, rather than the individual, plays in the enjoyment of culture (cf. Tamir 1993: 42 ff.). Basically, these questions are of two

kinds. First, it is sometimes suggested that the bearers of cultural rights are groups rather than individuals. Typically Vernon Van Dyke submits: "It makes sense of a right to preserve a culture only if the right is attributed to the cultural group as a whole" (Van Dyke 1982: 27). This claim derives from the observation that without a collective providing a cultural background, claims to culture become impracticable and meaningless. There is little sense to support a cultural practice that is only practised by a single, isolated actor, she needs others to communicate and share the cultural meanings with.

If it were true that the bearers of cultural rights are groups rather than individuals, there would arise some particularly difficult problems about how the interests of the collective can be adequately represented. Contrary to what Van Dyke suggests, however, most cultural claims are rather easily individualisable (cf. Kukathas 1992). This can be illustrated by the distinction Rainer Bauböck proposes between individual, group-specific, collective, and corporate rights:

"Group-specific rights are those where group membership is the relevant criterion for identifying the individual beneficiaries of a right; collective rights construe the group as a collective agent; corporate rights are those which can only be exercised collectively by the group (with individuals acting merely as representative agents). An exemption for Sikhs from a requirement to wear motorcycle helmets is a group-specific right; a right to establish private religious schools identifies the congregation as a collective agent although the right itself may very well be exercised by individual members or subgroups; a right for a congregation to determine the syllabus for religious instruction in public schools is a corporate one" (Bauböck 1996: 7; cf. 1994: 266/7).

Using Bauböck's terminology, the real problems of representation of interests, and thus of *locus standi*, appear only in the case of "corporate" claims because (only) these cannot be exercised by individuals but only by groups. The most important cultural claims of this kind are probably political claims to representation (affirmative action) and group autonomy (self-determination). I return to these claims at the end of this subsection. Except for these exceptions, however, cultural claims can generally be adequately represented by individuals.



The second question that is raised by the crucial role of the collective for claims to culture derives from the fact that one can raise such claims only by virtue of being a member of a particular collective. It is this particular feature, one's membership of a particular group, that qualifies one as a claimant. At the same time, those outside of this collective have no way to qualify for raising these claims. Thus a sense of reciprocity of claims between individuals is lacking; some can raise claims, but only by virtue of their group membership, while others are irrevocably excluded from these claims.

This second question can be dealt with as we turn to the public good argument for basic rights. The justification of basic rights, I have argued, does not hinge upon the notion of reciprocity (cf. esp. Section 1.I above). Indeed, there is nothing exceptional about basic rights imposing more duties upon some than upon others. Politicians and journalists are bound to have more personal interests served by the right to free speech than the average member of the public. Similarly, wealthy proprietors have more personal interests in the right to private property than those whose property is limited to their basic needs for living. However, these rights can be justified as social relations and institutional effects can be identified by which all benefit from certain ranges of action enjoying special protection.

The question thus is whether the recognition of cultural claims can be said to come eventually to the benefit of all members of society even though they belong to distinct cultural groups. In response to this question I fear that, the undeniable moral force to claims to culture notwithstanding, there is no *general* political ground for which others could be expected to accept the duties they require. Essentially, the problem with a general basic right to culture is that the range of claims to which it refers seems infinitely diverse and cannot be taken to correspond to a delineable public good.

Instead, the argument that all people in liberal democracies can be taken to have important interests in cultural diversity as it opens prospects for choice and renewal of their beliefs and interests, appears to work better by having it accommodated by different, established basic rights. Indeed, the analyses of the basic rights to free speech

and to education delineated above already suggested that these rights may serve the protection of certain important cultural claims: claims to express and distribute distinctive cultural ideas and claims to a certain diversity in schooling.

Other cultural claims may well be protected by way of human rights as they are inextricably entwined with people's human dignity. I am thinking in particular about certain cultural practices (dress codes, for instance) that derive from people's specific cultural convictions. In the end, however, many of the cultural claims will have to be met by way of policies rather than principles (cf. Dworkin 1977: §2.3). No doubt there are sound, prudential reasons to provide for them (especially when the cultures involved have formerly been the victim of oppression or as the initial integration of new immigrants warrants special measures), but like many other policies they simply have to be weighed against the costs and duties they require.

Finally, there remain the extremely complex cultural issues of affirmative action and national self-determination. I do not think that the concept of basic rights as proposed by me has much to contribute to either one of these issues. Affirmative action qualifies in my view neither as a basic nor as a human right. However, I have no doubt that it may be justified as a policy to correct for remaining inequalities in the chances certain groups have to secure their place in certain professions and to represent their interests. National self-determination as a claim of a cultural community to affirm its political autonomy may well impinge on the sense of the human dignity of its members and may therefore qualify as a human right (cf. Margalit & Raz 1990). However, in a world in which communities are less and less susceptible to clear boundaries and in which the fates of particular groups have inextricably become entwined with those of others, national self-determination cannot simply be decided by unilateral proclamation, but requires the serious consideration of the interests of others within and outside of the boundaries of the community.

### Basic Rights to Privacy

The rise of liberal democracy and the expansion of economic markets draws an ever increasing number of actions into the public realm. As a reaction to this, people may raise claims to reclaim certain actions to be subject to their personal control alone. Such claims may be protected by way of privacy rights.

Notably, privacy rights require the state to uphold limits upon its own sphere of action. By definition the private sphere may be conceived as the sphere of actions beyond the reach of the law. Privacy can be taken to be protected to the extent that public regulation by way of law has to be justified in the light of the liberal presumption in favour of liberty and state intervention in people's affairs is not warranted without laws providing for it. Indeed, claims to privacy are generally held to be protected by putting state action under strict constraints.

However, the protection of privacy may also require active state intervention to protect the private sphere from other social forces. The state may, for instance, impose restraints upon the efforts of entrepreneurs to intrude into people's privacy to sell their products, or it may constrain people's engagement with other's family affairs. What is more, the state may even be called upon to facilitate people's ability to autonomously exercise their choices within the private sphere. Thus the state can be held under a duty to provide information about different life choices and to provide, for instance, for the facilities for artificial reproduction.

These positive contributions the state may make to people's privacy suggest that the libertarian conception of privacy as a sphere fully excluded from any state control cannot, or at least no longer, be held valid. Certainly, the value of privacy is found in a range of actions that allow each individual certain choices by which she can control her own way of life. Privacy is thus closely related to personhood, the ability to be oneself, to be autonomous in certain actions, to make one's own choices about how to live. However, the recognition of the value of such private choices need not warrant their *a priori* immunity from any public considerations. Indeed, private choices and public affairs are in significant respects closely related; the public sphere poses a structure of

constraints within which private choices can be made and, in turn, these choices are bound to re-enter in certain ways into the public sphere. Consider, for example, the private decision to have children. This decision is conditioned in important respects by such public factors as living standards, the social status attaching to parenthood, social security, and general life prospects. In turn, in the aggregate, the private decisions to have children (or not) determine the size and composition of the population which is, of course, one of the most important public parameters of the nature of a society.

Like claims to culture, claims to privacy may be of a variety of kinds. Laurence Tribe helpfully suggests five different categories (Tribe 1978: 897). The first category, lying at the heart of any conception of privacy, is freedom of conscience. Secondly, there is the maintenance of bodily integrity against intrusions of others. Thirdly, Tribe identifies the freedom to control certain choices concerning one's lifestyle, in particular regarding sex preferences, vocation, travel, and public appearance. The fourth category concerns the control over one's "informational traces - the impressions and images that a person leaves with others and through which a person's public identity is defined". Finally, Tribe includes among privacy claims one's freedom to choose the associations in which one participates.

As is suggested by this list of categories as well as by the earlier association of privacy with personhood, privacy is in many respects a central component of human dignity. This suggests that claims to privacy are above all to be protected by way of human rights. Their distinctive value is not conditional upon a particular community or particular social relations, but deserves universal consideration for every living human being. The right to freedom of conscience and to bodily integrity appear in particular as obvious, strong instances of human rights. In the other cases, however, protection by way of human rights may be less self-evident, especially so because certain claims in these categories only come to be widely raised within particular societies as a reaction to particular social developments.

There is also a case to be made for the right to privacy as a basic right as its protection can be taken to benefit not merely each individual in turn but also society at

large. A sense of personal security that the right to privacy may guarantee is in many ways an important precondition for efficient and purposeful social interactions with others. If one feels that with every initiative one takes, one runs the risk of public repercussions, one may well think twice about making such a step in the first place. As a consequence the interests of others (third parties) who may have a potential interest in these initiatives are also set back.

On the aggregate level, the public good that we may relate to the basic right to privacy is the civil society. Relying on the work of Jürgen Habermas, civil society can be regarded as the structure of associations of a non-state and non-economic character in which practical experiences are elaborated, allowing for self-expression and the constitution of identities (Habermas 1992: 443 ff.; 1962; cf. Calhoun 1992; Arato & Cohen 1992). People are only likely to engage in civil society when they know at least some range of private action to be secure. In turn, it also appears that violations of the right to privacy come at the public cost of terror and the disintegration of a civil society.<sup>98</sup>

To conclude this sub-section let me shortly consider two kinds of claims associated with privacy that have come to be of particular salience in recent years: claims to reproductive freedom and claims to protection of personal data. In the case of claims to reproductive freedom there need not be any dispute about individuals' authority in raising these claims. Parents obviously appear as the primary actors involved in choosing whether or not to have children (cf. McLean 1986). Clearly, however, this decision affects many more people and, in a way, society at large. Yet society's interest in reproduction need not necessarily harmonise with the parents'

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<sup>98</sup> These ideas could be developed by referring to the experiences in actual totalitarian regimes, like the late Stalinist regimes in Eastern Europe, the fascist regimes in Latin America or Maoist China. As these regimes had little reluctance in intervening in people's private affairs, the development of a full-fledged civil society was effectively blocked. Nevertheless one may observe that the opposition against these regimes somehow relied on a very strong sense of association that may not have been as widely dispersed as civil societies in liberal democracies but was possibly much more engaging and intense. The relation between privacy and public engagement may be maintained by conceding that members of such opposition movements are of exceptional, heroic character, and, what is even more striking, that as they are generally intellectuals, scientists, publicists and artists, they command a sphere of inner privacy that is inherently beyond the reach of any state power.

freedom, nor can it simply be regarded as an interest in having as many children born as possible. The nature of society's interest rather depends on certain macro-social factors, like social wealth and life expectancy, and particular traits of the parents that determine the likelihood that they will raise their children to become capable and valuable members of society. However, if such considerations justified state intervention into the choices of parents of how to organise their families, they would obviously come at severe personal costs as well as causing a widespread experience of terror. I think that the case for reproductive freedom depends above all on the sense of personal dignity it affirms. Thus I would regard it first of all as a human right. However, given the persisting presence of people challenging this freedom on moral and political grounds, there are also good reasons to bring the (basic rights-) arguments demonstrating the societal costs of its violations to the fore.

The case of claims to the protection of personal data is possibly even more complex. Clearly there are many social interests in the public disclosure of personal information, ranging from governmental interests, to commercial and even private ones. However, there is also a whole range of costs to such practices. The availability of some information may at some point even be experienced as an infringement upon one's human dignity. In trying to regard the protection of personal data as a basic right, one may observe that the prospect that a public entry may possibly attract public inspectors, as well as aggressive salesmen and all kinds of personal invitations, may well cause a certain hesitation in people's public participation. This consideration certainly justifies a serious data protection policy. Nevertheless to develop such a policy by way of a stringent basic right to personal data protection, dominating all conflicting interests in principle, will, I think, run into a serious stream of objections in societies that are by now aptly characterised as "information societies".

### Basic Rights of Nature

In recent years there has been a growing, global concern with the environment and the political measures required to preserve it. The question thus arises whether such

measures can, following the successful example of, for instance, the right to free speech, be conceived of in a form similar to basic rights. In this sub-section I want to approach this question from two complementary sides. First, I consider the common objection to environmental rights that relies on the fact that natural objects are incapable of adequately representing their interests. Secondly, I turn to the indisputable fact that the environment constitutes a public good which may suggest that it may nevertheless somehow suit the public good argument by which I have defined basic rights.

In considering the ability of the environment to represent its interests, we have to distinguish between different kinds of natural objects: animals, plants, and inanimate objects, like stones. Obviously natural objects of all kinds are less capable of representing their interests than humans are. However, though they do not avail of an actual language to communicate with human beings, we can nevertheless identify natural objects to have certain interests. The question on this point is whether human beings are bound to respect these interests only for the sake of their own, human interests or whether the capacity to bind people to certain duties derives in some sense from the intrinsic nature of natural objects (Feinberg 1974; Singer 1975; Regan 1976)?

One interest may be identified even with inanimate natural objects: an interest in their preservation. Why would we respect this interest? Can it simply be violated without standing in need for justification? Consider, for example, the destruction of a simple rock, does that require good reasons? I really do not think so. More difficult, however, is it when these inanimate objects are of a more special or rare kind, like a lake or a glacier. Clearly their destruction will have to be justified to the rest of society that takes an interest in these objects, but one cannot really argue that we actually owe a justification of their destruction to these objects themselves. As a third alternative that would get one beyond an anthropocentric view, one would have to make the difficult spiritual case, holding that human beings are bound to respect nature in the light of it having been given into their care by some supernatural power. Given that there are little prospects for general agreement on the latter kind of argument, I conclude that people's

respect for inanimate objects derives above all from the interests other people take in them.

In the case of animals and plants I think, however, that there are better prospects in arguing that we owe certain duties of respect to them for their own sake. Obviously, we cannot simply attribute to animals and plants the same interests we generally attribute to human beings. It appears, for instance, unlikely to attribute to them an interest in free speech (Singer 1975: 2). However, animals and plants can be taken to have certain interests of themselves that go even beyond the interest in mere preservation. They can represent interests in being treated well. We have clear indicators of the wider interests of plants and animals as we can perceive when they thrive and when they suffer, in the ultimate we recognise when they live and when they die. (Certain) animals are even capable of displaying feelings of like and dislike and communicate, for instance, that they are hungry.

Affecting the recognisable interests of animals is not without moral impact and requires to justification on reasonable grounds. The same may, admittedly in a weaker sense, be argued in the case of plants, people should not destroy them without any reasons at all. What matters at this point is not linguistic capacity, since interests can be conveyed in other ways than through language. As Peter Singer notes, it is even true in the case of human beings that "the basic signals we use to convey pain, fear, anger, love, joy, surprise, sexual arousal, and many other emotional states are not specific to our own species" (Singer 1975: 15). Following Jeremy Bentham we can hold that the crucial question, by which human beings distinguish those natural objects to which they attribute interests in themselves and to whom they feel bound to justify their actions affecting them, "is not, Can they *reason*? nor Can they *talk*? but, *Can they suffer*?" (Bentham quoted in Singer 1975: 8).

Even if norms can be recognised that bind human beings to respect the interests of animals and plants, the problem remains that they themselves are incapable of adequately invoking such norms to assert their interests: they cannot be expected to go to court or to petition a member of parliament. The problem here is essentially similar



to that of children's rights to education (Section 4.I above). In that case I relied on Ruth Jonathan in arguing that others can be taken as adequate and authoritative representatives of the children's interests on the conditions that there is "an identity of interest" and that the representative is "the person best placed and/or most strongly motivated to act as [a] trustee or agent" (Jonathan 1993: 19). While parents are the obvious parties to pass these conditions in the case of children's rights, in the case of natural objects there need not always be adequate candidates who pass these conditions. For a start, to establish "an identity of interest" between a person and a natural object requires a rather intense relation between them in which the person either has property in the object or extensively enjoys it.<sup>99</sup>

The second condition is even stronger as it requires the representative to demonstrate that she is "the person best placed and/or most strongly motivated to act as a trustee or agent". Generally, this condition points again to the proprietor of the natural objects.<sup>100</sup> On the other hand, the reference to "the person most strongly motivated to act as a trustee or agent" opens the possibility for others than proprietors to act as nature's representative. The authority of such actors would depend again on a particular bond to the natural object that would warrant an identity of interest and, furthermore, their capacity to identify certain interests of the object that have been neglected by others. For example, the "Friends of the Zoo" may conceivably stand up to represent the animals of the zoo if there are clear signs of their interests being neglected by the zoo management.

To sum up, the representation of the interests of natural objects remains a most intricate issue. It is conceivable that human beings act as authoritative proxies representing the interests of animals and plants, but under the strict conditions that these

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<sup>99</sup> The classical example is the role of the Californian Sierra Club in defending Mineral King Valley against Walt Disney Enterprises' plans for a massive ski resort there (Sierra Club v. Morton, 405 U.S. 727 (1972)). Although the U.S. Supreme Court decided against the Sierra Club's claim to speak for Mineral King Valley, the case opened the door for the legal representation of natural objects, in particular because it was taken up in Christopher Stones pathbreaking article "Should Trees have Standing?" (cf. Nash 1989: 128-131).

<sup>100</sup> An interesting implication that may be drawn from this is that the protection of vulnerable natural objects may be strengthened by removing them from common ownership and assigning individual property rights so that the authority to represent their interest is trusted to a particular actor (cf. Schmidt 1990).

interests are apparent on the side of the natural objects and that the representative and the objects are related by a particular bond that warrants an identity of interest.

It is one thing to establish that animals and plants can be taken to have certain intrinsic interests, it is yet another to give these any significant weight against human interests or to recognise them as basic rights. Taken by themselves it is unlikely that a natural interest would prevail over a human interest. If, for instance, I am irritated by a mosquito and want to stop it biting me, its interest in self-preservation appears to be of little weight against my interest in its being splatted. Nature's interests only prevail against such human interests that lack all reasonable ground or are mere senseless desires to nature's destruction.

However, there is an interesting prospect for basic rights of nature as the preservation of nature can be recognised as a public good in which humanity at large takes an interest. The interests of natural objects not only merit consideration for their own sake; but also for the interests individuals take in their preservation. In many cases individuals may enter as "third party beneficiaries" enjoying certain natural objects, like neighbours who enjoy a beautiful tree which the garden-owner is determined to cut. By now, moreover, there is a global awareness that the preservation of nature is a public good, and that as minerals are depleted, forests cut down and species extinguished, human life in general suffers irrecoverable losses. These losses are not merely losses in terms of the enjoyment of the wealth of the earth. They threaten the very pre-conditions for the sustainability of human life itself.

Thus, basic rights for natural objects may be conceivable under the conditions that a) natural objects can be taken to have clear interests in their preservation, b) third parties are present that can claim an identity of interest with these objects, and c) the public good of the reservation of nature warrants a generally reluctant attitude towards the violation of natural objects. There are a number of steps that are still required for such rights to become really effective. First of all, there need to be clearer conceptions of what interests can be ascribed to natural objects; are these merely interests in preservation or also in particular acts of care and attention? Secondly, there is a need to

determine more precisely the exact conditions under which parties qualify to represent nature's interests and, as such parties are probably most authoritative and effective when they are collective actors, they have to be organised to be adequate to this task. This may require both a concentrated efforts on the side of organisations as they exist already - either as societies of "friends" of particular natural sites or as general social movements, like Greenpeace and Friends of the Earth -, and the proliferation of organisations that can take up this task for sites the interests of which have not been adequately defended so far. Thirdly, there remains a continuing need for adequate assessments of the public good value of natural resources. Currently, scientific reports often contradict each other in assessing the value of the environment and the costs of its destruction. In particular the fact that many environmental costs resist being fully expressed in monetary terms leads to widely diverging estimates. However, in the balance of the interests in nature's destruction against the interests of nature and its associates, the public good interest clearly weighs on the latter side. Hence, if basic rights of nature can be recognised, the burden of proof is always to be laid upon those who argue for its destruction.

Even if it turns out that the recognition of basic rights of nature would improve our dealing with the environmental problems we are currently facing, we should not expect too much of it. Obviously, there remain particularly difficult problems with this kind of rights (especially as regards the representation of nature's interests) that possibly do not allow for any full solution. Even if these problems can be overcome, basic rights cannot be expected to fully shoulder the decisions required for the preservation of the environment. In the end, the preservation of the world is likely to be secured only by active political interventions that are applied worldwide and by radical changes in the existing patterns of consumption and production.

#### A Basic Right to Income

Ideally claims to income might well be protected by a human right. Income appears as a universal desire of all human beings as it enables them to purchase the resources they

require for their physical survival. Of course, to a certain extent the insistence on income betrays a particular cultural disposition. People's basic needs may be satisfied by provision in good rather than income. Indeed, in societies in which few or none economic relations are monetarised, people will take only a slight interest in income. However, when we restrict our analysis to modern societies with developed economies, the general importance of income is clearly apparent. What is more, income in modern societies has, besides being a means to the satisfaction of one's basic needs, the value of being a means to assert one's own autonomy in giving effect to one's own (consumer) choices and of being an important indicator of one's social status.

Currently there are no societies in which a fully-fledged (human or basic) right to income is effectively recognised. Rather the recognition of claims to income is generally made conditional on the performance of work or, by way of exception, on certain personal features that excuse one from failing to work: age, handicap, sickness or involuntary unemployment. In effect, claims to income are not so much considered in the light of the individual needs they derive from, but rather on the basis of person's willingness and capacity to work. If no effort to work has been made, current liberal democracies are disposed to reject claims to income as not meriting consideration.

Underlying this practice is, of course, people's reluctance to take on the duty to contribute to other's income when they consider that this person might just as well have earned this income by her own work. Indeed, this consideration has an undeniable force against the effective establishment of a basic right to income. On the other hand, however, there are a number of considerations that nevertheless may come to weigh heavily in its favour (cf. van Parijs 1992; Heij et. al. 1993). First of all, the principle that every one can be taken to be able to earn one's own income may well be contested. Above all it may be contested on normative grounds by objecting against the conditions under which people can accept work to earn an income. As has most acutely been observed by Karl Marx, given people's basic needs for which they require an income, the most inhumane and exploitative conditions can be imposed upon them in the labour market. The insistence on every one's capacity to earn one's own income, forces people

into the dirty work of garbage collector and mind-numbing activities along conveyor belts.

Secondly, the principle that every one can be taken to be able to earn one's own income may come to be contested on factual grounds as well. Actually in all societies huge segments of society, if not even the majority, are excused from earning their own income. This becomes particularly apparent as in modern societies income becomes increasingly a concern for all *individual* members of society as they can rely less and less on the household in which they live to secure their basic needs. Depending on demographic, economic, and technological developments, we may furthermore come to reckon with the prospect that supply of jobs will simply structurally come to fall short of the total demand for work.

Indeed, despite vehement political new right ideology, current liberal democracies appear bound to a wide range of claims to income. Claims to income of pensioners, students, handicapped, single parents and even of the unemployment clearly cannot be adequately met through private insurance schemes. Nevertheless governments have achieved piecemeal financial cuts by differentiating among the different groups and by identifying one by one classes of recipients for which there appeared sufficient grounds to reduce their benefits. However, the use of an infinite number of classifications has done much to turn the administration of claims to income into a bureaucratic moloch, fuelling reluctance among tax-payers and alienation and fraudulent behaviour among recipients. In this light, a general and uniform basic right to income has the merits of not only making much administration redundant, but also bringing the crucial political question at issue back into full focus: how high is the income that people can justifiably claim from others to meet their basic needs? To use the words of David Purdy: "When people pay their income tax, they know exactly what they are paying for; how much a single person with no other sources of income has to live on; and where they themselves stand in relation to this baseline" (Purdy 1994: 44; cf. Goodin 1992)

The positive case for a basic right to income depends essentially on the viability of a political argument demonstrating a common interest in others having their claims to income met, or, to put it in other words, demonstrating that a basic right to income might constitute a public good. Indeed, I believe there are some interesting prospects on this account (cf. Jordan 1992). Like property, speech, and education, people use income to enter into social relations. Hence, to every claim to income that is met, there are also "third party beneficiaries" who benefit from the way the claimant employs her income in turn: sellers and producers. What is more, we can see these relations as forming a complex network of social relations covering society at large. As economists have observed, raises in income have "a multiplier effect" as they do not only benefit the initial recipient but, through an infinite chain of transfers, many others as well. "Keynesian" economists have studied in particular how income policy may stimulate consumption and economic growth. However, the merits of a basic right to income are far from equivocal in this respect as they have to be weighed against the detrimental economic effects of the tax duties required for such an income policy.

Eventually, the decisive argument for a basic right to income turns on the institutional, or public, effect that it will have. The crucial question here is whether the security in income provided by such a basic right will inhibit or stimulate people's activities. Opposition to a basic right to income is generally founded on the presumption that a basic right to income will discourage people's propensity to work. As people know their claims to a basic income to be secure, they can no longer be motivated to fulfil certain economic functions. It will become impossible to hire garbage collectors or only at improbably high wages. Even if the latter may be acceptable as only fair, in a global economy which allows other economies to keep these services at much lower costs such radical changes are bound to put the basic income economy at a severe and structural disadvantage.

There is, however, a counter-argument that so far has received much less attention in the debates. Security in income may well induce people's propensity to new activities the risks of which they would not dare to take if they would put their capacity

to provide for their basic needs at stake. It will enable people to take time off from their work for schooling and training, and stimulate entrepreneurship bringing new activities and innovative ideas into the economy. As David Purdy suggests, security in income may also have positive effects in regard of labour relations: "if workers enjoy a basic level of income security, they may be less anxious to defend their existing jobs in the face of competitive market pressure, and more receptive to technological change and industrial restructuring" (Purdy 1994: 42).

In the end, the nature of these effects can only be born out in practice and they then have to be set against the restructuring costs that the introduction of a basic right to income will have. Whether the full public benefits can be reaped will, however, to a large extent depend on people's dispositions to such a right and the claims that it serves to uphold. The public good of "a widely innovative economy" constituted by a basic right to income is unlikely to be fully enjoyed in a society in which the preservation of a basic right to income is continuously threatened by a wide opposition. Under these conditions, theoretical arguments may serve an important function in paving the way for public acceptance of certain claims, showing people where their interests may intersect with those of others. In Table 2 I have tried to summarise the arguments that may be adduced to argue for the different new basic rights discussed in this section and to identify the respects in which such arguments remain problematic.

Claims	Public Good	Claimant	Third Parties	Public Costs (Insecurity)	Competing Claims
Culture	??? Disparate Cultures	Individuals	Fellow Citizens	Impoverished Society	Tolerance, (Active/Financial) Support
Privacy	Civil Society	Individuals	Affiliates	Terror	Public Morality, Public Surveillance
Environment	Preservation of Nature	??? Proxies	Friends of Nature	Pollution	Economic Activities, Consumption
Income	A Widely Innovative Economy	Individuals	Sellers, Producers	Poverty, Stagnation	Finance

Table 5.2: The presence and absence of features that make new basic rights feasible.

Of course, any attempt to foretell the viability of new basic rights is necessarily speculative. Basic rights have never been established by design, as theoretical designs by themselves are unlikely to convince the opposition against the duties they require. No one could anticipate the full range of the beneficial - and especially the public, "institutional" - effects the recognition of the basic right to private property, free speech and education were to have. Even if there were distinct political groups who could put forward strong interests in the general recognition of such rights, they met with strong opposition. Generally this opposition could only be overcome by virtue of particular, favourable historical circumstances: the basic right to private property depended to a large extent on the emergence of the modern state, the basic right to free speech on the recognition of citizens' sovereignty, and the basic right to education on the need to engage the populace at large in political and war efforts. However, once these rights have been established and their beneficial effects experienced, theoretical accounts may serve their continued preservation.



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