

Right to Life: a Principle of Equality

Hjördís Björk Hákonardóttir*

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1 Introduction

The theme of this volume provokes questions on the essential nature and role of human rights in society. This discussion has to some extent been limited by the traditions of different schools of legal theory, from nihilism to natural law. The collective aim of human rights as an institution is to guard the life and well being of individuals living in a society with other human beings. In some sense we have failed to accomplish this aim, at least in the context of the world as a whole, and in most places from an egalitarian point of view. Perhaps it is in part due to our general reluctance to perceive a relation between law and morals and face the hard questions it implies. Perhaps the conflict between the traditional schools of thought has hindered the idea from evolving for the good of man in society as it was meant to do. This is just a thought that I shall not try to argue further in this paper. I shall however try to make a couple of unconventional arguments.

Equality and liberty are by many legal philosophers seen as a pair, of which liberty is the primary value that ought to be distributed equally to everyone. My hypothetical approach to human rights focuses on equality as the *primary* notion from which reason leads us to the fundamental rights that we have already established and legalized in the form of human rights. On this formulation and because human characteristics are its prime, it may be said to be a natural law theory of a kind. That classification, however, is not the core of our concern here; rather it is how to make sense of human rights and why they are important.

Another undertaking of this paper is to take a closer look at *the right to life*. It may both be seen to be a fairly simple and straightforward conception, and a very complex one. I will here deliberately bypass the theological discussion on the sanctity of the human life. I will also leave out the debates about where to draw the line in human development and decline, and about degrees of intelligence human beings have compared to other creatures. These are immensely important questions and people have very strong opinions about the answers to them. That is why I am not discussing them in this paper; they tend to take the discussion into a blind alley. The nature of a debate is to clarify things, but it may reach a point where counterarguments stop the discussion and make it unfruitful. That is, I think, happening with the discussion about human life and therefore I propose to put some of those hard questions in brackets for the purposes of this paper.

My notion of human life does in a sense reflect on Ronald Dworkin's explanation of what the concept 'sanctity of human life' involves.¹ I do not, however, use that concept. Although the characteristics of the human being are partly "mysterious" and those may be the ones that best define the human being, they need not be described in terms of 'sanctity'. Rather, human life may be said to have two interrelated factors: the life of the human body and the life experienced and developed by the function of the human mind. I intend to explore the significance of this in relation to the right to life and in view of my

1 Dworkin, R., *Life's Dominion: An Argument about Abortion and Euthanasia*, HarperCollinsPublishers, Glasgow 1993, cf. p. 68 ff.

hypothetical premise of equality as the core we should work from in defining our relations and rights. In the process I will take a short look at how the right to life has been exercised and interpreted in international courts, taking my examples from the European Court of Human Rights.

2 The Human Nature

The living human being has certain characteristics, which other living things do not have and in virtue of which we claim that we have moral rights. Many scholars have tried to define what exactly ‘human’ implies and its moral implications. Some like to describe the concept from the perspective of an inner self or consciousness, others stress the psychological qualities such as memory and mind, and others still stress its transcendental nature, such as Thomas Nagel: “People can come to feel, when they are part of something bigger, that it is part of them too.”² Nagel sees the capacity of insight—to transcend oneself in thought—as the cause of our feeling that life is absurd which, in turn, he holds is “the most human thing about us”.³ He acknowledges the circularity of referring to such arguments but adds: “We adhere to them because of the way we are put together; what seems to us important or serious or valuable would not seem so if we were differently constituted.”⁴

The Stoics saw man as having “parities of faculties”, says Johnny Christensen, stressing the influence Stoic social philosophy has had on European thought and social structures.⁵ The distinctive capacity human beings share is rationality, but it needs to be cultivated and nourished in order to present itself in the human being. It is the role of rationality to control the impulses to less virtuous actions rooted in our natural drive of self-preservation. The Stoics define rationality, as Christensen describes it, almost like a creature which forms and controls the individual it resides in as if it has a will of its own, but is at the same time like a bird in a cage, bound within the human individual.

Rationality is a structuring of the mind that enables it to handle impressions and ideas of any kind: to argue, systematize, analyze, make conjectures. Rationality is a self-correcting device, it is free relative to its field of apprehension, bound only by the demand for consistency and its recognition of other instances of rationality at work, in the universe and in rational individuals or groups of individuals. It is also free relative to its proper field of action. Bound as it is, in human beings, to the “energy” that makes action possible (“impulses”, *bormai*), it is in principle capable of total command of impulse. The impulses of man are not fixed in their responsive patterns as are those of animals. If they were, rationality would be meaningless. On the other hand, in man impulses may run

2 Nagel, T., *Mortal Questions*, Cambridge University Press 1979, p. 16.

3 Ibid., p. 23.

4 Ibid., p. 17-18.

5 Christensen, J., *Equality of Man and Stoic Social Thought*, *Comm. Hum. Litt.* 75 (1984) p. 45-54, at p. 45-6.

wild, precisely because of the possibility of rational freedom, if rationality has not unfolded itself to full activity.⁶

All human beings, regardless of social status, sex, age, language, race or generic differences are capable of virtue and rationality. In this sense all men are equal. The *degree* to which human beings have this capacity or use it is irrelevant. And there are always exceptions; rationality may be partly or completely lost on some, for example an individual in a vegetative state. Those individuals are of course no less human, nor does their condition change the overall picture of how human beings are constituted.

Parity of natural potentiality is implied by the very definition of man. Therefore there can be no natural differences between Greek and Barbarian, man and woman, noble and commoner, free man and slave.⁷

Bernard Williams argues in his essay “The Idea of Equality”⁸ that it is neither trivial nor a platitude to say that men’s common humanity constitutes their equality. Any difference in the way men are treated must be justified, he says, and this is seen by many to imply “an essential element of morality itself”.⁹ This is the core of the matter. Humanity itself is the starting point, the common ground, and the kind of creature the human being is marks every step from there.

The human body is the tool we have to enjoy life, therefore the protection of the body and of life itself are interwoven. Criminal codes and court cases reflect this fact. Any attack on the body is a grave offence and the harshness of punishment in individual cases reflects the seriousness of the threat to life or damage to wellbeing it brought about. Bodily health is an important component when defining the implications of the ‘right to life’. But the body is not just a tool we have to execute physical functions, it is also essential for our ability to sense the world and react to it. The human body makes rational thinking possible as well as all other experiences—such as hopes, disappointments, and accumulation of knowledge and skills. All these experiences and activities of the human mind determine in the end the kind of life that has been lived. If we didn’t have this extraordinary ability to reason and perceive emotional and religious sensations, and in a sense create our own life-path,¹⁰ human life would not have a different status from that of other living beings. The Ancient Greeks talked about life as *zoe* meaning the biological life, and life as *bios* meaning our life as a continuous experience with the development of a conscious and rational

6 Ibid., p. 45.

7 Ibid., p. 46.

8 Williams, B.A.O., *The Idea of Equality in Justice and Equality*, Bedau, H.A., (ed.), Prentice Hall, New Jersey 1971, p. 116-137, at p. 116-117.

9 Ibid., p. 117.

10 See Dworkin, *op.cit.*, p. 82.

mind.¹¹ In light of this we need a right to life in a double sense, to protect the life of the body and the life of the mind in this broader context.

3 Legal Rights, Moral Principles and Human Rights

The concept of ‘rights’ is a serious and constant undertaking of academics and lawyers who try to analyse it and define it, search for its essence and origin, and try to solve conflicts that arise from it. Its roots probably lie as far back in antiquity as men have pondered over justice and ethical action although its modern form is first to be seen in the middle ages. Sophocles’ *Antigone* refers to an absolute rule of natural law in support of her claim to bury her brother Polynices: “I did not think your edicts strong enough to overrule the unwritten unalterable laws of God and heaven, you being only a man.”¹² Socrates and Plato argued against the Sophists’ relativist approach to ethics. Aristotle further emphasized that man needed certain conditions to flourish. In the same way as the flower needs light, water and fertile ground to bloom, man needs certain living conditions and a good society in which he might learn virtue and manners and thus perfect his human nature. A good society was governed by good laws, but bad laws would destroy it.¹³ It is however in Heraclitus’ concept of the *Logos* taken up by the Stoics,¹⁴ and in other Stoic notions and Roman Law, that we can point to direct sources of the natural law tradition. As Cicero writes: “True law is right reason in agreement with nature, diffused among all men; constant and unchanging . . . To curtail this law is unholy, to amend it illicit, to repeal it impossible”.¹⁵ The Catholic church later had great influence in respect to our modern conceptions of fundamental rights. St Augustine argued that for the legal order to be just it had to be in accordance with the ultimate source of truth—that is God’s will. He acknowledged the necessity that the earthly state had power to execute the law, and warned that a state without justice was no better than a gang: “Remove justice, and what are kingdoms but gangs of criminals on a large scale?”¹⁶ In the early Middle ages Thomas Aquinas held that natural law is the share man is allowed to have in the eternal law, or God’s intelligence. Man, having been given reason, can recognize what is good and what is bad, and thus what is desirable and what is to be avoided. Human law ought to take its guidance from the natural law, thus human law acquires its moral character and validity.¹⁷ The term ‘rights’ may, however, first have been

11 See e.g. *ibid.*, p. 82

12 Sophocles, *Antigone*, lines 450-458, quoted in Morrison, W., *Jurisprudence: from the Greeks to post-modernism*, Cavendish Publishing Limited, London 1997, p. 21.

13 Aristotle discusses these matters in his *Ethica Nicomachea* and *Politica*.

14 *The Worlds of the Early Greek Philosophers*, Wilbur, J.B., and Allen, H.J., (eds.), Prometheus Books, New York 1979, p. 61.

15 Cicero, *De Republica*, III.22 and 33, quoted in Morrison, *op.cit.*, p. 54.

16 St Augustine, *The City of God*, IV, quoted in Morrison, *op.cit.*, p. 64, see also p. 63.

17 Aquinas, T., *Summa Theologiae*, qu. 90-97; Morrison, *op.cit.*, p. 65-74; Lord Lloyd of Hampstead and Freeman, M.D.A. *Lloyd’s Introduction to Jurisprudence*, 6th ed., Sweet &

defined by William of Ockham, who by at least some interpretations saw rights as a power to act in conformity with natural law. He criticized Aquinas' theory that the laws God promulgated were necessarily in harmony with the dictates of right reason or the natural law, on the ground that God's will could not be thus restricted. In the Renaissance both Ockham's theory of God's will and Aquinas' theory of God's reason were replaced by more earthly and political conceptions, thus for example Francisco Suárez argued that *jus gentium* was plainly human rules that had no connection to natural law,¹⁸ but with Hugo Grotius and then Thomas Hobbes, John Locke and Jean-Jacques Rousseau natural law obtains a role in political debate and the modern concept of natural rights is born. According to Hobbes, natural right "is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature".¹⁹ Locke, on the other hand, argued that all men had fundamental rights to life, liberty, possession and equality and the purpose of the social contract was to secure protection of the values these natural rights stand for.²⁰ Ockham's approach has often been held to be voluntaristic or even authoritarian and is seen, as Hobbes' liberty-based right theory was later, as a counterpart of the modern 'choice' theory of rights.²¹

The nature of 'legal rights' is also a matter of constant debate, not least in respect to their connection to moral principles. Adherents of natural rights theories for example argue that some legal rights are necessarily based on universal, absolute and inviolable moral principles, which may be discovered by reason. A completely opposite view argues that the language of rights and duties only portrays meaningless fantasies and is not based on reality. Such was for example the view held by the Scandinavian realist school.²² Many legal provisions have no direct moral basis, such as various fiscal rights. These may equally be held by human beings as legal persons or any entity where the legislator so decides irrespective of whether the same entity is considered to hold moral rights and duties. Moral principles on the other hand typically only apply to human beings in social interaction.²³ Those have at least some counterparts in the law, such as rules forbidding murder and fraud.

Maxwell, London 1994, p. 95-97 and 132-137. McInerny, R., *Thomas Aquinas, Saint* in Encyclopedia of Ethics, 2nd ed., L.C. Becker and C.B. Becker (eds.), Routledge, New York and London 2001, points out that there is scholarly disagreement on every aspect of Aquinas' moral theory.

18 Lloyd and Freeman, op.cit., p. 98.

19 Hobbes, T., *Leviathan*, chapter 14.

20 Locke, J., *Two Treatises of Government*, e.g. paragraphs II.6, 7 and 13 and XI.123.

21 See Freddoso, A.J., *William of Ockham*, Encyclopedia of Ethics, 2nd ed., op.cit.; and Finnis, J., *Natural Law and Natural Rights*, Clarendon Press, Oxford 1980, p. 228. Freddoso comments that Ockham's writings may have been more Aristotelian than commonly recognized.

22 See e.g. Lloyd and Freeman, op.cit., p. 731f.

23 Powerful arguments have however also been presented in support of the moral rights of animals and even other things in nature.

‘Human rights’ are a category of rights that clearly combines moral and legal rights. Generally it may be said that these are rights the right-holder enjoys *qua* human being, based on moral and legal norms stated in national as well as international law. Just as the nature of rights is debated, so there are different theories about the nature and origin of human rights as such: are they simply reasonable man-made rules based on an understanding of human nature and social utility, or do they reflect fundamental moral principles? If we believe the former, that human rights are nothing but rules that humans have laid down as a result of observation and conclusions about what kind of rules serve individuals and society best, then we cannot use the terms ‘human rights’ and ‘moral rights’ interchangeably.

We use various other expressions for rights of this kind, such as ‘civil rights,’ ‘constitutional rights,’ ‘individual rights,’ ‘fundamental rights,’ ‘basic rights’ and ‘natural rights.’ The term ‘human rights’ will here be applied to those legal rights people have by virtue of international conventions and charters concerning the rights of the human being. Usually these have counterparts in the respective state’s constitutions and other sources of national law. The terms ‘fundamental rights’ and ‘basic rights,’ on the other hand, can be applied both to moral and legal rights and situations in which these merge. The working premise here is that fundamental rights are the protective instruments of important values and interests, and human rights are their legal counterparts. The influence of the school of natural law is evident in human rights documents such as the Amendments to the Constitution of the United States of America and in the Universal Declaration of Human Rights; even in the more pragmatic European Convention on Human Rights that spirit may be detected.

The proclamation of the Universal Declaration of Human Rights,²⁴ shortly after the nations of the world had found a common platform in the United Nations, shows that human rights were among the United Nations’ main concerns, as they were of its precursor The League of Nations. In spite of the fact that the Declaration itself is not binding it is beyond doubt that it has had a profound influence in international and national law. Its content has been echoed in legal texts proscribing that human rights be upheld and protected, but most importantly it sends a moral message to the peoples and individuals of the world, the core of which is that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.²⁵

The first two articles of the Declaration stress that the moral foundation of human rights is the inherent and equal value of all men: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”²⁶ The basic rights outlined in the Declaration shall be enjoyed by everyone “without distinction of any kind”.²⁷ Thereafter the distinctive rights are defined starting

24 On the 10th of December 1948.

25 Preamble to the Universal Declaration of Human Rights.

26 Ibid. Article 1.

27 Ibid. Article 2.

with the most fundamental: “the right to life, liberty and security of person”.²⁸ The right to life is the backbone of the human rights family. This is so for the obvious reason that only a living being can enjoy rights. It is thus logical that important human rights documents place the protection of the right to life at the head of their list.

The authors of the Declaration realized that it was also necessary, if the ideal of human rights was to come to be, that man was secured the right to participation in a democratic society and, through the organization and resources of the State, the “economic, social and cultural rights [which are] indispensable for his dignity and the free development of his personality”.²⁹ This implies for example “the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care”³⁰ but at the same time requires everyone to respect the rights and freedoms of others as well as the “morality, public order and the general welfare in a democratic society”.³¹ It is the political and moral task of the state, under international surveillance, to define the thin line that marks the boundary between social and cultural rights and individual endeavour, and to secure equal and fair distribution of the goods it controls. It is a mistake to take economic, social and cultural rights as a mere aim or policy that government should adopt but has no duty to execute. The wording of human rights documents may have led to a legal interpretation of this nature,³² but if we take the equal existence of human beings as the starting point of human rights, we will see both that the importance of economic, social and cultural rights is the same as of other rights and that their limits can be defined just as the limits of liberty rights can.

4 Equality

I will now venture to argue that the basis of fundamental rights is best explained by way of a conception of equality. That is, rather than moving from a principle of liberty to a principle of equality, equality itself should be seen as the basis of other values and lead to the realization of fundamental rights.³³ What we know

28 Ibid. Article 3.

29 Ibid. Article 22.

30 Ibid. Article 25.

31 Ibid. Article 29.

32 This criticism does not go as far as the Benthamian stand that human rights in general are pre-legal moral claims that do not hold in court of law, cf. Sen, A., *Development as Freedom*, Knopf, New York 1999, p. 228-229.

33 In my approach I have in particular been influenced by two conceptions. One is the ‘respect principle’ Tom Regan spells out in his *The Case for Animal Rights*, University of California Press, Berkeley 1984, p. 326-327. The other is Ronald Dworkin’s thesis that governments ought to treat people ‘as equals’ and not merely ‘equally’. His theory of equality is complex but importantly he seems to see equality as a fundamental value and liberty and equality as inseparable. See e.g., Dworkin, R., *Liberalism*, in Public and Private Morality, Stuart Hampshire (ed.), Cambridge University Press, Cambridge 1978, p. 113f, at p. 125; and *Taking Rights Seriously*, Harvard University Press, Cambridge, Massachusetts 1977, p. 227.

about the inner life of human beings is sufficient to provide us with a compelling reason for acting at least in one certain fashion and that is to treat all human beings ‘with equal consideration and respect’. To treat one or some in a way that is not in accordance with that principle amounts to abusing the common ground of all human beings. No one has the power to decide, for instance, that ‘A may have two years, B twenty and C as long as she lasts to live’, nor has anyone a right to say: ‘you are a woman so you cannot have a certain freedom of choice in your life’ or ‘you are a black man so you are to live your life in certain conditions’. To act on such assumptions, without saying them out loud, brings about the same result.

I like to call this first principle of human interaction the *platform of equality*. Minimally, the platform stands for a conception of equality or a ‘principle of equal consideration and respect’ any breach of which amounts to discrimination. And since facts about human nature are what determine whether a certain division of values is discriminatory, the principle that forbids it is a kind of natural law principle. This assertion—that any unequal treatment in respect to certain values where we require equal consideration and respect amounts to discrimination—may be referred to as the weak approach to the principle.

I shall now venture to propose a strong approach as a rationale for any fundamental rights human beings may have. On this understanding, the conception of equality is prior and primary to, and in a causal relationship to, the existence of fundamental rights of human beings; not the other way around. This is so because if we take a principle of equal consideration and respect seriously it leads us to an awareness of the necessity to uphold certain fundamental rights. It is this strong approach that I seek to defend. The infringement of certain factors residing within the individual domain—many of which have been defined as fundamental human values protected by human rights—is totally inconsistent with a principle of equal consideration and respect. Breach of someone’s fundamental right always implies discrimination in the sense that by infringing such a right the aforementioned principle has been broken. It is broken any time a value, which we respect as a common human value, is curtailed. The elements or values that necessarily must be observed in order to fulfil the requirements of the platform of equality are, at the very least, those acknowledged in human rights clauses and conventions. The principle requires equal consideration and equal respect as regards the qualities that are distinctively human, or are valuable because of those distinctive qualities.

This is the core of the matter. By establishing that the most fundamentally correct behaviour is treating human beings equally in this respect, we have found a platform from which everything begins in a good human society and from which we can work. From there we can with reason construct a theory of essential rights, which are derived from the natural principle of equal consideration and respect. And we can now see how the principle leads to the necessity of fundamental rights.

Perhaps a critic might ask whether curtailing the same rights of all human beings would then present any infringement of the principle. If liberty was taken away from everyone then, on this account, that should be all right since everyone suffered the same. But this would, it seems to me, beg the question. First, the theory does not allow for an agent administering lots at the primary stage, it is

literally square one. Second, it is not consistent with the conception of respect and consideration for the common humanity to curtail a value such as liberty, or any other values essential to the wellbeing of humans because of the kind of beings they are. And equality, in this fundamental sense, is the axiom by which such a value is measured.

This approach clarifies the importance of identifying which interests derive directly from the human self-consciousness and thus are necessary for a good and flourishing human life. As a heuristic device, we can think of the world as an empty tablet of a game onto which our figures will be placed in various roles. We can make a list, similar to that found in human rights conventions perhaps and distribute those qualities, equally, since every figure is equally entitled to each and every item on the list. It is first then that government power, official institutions and private enterprises come in. Then we start playing the game of building a society, but a primary rule is that those qualities—we can call them rights—equally allocated at the beginning may not be obliterated or curtailed. Thus the players evolve a society around what is essential for the development and wellbeing of everyone who lives in it. That is the idea of starting at the platform of equality; building on the conception of approximate equality. Of course it is complicated to turn around in the real world if we have started down the wrong path, but to think it over and realize the mistake is taking the first step.

Because all humans are fundamentally the same but still different in their individuality, in respect to elements like sex, skin colour, IQ, physical strength, beauty, race, age, living conditions etc., we need to stress certain limits or draw a circle around each and every individual within which we locate fundamental values, which are defined in accordance with certain truths about human kind. And having drawn these circles, which for each and every individual are the same, we call their content fundamental rights. By drawing all the circles in the same way and by not trespassing any circle drawn, we are treating everyone with equal concern and respect. In this hypothetical method, natural rights theories and the contractarian theories are similar, both seeking to understand how the human being really is—and thus what she really needs—in order to be able to understand what properties are to be placed within the circle.

Because of the relative sameness of humans, due to being of the same kind, it cannot be true that one life is valued more than another³⁴ and thus that one person is entitled to a life and not another; the same is true about bodily protection and liberty and man's dignity. As Locke put it:

The state of Nature has a law of Nature to govern it, which obliges every one, and reason, which is that law, teaches all mankind who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions: . . . And, being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we

³⁴ The debate of the sanctity of a potential human life is not under review here nor are many other hard questions concerning the abortion dilemma addressed.

were made for one another's uses, as the inferior ranks of creatures are for ours.³⁵

For Locke the state of Nature was a device to justify or explain the power of government and its limitations; a device to think away social institutions and discover what it is about human beings that needs to be taken into account in a just and good society. It seems to me that Locke's primary emphasis is on the fact that individuals of mankind are "equal and independent", that is equal and have a will of their own and ought to treat each other accordingly. The most important thing is not to "harm another in his life, health, liberty or possessions",³⁶ because these are essential elements of development, autonomy and dignity of the human being and equally so for everyone.

Living together, in society, we need to equip ourselves with tools such as restraints, rights and rules. Both positive and negative reasons can be given for this need. In Hobbes we see the negative tendencies of human beings such as arrogance, jealousy, greed, or in short nastiness, being used as an argument for applying such tools.³⁷ H. L. A. Hart emphasizes the vulnerability of human nature in order to stress the approximate equality of human beings, on which he bases his thesis of the "minimum content of natural law".³⁸ This also appears to be because of the negative traits in human nature. Both seem to stress that we need rules and rights for practical purposes only, for protection from bad elements in human nature and for guidance in our imperfections.

Whether on the positive note of Locke's vision of the bliss of the State of Nature or Hobbes's negative opinion of the human nature, we can claim that we need these tools we call human rights because only with them can we exercise the human creative force and preserve human dignity. Although it may come to much the same in the end whichever approach we take, it seems to me more enlightening to take the positive route, to see the fundamental rights as logically following from the fact that human beings are equal in respect to what is needed for happiness, or a full and flourishing human life. When we have defined the positive elements of human nature there is no justification at hand for not treating everyone equally in respect to *those elements*. Acting otherwise insults human dignity; and it would signify discrimination in respect to the basic characteristics all human beings have. To take no note of this fact, once recognized, would be irrational and immoral.

What is proposed here is that human nature requires the basic principle to be the principle of equal concern and respect. What that entails is that everyone ought *equally* to be in control of those matters in her or his own life that we

35 Locke, op.cit., II.6.

36 Ibid. Locke's theory of possession is disputed but I consider that irrelevant to my point, as is his theory of man being the workmanship of God and thus His possession, Locke's opinion on the inferior status of other creatures, and certainly the class distinctions he has previously taken into account and which are in gross contradiction to his theory as stated in the above paragraph and elsewhere.

37 Hobbes, op.cit., chapter 13.

38 Hart, H.L.A., *The Concept of Law*, Oxford University Press 1961, p. 189 ff.

agree are so important for human living and the impediment of which would signify discrimination in the fundamental sense of not being treated as equals. That in turn is derived from the relative sameness in respect to the elements that define what is human, as well as the approximate equality of strength of human beings. This equality or sameness inspired the Stoic's teachings of brotherhood or solidarity. On this understanding human beings are not primarily equal in the possession of their fundamental rights, rather they have these rights because they are equal in a fundamental and natural sense. Fundamental rights are derived from their equal status in respect to what human beings generally need for a good and flourishing life.

5 No Human Rights without a Struggle

It has for long been debated whether social, economic and cultural rights have the same status in the human rights family as political and civil rights. In his book *Rethinking Human Rights for the New Millennium* the scholar A. Belden Fields holds that they are necessarily of equal importance. He sees human rights as social practises in response to a social situation—they are thus dynamic and not static.³⁹ He holds that human rights are not conceptually bound to individuals, and that other human units, such as groups of people or nations, can also make claims in the name of human rights. In the same manner, others besides governments can be actors in infringing on human rights. Further, human rights have come into being and are developing through the struggle of those who do not enjoy full human rights. His view of human rights is a holistic one, he holds that there is an organic and active relation between elementary parts and the whole, in other words many items held to be in conflict or to be of a different value are in fact essentially equal and must merge in such a way that they support each other, and that this is the only way to make sense of the concept of human rights. According to Fields different approaches to the nature of human rights do not necessarily mean that one is wrong and another is right, rather their advocates overlook the need for the different elements to come together. His thesis of how to approach human rights is composed of eleven points which I will recite in a nutshell version, which of course does not do justice to his arguments.

1) Field argues that the basis of human rights is the creativity and the emotional and rational intelligence of human beings, and the potential they have to develop. 2) The human being is both a social being and an individual that needs his or her private sphere and autonomy protected. It is through encountering other human beings in society that their skills develop. 3) The social circumstances have in fact essential bearing on the possibility a human being has to develop her faculties. It is not mere coincidence that major improvements in the human rights sector have happened in the wake of a struggle for political change where human potentials are stunted, as examples he

³⁹ Fields, A. Belden, *Rethinking Human Rights for the New Millennium*, Palgrave Macmillan, New York 2003, p. 93.

names the American and the French revolutions in the 18th century. 4) The force of the struggle for human rights is rooted in the conflict between domination and the individuals' awareness of their potential for development. 5) Opposition against domination is portrayed in a struggle for new structures, institutions and practices which open up opportunities to develop for those who are dominated. Civil disobedience or a battle of some kind has usually been necessary to produce improvement in the area of human rights. 6) History shows that it is often so that when freedom from dominion is obtained a new kind of dominion takes its place. 7) The struggle itself nevertheless emphasizes the core values of human rights: freedom, equality and solidarity. All three are of equal importance, rooted in human society; they are not merely philosophical slogans. Therefore care must be taken not to take one as more important than the others; history tells us that in that case the result may be the reverse of what was aimed at. 8) Field applies the Hegelian term "social recognition" which stands for the human claim to be recognized as an autonomous, creative individual, and not just as a natural phenomenon. As such the individual has dignity and deserves respect. Thus everyone has the duty to respect other human beings as equal and free and recognize that everyone has certain needs that have to be fulfilled in order for them to be able to develop their potentials. This entails that everyone enjoy freedom, equality and solidarity. 9) Field argues that human rights claims should not be restricted to individuals, and that it is essential to broaden the scope: "one of the points in making use of a relational concept such as social recognition is to break with the extreme rights individualism so prevalent in Anglo-Saxon thought".⁴⁰ Groups and other entities can suffer impairment of their human rights, as well as individuals, and can thus rightly claim respect and recognition. And violations of human rights may be committed by individuals and various social groups as well as the State. 10) Thus, because the criterion for whether a breach of human rights is taking place reflects the very elements that hinder development of cultural, economic and social interrelations, it follows that social, economic and cultural rights must have the same standing as political and civil rights. 11) Finally Field points out that the basic premises that structure his holistic account of human rights are not unique to Western scholars, on the contrary he finds correlation in aphorisms of non-Western peoples.⁴¹

I do agree with Fields that commitment to one theory, for example natural law or positivism, has not forwarded our thinking, quite on the contrary in fact. The time has come for rethinking human rights. Many points Fields makes are interesting and important. In my opinion, however, he does not take seriously enough the somewhat mysterious characteristics of the human being as the basis of all human enterprise, human needs and development and as a source of human rights. Nevertheless by his reference to the aphorism of the Zulu people it seems that he accepts a collected wisdom of human beings connected to its roots in nature, a similar connection is to be found in the cultures of American and Canadian Indians, lost on the Western man. But primarily Fields sees human rights as a "set of social practices", the basic values "liberty, equality, and

40 Ibid., p. 90

41 Ibid., p. 73-99

solidarity”⁴² all being social values and only making sense in the context of social relations. Human rights and the modern state, he says, were born together, and the conception of a holistic view of human rights demands that the values presented by economic, social and cultural rights and by civil rights be recognized as being of equal value. But a wish list does not suffice; because recognition of human rights will only be achieved through the struggle of those who are dominated and their sympathizers.⁴³

6 The Right to Life - a European Perspective

One variation of the struggle for human rights takes place within national justice systems and international institutions that have been established by human rights conventions. It is a struggle in the sense that agents argue about the implications of human rights provisions and whether they have been violated in a quest for justice; conclusions may have an effect broader than for the specific interests of the parties involved. The frame within which this debate takes place is of course very formal and strictly related to the facts of each case and the letter of the law. Nevertheless fundamental questions are often disputed in court and there are also arguments about the method of legal interpretation. There is a disagreement as to whether judges should follow the original texts of human rights provisions, irrespective of aims and the spirit of the relevant law or convention, or rather apply dynamic interpretation. Obviously, the facts concerning an alleged violation of a right vary and thus have a bearing on the various instances it may apply to, this is also the case when it comes to the right to life. Moreover, the boundaries between the right to life and some other protected rights are not always explicit, such as in the cases of torture and privacy.

I will now take a quick look at the case-law of the European Court of Human Rights in respect to the right to life protected by Article 2 of the European Convention on Human Rights, keeping in mind the distinction between life as *zoe* and life as *bios*. We tend to think in terms of the former aspect of life, and ignore the latter. Nevertheless, the right to life and the ban against torture or other inhumane treatment sometimes are concurrently tested. The borders between them are somewhat blurred because in spite of the finality of death, torture is known to have a lasting effect on the human mind. Torture includes for example the infliction both of physical pain and humiliation by abuse of power. Its use contradicts the very idea that the human society must be based on respect for the autonomy and dignity of everyone. It is not just the endangering of the body that is at stake here. Torture represents something abusive to the very essence of human existence; strong enough to undermine arguments like that the use of torture could possibly save other human lives. Another area where in a sense the physical life and mind may be said to mingle is in the area of economic

42 *Ibid.*, p. 204

43 *Ibid.*, p. 203-206 A modern example is The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted 1979, precluded by women’s movements in the Sixties and Seventies.

and social rights, since minimal sustenance is necessary for keeping alive, and its fair distribution is essential for developing in life and exercising opportunities. It is not my purpose at this time to attempt any overall analysis of this subject matter, only to review the complexities of the right to life by looking at some instances the Court has dealt with in the context of Article 2.⁴⁴

Article 2. Right to life

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: [...]

The Convention explicitly bans the taking of a human life: "No one shall be deprived of his life intentionally". This ban is meant to protect individuals against arbitrary decisions of government; to guarantee that a government does not remove individuals it finds undesirable for whatever reason.⁴⁵ In the first case in which the Court had to interpret and apply Article 2, *McCann v United Kingdom*,⁴⁶ it was undisputed that McCann and his two collaborators had been deliberately shot dead by soldiers in an anti-terrorist operation, on the suspicion that they were about to detonate a bomb. The absolute ban of Article 2-1 is qualified by allowing the use of lethal force in situations where it is "absolutely necessary", cf. Article 2-2. In respect to Article 2-1 the Court noted "that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities."⁴⁷ Thus an effective official investigation into events in which a person had been killed by agents of the state was required, the defects of which might consequently lead to the conclusion that there was a breach of the provision. In *McCann* the investigation was considered sufficient and the Court decided that there had been no breach of Article 2-1 on that ground.⁴⁸ On a narrow margin the Court found that there had been a violation of Article 2-2.

44 For more exhaustive discussion about Article 2, see Mowbray, Alastair, *Cases and Materials on the European Convention on Human Rights*, 2nd ed., Oxford University Press, Oxford 2007; and Kjølbro, Jon Fridrik, *Den Europæiske Menneskerettigheds Konvention –for praktikere*, 2nd ed., Jurist- og Økonomforbundets Forlag, Copenhagen 2007.

45 It is debated whether the ban in this provision also applies to individuals (Drittwirkung), see e.g. van Dijk, P., and van Hoof, G.J.H., *Theory and Practice of the European Convention on Human Rights*, 3rd edition, Kluwer Law International, Hague 1998, p. 23-25; Harris, D.J., O'Boyle, M. and Warbrick, C., *Law of the European Convention on Human Rights*, Butterworths, London 1995, p. 38.

46 Judgement 27 September 1995.

47 *Ibid.*, para. 161.

48 *Ibid.*, para. 161-164.

A few cases have come before the Court where the use of firearms by government agents has led to the death of a citizen. *Huohvanainen v Finland*⁴⁹ concerns a shooting of a suspected felon who had put up an armed resistance to his arrest and a similar situation was up in *Ramsahai and Others v The Netherlands*.⁵⁰ In neither case did the Court find that Article 2 had been violated nor that the investigation into the case had been insufficient. The same conclusion was reached by a majority of the Court in *Andronicou and Constantinou v Cyprus*⁵¹ where a hostage situation had a tragic ending. In the *Nachova and Others v Bulgaria*,⁵² on the other hand, it was established that the victims had not been armed and had posed no threat to the military police. They were accused of deserting from the army and were shot dead when they tried to escape arrest. The Court found that the force used had not been necessary and Article 2 had been violated, nor had the investigation into the incident been satisfactory. The Court did not find sufficient proof for the claim that racial discrimination had been a concurring factor in the event, but its majority concluded that an investigation into this accusation had not been sufficient and therefore a breach of Article 14 and Article 2 was established.⁵³

In other instances the cause of death or disappearance of a victim has not been as clear and although the Court has been cautious when reviewing the facts of such cases, to determine that agents of a state have been involved, it has put the burden of proof on the state if sufficient evidence is not provided. The cases *Bitiyeva and Others v Russia*⁵⁴ and *Gakiyev and Gakiyeva v Russia*⁵⁵ concern for example abductions of people from their homes in Chechnya, later found dead. In both cases the government did not produce requested documents and thus the Court concluded that there had been a violation of Article 2—and also in respect to insufficient investigation. On the other hand, an infringement was not proven in *Ergi v Turkey* and *Yasa v Turkey*.⁵⁶

The Court has taken its conclusion in *McCann*—that a lack of investigation into a cause of death or disappearance amounts to an *independent* violation of Article 2 on the grounds that Article 2 would otherwise not serve its purpose—further and stressed the procedural nature of this protection and its purpose to secure that agents of a state have to account for their use of lethal force.⁵⁷ And further still in that the duty to secure investigation also applies in cases where civilians are suspected to be involved in a killing,⁵⁸ or when a killing has not

49 Judgement 13 March 2007.

50 Judgement 10 November 2005, Grand Chamber 15 May 2007.

51 Judgement 9 October 1997.

52 Judgement 26 February 2004, Grand Chamber 6 July 2005.

53 See on the other hand *Celniku v Greece*, judgement 5 July 2007.

54 Judgement 23 April 2009.

55 Judgement 23 April 2009.

56 Judgements *Ergi* 28 July 1998, *Yasa* 2 September 1998.

57 See *Kaya v Turkey*, judgement 19 February 1998.

58 *Yasa* op. cit.

been clearly established but a person has disappeared in life-threatening circumstances.⁵⁹ An investigation has to fulfil certain requirements,⁶⁰ and is especially important as a guarantee and reminder to a state of its duty not to violate and to protect the right to life of its subjects.

When the European nations came together to draft the Convention on Human Rights they did not agree on where to draw the line at the beginning and end of human life. The former Commission dealt with questions such as whether the concept ‘everyone’ included fetuses, and to what extent a foetus should be considered ‘life’ in the meaning of Article 2, and whether it should be protected by that provision. Although the Commission did not reach a conclusive decision it argued that an absolute ban on abortion would conflict with the woman’s right when pregnancy endangered her life and noted that the woman’s right to life was not restricted in any way under Article 2. In respect to other provisions of the Convention, the word ‘everyone’ referred only to human beings that had been born. In *Paton v United Kingdom*⁶¹ the Commission concluded that the meaning of the term ‘life’ could vary and might depend on its context and the aim of the respective legislation.⁶² In *H v Norway*⁶³ it was established that legislation in the contracting states varied a lot on this matter and in such a disputed and sensitive area the states should enjoy a margin of discretion. The Court took a similar stand in *Vo v France*.⁶⁴ In *X v Norway*, a foetus was not accepted as a possible claimant.⁶⁵ In the recent *Evans v United Kingdom*⁶⁶ the Court said that the foetus did not according to the national law have autonomous interests and rights and could not claim a right to life. It also noted that “in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere.”⁶⁷ Thus the Court still takes a similar stand to this sensitive matter as did the Commission in the early days of the European human rights institutions. Not long ago the Court first had to deal with the question whether the right to life, according to Article 2, protects a right of an individual to end his own life or to

59 *Cyprus v Turkey*, judgement, Grand Chamber 10 May 2001; *Tahsin Acar v Turkey*, judgement 8. April 2004, *Trubnikov v Russia*, judgement 5 July 2005, *Paul and Audrey Edwards v UK*, judgement 14 March 2002.

60 *Kelly and Others v United Kingdom*, judgement 4 May 2001. For more details see Mowbray, op. cit., p. 124 ff.

61 Decision 13 May 1980, no. 8416/79. Official name *X v United Kingdom*.

62 Cf. *ibid.* See also van Dijk and van Hoof, op. cit., p. 300; and Rehof, L.A., and Trier, T., *Menneskeret*, Jurist- og Økonomforbunders Forlag, Copenhagen 1990, p. 328.

63 Decision 19 May 1992, no. 17004/90.

64 Judgement, Grand Chamber 8 July 2004, para 81-95. Also *Boso v Italy*, decision 5 September 2002, no. 50490/99 (inadmissible).

65 Decision 29 May 1961, no. 867/60.

66 Judgment 7 March 2006; Grand Chamber 10 April 2007.

67 *Ibid.*, para. 46, cf. para. 62 and 68 and cf. Grand Chamber, para. 79.

be assisted to do so. It concluded in *Pretty v United Kingdom*⁶⁸ that no such right to die was protected.

The stand on capital punishment on the other hand has changed. If decided in a court of law it was not prohibited by the Convention, cf. Article 2-1, due to the fact that in some of the contracting states it was still legal. It has now been abolished; the first step was taken by Protocol no 6, abolishing the use of death penalty in peacetime, and in all circumstances by Protocol no 13. Not all the states have however ratified the Protocols and this fact may influence the Court's arguments. This question has been discussed both under Article 2 and 3 and in relation to the two Protocols. Most often the issue has come up because of an imminent deportation.⁶⁹

The state also has a positive duty according to Article 2 to protect the right to life of its citizens through passing and enforcing criminal provisions forbidding individuals to kill others. It follows that there has to be proper police protection, satisfactory investigations into cases of suspected murders and disappearances, arrests have to be made, perpetrators prosecuted and those found guilty by an independent and impartial court of law punished. Above were cited the arguments for finding insufficient investigation into cases—especially where government agents or sympathisers are involved—to be a violation of Article 2. An additional reason might perhaps simply be respect for human life and the emotional life of the living relatives who experience the loss, which is in a way recognized as relatives are entitled to information about the circumstances of death.⁷⁰

Governments have the duty to be attentive when issues that concern the life and health of its citizens are at stake, to provide a satisfactory level of security in the society but take at the same time care not to trespass other rights and freedoms of the citizens or to create a new danger. All these interests have to be considered in a proportionate manner. Investigating powers, for example, have to keep in mind, during their enquiries, the principle that everyone is to be presumed innocent until proven otherwise. In *Osman v United Kingdom*⁷¹ there was a claim that the state had failed to fulfil its duty in this respect. A teacher's attraction to one of his students had developed into an obsession. This ended in a tragedy where the teacher killed the boy's father and seriously wounded the boy. The Court acknowledged that the state had a duty to protect its citizens from criminal activity, but a demand of police protection had, however, to be within reasonable limits. It was concluded that there had not been a reason to suspect

68 Judgement 29. April 2002, para. 39.

69 See *Soering v United Kingdom*, judgement 7 July 1989; *Ocalan v Turkey* 12 March 2003 and Grand Chamber 12 May 2005; and *Bader and Others v Sweden*, judgement 8 November 2005.

70 *Erikson v Italy*, decision 26 October 1999; in *Leparskiené v Lithuania*, judgement 7 July, and *Zvoloka v Latvia*, judgement 7 July 2009, no violation of Article 2 was found. In a recent case *Dvořáček and Dvořáčková v Slovakia*, judgement 28 July 2009, the Court found violation of Article 2 on account of the judicial proceedings having lacked promptness and reasonable expedition in a case concerning medical negligence leading to the death of the applicants' daughter.

71 Judgement 28 October 1998.

that the teacher was dangerous to the life of other people even though his obsession had been known to the authorities. The Court emphasized the importance of weighing the proportionate interests of each party. In another case the Commission did not consider it a duty to let terrorists walk in order to free hostages.⁷² Nor was it considered to be the state's duty to provide civilians with a bodyguard for an unlimited period of time, although their lives were threatened by terrorists.⁷³ In other words, the right to life does not imply a positive duty for the state to prevent every act of violence,⁷⁴ but it has a duty to do so within reasonable limits.⁷⁵ In *Mahmut Kaya v Turkey*⁷⁶ the Court found that the state had failed to comply with its positive obligations to protect the right to life of a medical doctor who practiced in south-east Turkey. He had suspected his life was in danger and knew that the police was making reports on him and keeping him under surveillance. He was called to treat a wounded member of PKK but didn't return. The Court, referring to other cases from that area, found the state had failed to protect the life of the deceased and that there had been very serious breaches of Article 2 which reflected the virtual breakdown of the rule of law in the area.⁷⁷ In *Gongadze v Ukraine*,⁷⁸ concerning the killing of an investigating journalist, the Court came to a similar conclusion. And in a recent case, *Opuz v Turkey*,⁷⁹ the Court found that violence by a family member had not only been possible but foreseeable. Domestic authorities had repeatedly been alerted about the offender's violent behaviour that finally led to a killing. The authorities were found to have failed to protect the victim from domestic violence. Finally, several cases have come up where death has occurred while a person has been in the custody of state officials. The court has emphasised "that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them."⁸⁰

The right to life protected by Article 2 may be considered in relation to economic, social and cultural rights, for there are still many questions as to what the positive duty of the state to protect everyone's right to life may involve.

72 *W v United Kingdom*, decision 28 February 1983, no. 9348/81.

73 Cf. *X v Ireland*, decision 20 July 1973, no. 6040/73.

74 Harris, O'Boyle and Warbrick, *op. cit.*, p. 39.

75 *Makaratzis v Greece*, judgement, Grand Chamber 20 December 2004 – found that the policemen involved went too far and that there was a breach of Art. 2, even though death did not result from their action, cf. para. 49.

76 Judgement 28 March 2000.

77 See Mowbray, *op. cit.*, p. 117.

78 Judgement 8 November 2005.

79 Judgement 9 June 2009. See also *Kontrova v Slovakia*, judgement 31 May 2007, para. 52-54.

80 *Paul and Audrey Edwards v United Kingdom*, judgment 14 March 2002, para. 56. Also for example *Anguelova v Bulgaria*, judgment 13 June 2002; *Tais v France*, judgement 1 June 2006; *Raducu v Romania*, judgement 21 April 2009; *Renold v France*, judgement 16 October 2008; *Saoud v France*, judgement 9 October 2007. But no violation found in *Horoz v Turkey*, judgement 31 March 2009 (hungerstrike).

Does it imply that the state has a duty to set rules concerning security⁸¹ in order to try to prevent fatal accidents, e.g. by setting speed limits or regulations for building sites and pollution?⁸² Does it imply a duty to secure what is needed for the minimum sustenance of life, and if so to what extent?⁸³ Is it the duty of the government to provide for health services, even food and housing when necessary?⁸⁴ To insist on a wide interpretation of Article 2 in this respect may be going further than was originally anticipated by the contracting states, both in respect to the right to life and social rights. It does however seem to be in coherence with the Convention's goals and spirit and the states' general legal setting.⁸⁵ Several instances concerning health issues have come under consideration at the Court.⁸⁶ In *X v United Kingdom*,⁸⁷ concerning several children who died in the wake of a vaccination campaign, the Commission concluded that Article 2-1 did oblige the state to make proper arrangements in order to protect life. Nevertheless there was found to be no breach because, in spite of the fact that a mistake had been made, the aim of the vaccinations had been to protect the children from diseases and precautions had been taken in order to make the process safe. The Court has established, that if a state has initiated rules in order to secure professional standards in the health sector and to protect the patients' lives, mistakes as such will not lead to violation of Article 2.⁸⁸ There are limits to the state's duty to provide free health service and free medicine,⁸⁹ but denial of access to public health services may nevertheless violate the provision.⁹⁰ In a few recent cases a violation has also been established in this context on the grounds of insufficient investigation into the cause of death.⁹¹ Special care must be taken when health problems arise while persons are employed by, detained by or otherwise in the care of the authorities.⁹² In *LCB v United Kingdom*⁹³ the father of the claimant had worked for the air force in 1957-1958 in the Pacific area during the government's experiments with nuclear bombs. The claimant, born 1960, was at a young age

81 *Pereira Henriques and Others v Luxembourg*, judgement 9 May 2006.

82 Van Dijk and van Hoof, p. 297.

83 Harris, O'Boyl and Warbrick, op. cit., p. 40.

84 Ibid., p. 40.

85 Ibid., p. 41.

86 See ibid., p. 40; and Rehof and Trier, op. cit., p. 325.

87 Decision 12 July 1978, no. 7154/75.

88 *Powell v United Kingdom*, decision 4 May 2000 (inadmissible), no 45305/99.

89 In the case *X v Ireland* the parents of a severely disabled girl complained that she had not had free access to health service, decision 4 October 1976, no. 6839/74; *Nitecki v Poland*, decision 21 March 2002, no. 65653/01.

90 *Cyprus v Turkey*, judgement 10 May 2001, para 219.

91 E.g. *Šilih v Slovenia*, judgement 9 April 2009; and *Dvořáček and Dvořáčková*, op. cit.

92 E.g. *Raducu v Romania*, op. cit.

93 Judgement 9 June 1998.

found to have leukaemia and it was suspected that the disease was connected to the occupation of the father. The complaint was that the government had failed its duty to monitor the health of the claimant and her family. No breach was established since at that time there was not sufficient knowledge about radiation to give the government a reason to suspect that the father had been exposed to dangerous levels of radiation, nor that his exposure would jeopardise the health of his then unborn child. Further there was not enough scientific evidence to conclude that there was indeed a causal link between the radiation the father had suffered and the leukaemia of the child.

LCB may also be seen as an example of questions that arise in connection with the duty of the state not to put persons at risk or to protect them from dangerous situations. In *Pasa and Erkan Erol v Turkey*⁹⁴ insufficient security measures had been provided in an area where mines were to be found. In *Öneryildiz v Turkey*⁹⁵ the government was found responsible because of unacceptable conditions at a dumping site. The State was instructed to provide money and technical service in order to secure the area. Insufficient investigation into working conditions at a building-site,⁹⁶ and into the responsibility of the authorities in respect to an accident caused by a land-slide⁹⁷ have been found to be in breach of Article 2. In the last case there was also a violation in respect to negligence in maintaining a barricade that had been constructed to protect the locality against such slides. On the other hand the Court has declined to confirm a violation because a state has not passed law forbidding smoking and tobacco advertisements.⁹⁸ No violation was found in a case concerning a boy who died after falling from a swing in a park.⁹⁹

Finally it should be mentioned that in the case *H v Norway* concerning abortion legislation, the Commission came to the conclusion that legislation allowing abortion for social reasons—such as if the pregnancy, the birth itself or the taking care of the child would place the woman in a difficult position in her life—was no violation of Article 2.¹⁰⁰ Questions concerning abortion have also been brought for the Commission and the Court in relations to Articles 8 and 10 of the Convention. In *Brüggeman and Scheuten v Germany*¹⁰¹ two women claimed that abortion legislation violated their right to privacy protected by Article 8. The Commission did not concur in the view that pregnancy and abortion only concerned the privacy of the woman, and found no breach in legislation limiting access to abortion. In a dissent J.E.S. Fawcett held on the other hand that if anything was ‘private’ it had to be everything to do with

94 Judgement 12 December 2006.

95 Judgement 30 November 2004.

96 *Pereira Henriques and Others v Luxemburg*, judgement 9 May 2006.

97 *Budayeva and Others v Russia*, judgement 20 March 2008.

98 *Wöckel v Germany*, decision 16 April 1998, no 32165/96 (inadmissible).

99 *Balci v Turkey*, judgement 17 February 2009.

100 *H v Norway*, decision 19 May 1992, no 17004/90.

101 Decision 17 March 1978, no.6959/75.

pregnancy, its beginning and its ending, and should thus come under the protection of Article 8.

7 Equality and the Right to Life

I defined above a conception of equality as being fundamental to the understanding of the basis of human rights. Accordingly, any dominance or indoctrination that results in the curtailment of a person's capacity to create their own life or leads to their subjection insults the meaning of humanity and the fundamental equality of human beings. In order to guarantee that this does not take place we define our fundamental rights so as to protect those values of a human life that are essential to the sense of existence and autonomy of everyone.

A consequence of this approach is the realization that the right to life is much more than a right not to be physically harmed in such a way that death is caused. Certainly the body is the condition for everything else in human life. But in itself the human body is just a body of a kind and not so very different from that of other species. But the human mind is special, the individual's sense of the self, of loss, inequality, opportunity, or happiness and need for relations with other human beings. It is this sense of life we mean when we talk about human beings flourishing as the beings they are.¹⁰²

In ancient Greece philosophers saw the role of motherhood as a reason to doubt the full humanity of females¹⁰³ and ever since it has significantly contributed to their subjugation. Women have been "associated with the merely animal functions of domestic labour, whereas men achieve truly human lives by choosing activities according to cultural goals, not natural instincts".¹⁰⁴ Society is so constructed that women have to a large extent had to surrender to a subservient status on the job market and become dependent on another human being who has a stable income. When a certain group of people has been displaced in society for any reason, such as has for example been the case with coloured people and women, it is clear that their fundamental equal status has been violated, which implies that their human status as defined by the special characteristics of human beings has not been respected. Any laws or states of affairs or any kind of dominance that reasonably may be said to support such a result are for that reason morally suspect.

The most difficult controversies concerning the right to life relate to the beginning and the end of life. Where do we draw the line of human existence? This question is in part biological and technical, but also philosophical. There are many hard questions that we have been debating for a long time, such as whether every life with a genetic human code is equal in terms of the right to life; how a choice can be made if two lives are about to perish and we can only save one; and what the essential elements are in defining the protection of the

102 Aristotle discusses these matters in his *Ethica Nicomachea* and *Politica*, e.g. NE I 4 1095a.

103 Aristotle, *De Generatione Animalium*, Book IV, 767b, cf. 775a.

104 Kymlicka, W., *Contemporary Political Philosophy: An Introduction*, Oxford University Press, Oxford 1990, p. 255.

human life. Further there are questions concerning the quality of life in relation to the right to life, a life in extreme poverty for example, or life in a body that can only be sustained through mechanical devices. Does the right to life translate into a right to live a decent life with health care, education and work, or have at least the minimum for sustenance, food and shelter? Does it imply a right to decide to die with dignity when facing a very painful death or muscular dystrophy?

Legislation that restricts abortion is one example of a social tool that through enforcing unwanted pregnancy upon women contributes to their subjected status in society. As such, and in the light of the history of the status of women, which shows that the natural course of reproduction has been used as a tool to doubt the full humanity of the female, it is suspect. In other words it may be seen as a tool to justify the assertion that men and women are not equal. In this sense the equality in respect to sex has a direct bearing on abortion—a certain status in society brought about by unwanted pregnancy can hardly be held to be voluntary—and any form of subjection of a human being is a breach of the principle of equal consideration and respect. Since reproduction thus has, in the real world, an important bearing on the equal status of women, and since abortion has a critical place with respect to involuntary reproduction, abortion has a bearing on the fundamental status of women in society. Therefore it does not hold to argue that equality does not have anything to do with the abortion dilemma, and point to the natural biological differences of men and women in support. That is of course not the core of the matter, and to point to that fact is only to ridicule the real problem. The natural capacity to bear children can be seen both as a talent and as a handicap. As the former when the pregnancy is voluntary and welcomed and thus likely to enrich individuals' lives and society; as a handicap when it is involuntary, dreaded and likely to worsen the lives of those concerned.

It seems to me that if we take seriously the duty, derived from the comparative equality of human beings at the platform of equality, to treat everyone with equal consideration and respect, the life (*zoe*) of an unborn human being at an early developmental stage does not overrule the right to life (*bios*) of a woman. This is so because the woman's status is about having full control over her life as an autonomous person and being the creator of her development and the course of her life. She cannot fully do this if others control her reproduction, given the enormous impact a child has on anyone's life (*bios*). A ban on abortion is, by the nature of things, only directed towards women and primarily affects their status. In this light and because of the history of the subjection of women, legislation on abortion must be carefully evaluated.¹⁰⁵

On a broader spectrum the right to life may be held to be impaired in the case of those who because of poverty, class, or for other social reasons beyond their power to change, are barred from exercising their human faculties for developing. The international community has in agreeing on human rights' covenants of social, economic and cultural rights recognized the essential needs

105 The fact that individual decisions concerning abortion may be seen as immoral is another problem. There is of course also a moral question as regards the father, but it is of a different nature and will not be discussed here.

of human beings. It may be true as Fields holds that progress in human rights only comes about through a battle of some sort, but it should not need to be so. The focus has been heavily on individual struggles of individual rights, and the debate about what it means to distribute those equally, but it has been argued here that liberty rights are derived from the equal status of human beings which necessarily results from the essence of human characteristics. This approach clarifies that liberty, as important as it is, or the safety of the human body should not be the only and primary focus of governments when implementing their positive duty to protect the right to life. The right to life understood in terms of life as *bios* is interwoven with social, economic and cultural rights to an extent which may still have to be defined. The threshold, however, of the margin of appreciation governments have when distributing the common goods should not be decided only on economic terms or the interests of some. It must be marked by a duty to pay respect to human beings and their equal right to develop as human beings, in other words, on their primary right to life based on their common humanity.