

## Article

# Liberty and Freedom in a Human Rights Paradigm

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### I. INTRODUCTION

Human rights are commonly conceived and expressed as human freedoms. The Universal Declaration of Human Rights (“UDHR”) says that every “member of the human family” has a kind of freedom and envisions “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear.”<sup>1</sup> Freedom, equality, and respect for human dignity are recognized as underlying principles of human rights.

The concept of “human rights” is multifaceted. Many scholars have attempted to provide a definition by describing two of its core characteristics of *liberty* and *freedom*.<sup>2</sup> But what do liberty and freedom mean in terms of human rights? Which kinds of freedom and liberty are protected by the international human rights system and what does it mean to be free? Fred E. Foldvary defines freedom as:

[A]n absence of restrictions or constraints. It exists on many levels. There is the physical freedom of a man liberated from prison walls, and there is inner freedom, the release from psychological inhibitions and fears. We are not

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1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at pmb1. (Dec. 10, 1948).

2. Starting with the Code of Hammurabi, through the Persian Empire and ancient India and Greece, as well as in Chinese philosophy and Roman law, there are examples of reflection on issues of liberty and freedom in the philosophical and political sense. During the European Enlightenment, the theory of social contract was developed by Thomas Hobbes, John Locke and Jean–Jacque Rousseau, and the idea of liberty was developed by John Stuart Mill. Their ideas endure into the twenty–first century.

dealing with these freedoms, but with what is usually called individual freedom or social freedom, or simply “liberty”: the absence of restrictive laws and government policies, the legal right to express oneself and move about as one wishes, in sum, the freedom from the coercive harm of others.<sup>3</sup>

Reflecting on the form of liberty and freedom which the authors of the UDHR had in mind, most international instruments dealing with human rights seem to guarantee rights of non-coercion. A right to a specific liberty or freedom is implied, for example, in Article 9 of the UDHR—freedom from arbitrary arrest and exile;<sup>4</sup> Article 12—freedom of interference with privacy, family, home, and correspondence;<sup>5</sup> and Article 13—right to free movement in and out of the country.<sup>6</sup> Additionally, there are references in the UDHR to other articles guaranteeing freedoms of thought, conscience and religion, expression, and other liberties.<sup>7</sup> Already at a first glance, differences are apparent in these kinds of liberties: Article 9 deals with physical liberty, Article 12 relates to secrecy and intimacy, while other articles cover restrictions on the government’s ability to limit people’s actions.

## II. BACKGROUND

The splitting of freedom can be traced at least back to the Enlightenment and New Age era. John Stuart Mill, in his 1859 essay *On Liberty*, wrote that “[t]he subject of this Essay is not the so-called Liberty of the Will, so unfortunately opposed to the misnamed doctrine of Philosophical Necessity; but Civil, or Social Liberty: the nature and limits of the power which can be legitimately exercised by society over the individual.”<sup>8</sup>

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3. FRED E. FOLDVARY, *THE SOUL OF LIBERTY* 50 (1980).

4. Universal Declaration of Human Rights, *supra* note 1, art. 9 (“No one shall be subjected to arbitrary arrest, detention or exile.”).

5. Universal Declaration of Human Rights, *supra* note 1, art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”).

6. Universal Declaration of Human Rights, *supra* note 1, art. 13(1) (“Everyone has the right to freedom of movement and residence within the borders of each state.”).

7. See, e.g., Universal Declaration of Human Rights, *supra* note 1, arts. 16, 18–20.

8. JOHN STUART MILL, *ON LIBERTY* 7 (7th ed. 1871).

The ancestors of the human rights movement in the West assumed that man was endowed with certain inalienable rights, notably and prominently that of liberty.<sup>9</sup> In the twentieth century, thinkers generally used two different categories of freedom to discuss and debate the role of government in citizens' lives.<sup>10</sup>

**NEGATIVE FREEDOM** is the freedom *from* external interference. Negative freedom prevents those who have power from doing what they want, when they want in an arbitrary way. These restrictions place limits on the government's ability to interfere in the lives of its people without reasonable excuses established by law. This meaning of freedom is used when talking, for example, about freedom of expression, movement, or religion.

**POSITIVE FREEDOM** is the freedom *to control* and *direct* one's own life. Positive freedom allows human beings to consciously make their own choices, create their own purposes, and shape their own lives. It allows individuals to *act* instead of being *acted upon*. Positive freedom usually deals with privacy.

Both forms of freedom mentioned above are based on the concept of **PERSONAL AUTONOMY**. Personal autonomy is a concept derived from ancient Greek philosophy and has evolved to denote self-legislation, self-governance, self-determination, self-ownership, and personal sovereignty. There is a lack of consensus on what "autonomy" entails, and the term has only recently arisen in the texts of international documents on human rights.<sup>11</sup>

Louis Henkin contends that the reason is "probably because it reflects a theory of government and of its origins on which there was not likely to be agreement in international instruments drafted and concluded during an ideological Cold War."<sup>12</sup> In a broader sense, liberty, as political freedom, may

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9. For example, Jacques Maritain, one of authors of the Universal Declaration of Human Rights and spiritual inspirer of the human rights philosophy in the twentieth century, is known as a strong defender of a natural law ethics.

10. See, e.g., ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

11. See International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (Dec. 13, 2006).

12. Louis Henkin, *Democracy and Liberty as Human Right*, in *TOWARDS IMPLEMENTING UNIVERSAL HUMAN RIGHTS*, 173, 177–78 (Nisuke Ando ed.,

well be a prerequisite to the exercise of autonomy as a capacity for choice in general. The concept of autonomy appears in the case law of the United States Supreme Court<sup>13</sup> and the European Court of Human Rights (“ECtHR”)<sup>14</sup> as a justification for the principle of freedom indicated in the Preamble to the UDHR.

### III. PERSONAL AUTONOMY AND PRIVACY

The concept of autonomy was clearly presented in the philosophical conception of Immanuel Kant, who recognized autonomy as the capacity of a rational being to make universal law.<sup>15</sup> In the human rights approach, autonomy usually pertains to privacy and the capacity to make one’s own decisions, the right to be left alone, and the right to make choices about one’s own body.<sup>16</sup>

This can be illustrated by the case *A, B and C v. Ireland*,<sup>17</sup> heard by the ECtHR in 2010. The case was brought by three women who suffered grave health consequences as a result of not being able to access abortion services within Ireland.<sup>18</sup> While rejecting the complaints of two of the three applicants, the Court found a violation of Article 8 with regard to applicant C<sup>19</sup>, who argued that she was a victim of a “lack of accessible and effective procedures in Ireland [so] to allow her to establish

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2004).

13. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence v. Texas*, 539 U.S. 558 (2003).

14. Key cases before the ECtHR will be analyzed below.

15. IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 421–39 (Lewis White Beck trans., 1959).

16. *See, e.g.*, *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155; *A, B & C v. Ireland*, App. No. 25579/05, 53 Eur. H.R. Rep. 429 (2011).

17. *A, B & C*, 53 Eur. H.R. Rep. at 429.

18. *Id.*

19. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention on Human Rights*]:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

her qualifications for a lawful abortion in Ireland.”<sup>20</sup> In its judgment, the Court stated that:

[A]uthorities failed to comply with their positive obligation to secure . . . effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.<sup>21</sup>

A similar approach to autonomy is seen in *Roe v. Wade*,<sup>22</sup> decided by the U.S. Supreme Court in 1973. In its decision, the Court held that the Constitution’s protections of privacy as a fundamental right encompass a woman’s decision to have an abortion.<sup>23</sup>

In the case *Pretty v. United Kingdom*,<sup>24</sup> the ECtHR found that underlying the protection of respect for private life set forth in Article 8 of the European Convention on Human Rights and Fundamental Freedoms was the principle of autonomy “in the sense of the right to make choices about one’s own body.”<sup>25</sup>

The applicant was a forty–three year old woman who suffered from a progressive neuro–degenerative disease of motor cells within the central nervous system.<sup>26</sup>

The disease is associated with progressive muscle weakness affecting the voluntary muscles of the body. As a result of the progression of the disease, severe weakness of the arms and legs and the muscles involved in the control of breathing are affected. Death usually occurs as a result of weakness of the breathing muscles, in association with weakness of the muscles controlling speaking and swallowing, leading to respiratory failure and

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20. *A, B & C*, 53 Eur. H.R. Rep. at 499, 501.

21. *Id.* at 498.

22. *Roe v. Wade*, 410 U.S. 113.

23. *Id.* at 154.

24. *Pretty*, 2002–III Eur. Ct. H.R. 155.

25. *Id.* at 195.

26. *Id.* at 162.

pneumonia. No treatment can prevent the progression of the disease.<sup>27</sup>

The applicant's condition had deteriorated rapidly, her life expectancy was poor and she strongly wished to be able to control how and when she died.<sup>28</sup>

Although it is not a crime to commit suicide under English law, the applicant was prevented by her disease from taking such a step without assistance. It is, however, a crime to assist another to commit suicide. . . . Intending that she might commit suicide with the assistance of her husband, the applicant's solicitor asked the Director of Public Prosecutions . . . to give an undertaking not to prosecute the applicant's husband should he assist her to commit suicide in accordance with her wishes.<sup>29</sup>

The Divisional Court refused the application.<sup>30</sup>

In its assessment the ECtHR stated that:

[T]he concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.<sup>31</sup>

In its judgment, the ECtHR held that there had been no

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27. *Id.*

28. *Id.* at 162–63.

29. *Id.* at 163.

30. *Id.*

31. *Id.* at 193 (citations omitted).

violation of Article 8 of the Convention.<sup>32</sup> However, in the assessment, the Court admitted the importance of respecting the principle of personal autonomy in the sense of the right to make choices about one's own body.<sup>33</sup>

Thus, privacy in the sense of choice and control may be identified with autonomy as a precondition to assurance of the value of freedom.

#### IV. PHYSICAL LIBERTY

Physical liberty as an aspect of human freedom had been defined by Thomas Hobbes as far back as the 18th century as "*the absence of Opposition; (by Opposition, I mean externall Impediments of motion;) and may be applyed no lesse to Irrationall, and Inanimate creatures, than to Rationall.*"<sup>34</sup> Coming from a position of determinism, Hobbes assumes that the only thing that can be free is something that can move in space. As long as one is not physically coerced, Hobbes would argue that you have liberty; and as long as nothing is stopping us from doing something, we are free or at liberty to do it.

This concept of liberty corresponds with the position of the ECtHR regarding the meaning of the right to liberty:<sup>35</sup>

In proclaiming the "right to liberty", paragraph I of Article 5 is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Article 2 of Protocol no. 4). This is clear both from the use of the terms "deprived of his liberty", "arrest" and "detention", which appear also in paragraphs 2 to 5, and from a comparison between Article 5 and the other normative provisions of the Convention and its Protocols.<sup>36</sup>

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32. *Id.* at 201.

33. *Id.* at 193–97.

34. THOMAS HOBBS, LEVIATHAN: OR, THE MATTER, FORME AND POWER OF A COMMONWEALTH ECCLESIASTICALL AND CIVIL 261 (C.B. MacPherson ed., 1962).

35. European Convention on Human Rights, *supra* note 19.

36. Engel v. Netherlands, 22 Eur. Ct. H.R. (ser. A) at 25 (1976).

In the context of Article 5, liberty plausibly refers to freedom from physical restraint except as punishment for crime, and only pursuant to fair trial: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”<sup>37</sup>

Moreover, deprivation of liberty is recognized by the ECtHR according to the “spirit of law.” The case of *H.L. v. United Kingdom*<sup>38</sup> is an example of such an approach, and the ECtHR held to the definition of the Article 5 of the European Convention.

H.L., who suffered from severe autism and exhibited challenging behavior, lacked the capacity to decide where he wanted to live. After many years in a psychiatric hospital, he lived with caretakers for three years. Then, while at a day center, his behavior deteriorated and he was informally admitted to a hospital. He was denied contact with his caretakers for three months and the intention of the authorities was to keep him in the hospital. Because he was “compliant,” it was asserted that he was not deprived of his liberty.<sup>39</sup>

The Court observed that the applicant was under continuous supervision and control and was not free to leave. It made no difference whether the ward in which he was being treated was locked or lockable. The Court, therefore, concluded that the applicant was “deprived of his liberty” within the meaning of Article 5(1) during this period.<sup>40</sup>

The presumption in favor of liberty is underlined by the imperative requirement under Article 5 to ensure that liberty should both be lost for no longer than is absolutely necessary and be capable of being readily recovered where such loss is not justified. In the above-mentioned case, the applicant was an informally admitted psychiatric patient in a hospital, but drafters of the ECtHR believed a similar lack of procedural safeguards also covered a sizeable population—mostly people with dementia and learning disabilities—who were deprived of their liberty in care homes.

The case of *H.L. v. United Kingdom* is interesting not only

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37. European Convention on Human Rights, *supra* note 19.

38. *H.L. v. United Kingdom*, App. No. 45508/99, 2004–IX Eur. H.R. Rep. 191 (2004).

39. *Id.* §§ 9–51.

40. *H.L.*, 2004–IX Eur. H.R. Rep. 191.

from the point of view of a description of physical liberty, but this case also brings our attention to the quality of law that outlines limits of freedom which, by not being clear, may cause human rights violations.

#### V. TO BE FREE FROM HARM OF OTHERS

Enjoyment of freedom in the human rights context is interconnected with responsibility, with possible restrictions determined by the limits of freedom established by law, and with the principles of humanity, solidarity and morality as well. Isaiah Berlin, in his essay *Two Concepts of Liberty*,<sup>41</sup> brought to our attention a danger which may appear from the wish to present a group image. Now people conceive of themselves not only as individuals but also as

a social 'whole' of which the individual is an element or aspect: a tribe, a race, a church, a state, the great society of the living and the dead and the yet unborn. This entity is then identified as being the 'true' self which, by imposing its collective, or 'organic', single will upon its recalcitrant 'members', achieves its own, and, therefore their, 'higher' freedom.<sup>42</sup>

It is not difficult to find throughout history many examples of dangerous consequences following the use of organic metaphors to justify the coercion of some people by others in order to raise them to a "higher" level of freedom.

Legal restrictions contained in international human rights law provide that restrictions may only be such as are provided by law and are necessary for the protection of specific values. For example, according to Article 19 of the International Covenant on Civil and Political Rights (ICCPR),<sup>43</sup> freedom of expression may be restricted "(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."<sup>44</sup>

The ICCPR provides for the possibility of prohibiting inhumane or immoral acts of war propaganda, and any advocacy of national, racial or religious hatred that would

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41. BERLIN, *supra* note 10.

42. *Id.* at 132.

43. International Covenant on Civil and Political Rights, art. 19, Dec. 16, 1966, 999 U.N.T.S. 171.

44. *Id.*

constitute incitement to discrimination, hostility or violence (Article 20).<sup>45</sup> The International Covenant on Economic, Social and Cultural Rights<sup>46</sup> permits restrictions on rights to the extent that it is “compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”<sup>47</sup>

In the European Convention on Human Rights, limitations are described in the second paragraphs of Articles 8–11, Article 1 of Protocol 1, Article 2 of Protocol 4, and Article 1 of Protocol 7.<sup>48</sup> They suggest that rights and freedoms are not absolute, and may be restricted by the state, but only on the basis of law and in the public interest directly transferred to them.

“Public safety” and the “protection of health or morals” appear in Articles 8–11.<sup>49</sup> “National security” and “the prevention of disorder or crime” appear in Articles 8, 10 and 11,<sup>50</sup> and “the protection of the rights and freedoms of others” are found in Art. 8, 9 and 11.<sup>51</sup> Article 8 mentions the “economic well-being of the country,” Article 9 contains the phrase “public order,” and Article 10 includes “territorial integrity,” “protection of the reputation or rights of others,” “preventing the disclosure of information received in confidence,” and “maintaining the authority and impartiality of the judiciary.”<sup>52</sup>

These kinds of restrictions are rooted generally in the field of morality. As Fred E. Foldvary argues:

Freedom is not something relative to arbitrary, but a specific principle with two rules: (1) Acts which coercively harm others are prohibited. (2) All other acts are permitted. In other words, no restriction is placed on any actions in which others are not harmed... In a free society people are not only free to do, they are also free to be – to be free from harm by others.<sup>53</sup>

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45. *Id.* art. 20.

46. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

47. *Id.* art. 4.

48. European Convention on Human Rights, *supra* note 19, art. 8, Protocol No. 1, art. 1, Protocol No. 4, art. 2, Protocol No. 7, art. 1.

49. *Id.* arts. 8–11.

50. *Id.* arts. 8, 10, 11.

51. *Id.* arts. 8, 9, 11.

52. *Id.* arts. 8–10.

53. FOLDVARY, *supra* note 3, at 50.

In the human rights paradigm, the term “others” could be applied to those who have the power to dictate their will to the average human being. Usually, this means a government elected by the majority, which has different methods for putting pressure on a society. Therefore, limits, as envisioned in international human rights law, are directed to the governments in the first place. On the other hand, government, as a main bearer of duty in the human rights framework, is responsible for securing everyone from the harm of others through implementation of appropriate law and compliance with the law.

In Europe, interference with the exercise of rights and freedoms contained in the European Convention for Human Rights will not be compatible with the Convention unless they are:

- in accordance with the law
- have an aim or aims that is or are legitimate under particular paragraphs and
- are “necessary in a democratic society” for the aforesaid aim or aims.<sup>54</sup>

According to the European Court’s established case law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.

In the European legal tradition, the concept of the “rule of law” is used. It is mentioned in both the Statute of the Council of Europe<sup>55</sup> and in the Preamble to the European Convention on Human Rights,<sup>56</sup> which requires effective safeguards against arbitrary interference by the authorities. In the United States, since the end of the 19th century, the Supreme Court has interpreted “liberty,” as well as “due process of law”:<sup>57</sup>

The liberty mentioned in that [14th] Amendment meant not only the right of the

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54. See, e.g., European Convention on Human Rights, *supra* note 19.

55. “Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy. . . .” Statute of the Council of Europe, pmb., May 5, 1949, 87 U.N.T.S. 103.

56. “Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.” European Convention on Human Rights, *supra* note 19.

57. HENKIN, *supra* note 12, at 178.

citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned.

In that and other cases of the time, the Court also interpreted “due process of law” to require not only a basis in law, and lawful, fair procedures, but conformity of legislation to “substantive due process” to principles of “ordered liberty” requiring rationality, fairness, and justice.<sup>58</sup>

The goal of both concepts is to monitor the quality of legislation. Both Courts recognize the authority of the government under its “police power” to limit individual autonomy and liberty by laws necessary to protect health, safety, morals, or the general welfare.

## VI. CONCLUSION

Starting with Kant, personal liberty and named autonomy, recognized as the capacity of a rational being to make universal laws, is at the heart of the concept.<sup>59</sup> In the human rights paradigm, personal autonomy and physical liberty are aspects of human dignity and human freedom, principles which underlie various specific rights. These two notions underlie all human rights guarantees as general principles, and personal autonomy, liberty, and freedom can be argued to have a central, underlying role.

Physical liberty as one of the aspects of human freedom is a fundamental condition which everyone should generally enjoy. Its deprivation is something that is also likely to have a direct and adverse effect on the enjoyment of many other rights. In order for the guarantee of liberty to be meaningful,

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58. *Id.*

59. KANT, *supra* note 15, at 32.

any deprivation of it should always be exceptional, objectively justified, and of no longer duration than absolutely necessary.

This notion connects to the general principle that human rights limitations should be described clearly and not permit any double meanings. Probably the most important issue in the current human rights framework is how legal systems should balance liberty and other values, such as common good, security, stability, or general welfare.