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Uncovering the Nature of ECHR Rights: An Analytical and Methodological Framework

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ABSTRACT

How does the European Court of Human Rights (ECtHR) understand the nature of human rights? The article develops a framework for the analysis of this question and shows how it can be applied. The first part identifies a gap at the intersection of doctrinal and philosophical approaches to human rights practice that leaves the ECtHR's understanding of the nature of rights unaccounted for. The second part develops an analytic and methodological framework based on the idea of grounds, content and scope of human rights to bridge this disciplinary divide and facilitate a more perspicuous analysis of the Court's conception of the nature of human rights. The third part tests this framework by examining the Court's doctrines in relation to freedom of thought, conscience and religion and the right to free elections.

KEYWORDS: European Convention on Human Rights, European Court of Human Rights, nature of human rights, human rights theory, moral and political conceptions of human rights, doctrines of interpretation

1. INTRODUCTION

The European Convention on Human Rights (ECHR) has established one of the most developed systems of human rights protection in the world. The central role in that system is played by the European Court of Human Rights (ECtHR). In over 50 years of implementation and interpretation of the Convention, the ECtHR has developed a complex web of legal doctrine which pertains not only to the specific rights and freedoms, but also to fundamental features of human rights as an idea. However—although the ECtHR's understanding of particular rights has been subject to decades of scholarly analysis and critique—insufficient attention has been paid to the more general question of how this court understands the nature of human rights.

In this article, we show why this is an important question, provide an analytic and methodological framework that can be used to answer it and demonstrate the benefits of this framework by analyzing the ECtHR's doctrines. In so doing, we build upon but also transcend some of the prominent contributions that seek to immanently reconstruct the legal practice of human rights.

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We share methodological affinities with such approaches and agree that significant insights can ensue from this kind of investigation.[1] But we depart from such approaches in two senses. On the one hand, in trying to account for the nature of human rights in legal practice, we consciously aim not to make assumptions about the nature of law and legal reasoning, or about the function of human rights law within international law. As we will explain, such assumptions limit the explanatory capacity of previous attempts to reconstruct the legal practice of human rights. Our goal is to offer a more encompassing framework of analysis that would capture the richness of the practice and investigate—among other things—whether some of these assumptions are warranted in the ECHR context. On the other hand, our focus is solely on the ECHR and not on international law of human rights in general. Although there is no principled reason why our framework of analysis cannot be used for similar inquiries in other institutional contexts, the ECtHR's interpretation of human rights is prominent, sophisticated and—as we will show—subject to a range of scholarly debates that could profit from a prior analysis of the ECtHR's understanding of human rights.

In the first section, we make the case that such analysis is important for many familiar arguments made in the literature. We do so with a reference to two strands of scholarship. We first show that some of the key debates about the ECtHR—concerning, for example, its central doctrines or its authority—rest on certain premises about the nature of human rights that for the most part remain unhelpfully implicit. We then move on to demonstrate that similar observations hold for the field of human rights philosophy, which has recently turned its focus on human rights practices, but has neglected the ECHR, despite its global prominence. If they are to benefit from tighter mutual engagement, we believe, these two bodies of scholarship need a common vocabulary and a set of shared analytic tools.

In the second section, our aim is to provide such tools: we develop an analytic and methodological framework to bridge this disciplinary divide and facilitate a more perspicuous analysis of the ECtHR's understanding of human rights. The suggestion is to understand the nature of human rights in light the *grounds* of human rights, which denote the more fundamental features of reality in virtue of which human rights exist; the *content* of human rights, which denotes the kinds of normative relations established by human rights; and the *scope* of human rights, which denotes the field of application of normative relations established by human rights. This tripartite framework does not aim to provide a comprehensive overview of different philosophical positions about the nature of human rights. Rather, the goal is to underline the basic philosophical questions and disagreements and to provide a guide for legal scholars to analyse the nature of the ECHR rights.

In the third section, we show how such analysis can be conducted. We test our framework by examining the ECtHR's doctrines in relation to freedom of thought, conscience and religion (Article 9 ECHR) and the right to free elections (Article 3, Protocol 1). These two rights reflect the breadth of the Court's reasoning with respect to the nature, grounds and scope of human rights and as such illustrate the usefulness of the analytical framework that can track this complexity. Although our focus here is limited to two rights from the Convention, this section is meant to serve both as an illustration of the kind of inquiry that can be facilitated by focusing on grounds, content and scope of any particular right and as an important test of the success of our account. The measure of such success can be observed along three primary dimensions. The first pertains to a better analysis of the ECtHR's doctrines, for instance, in terms of new insights into the available choices the ECtHR faces in relation to different understandings of the grounds

[1] See e.g. Besson, 'The Law in Human Rights Theory' (2013) 7(1) *Zeitschrift für Menschenrechte—Journal for Human Rights* 120, Besson, 'Human Rights: Ethical, Political . . . or Legal? First Steps in a Legal Theory of Human Rights' in Childress (ed.), *The Role of Ethics in International Law* (2015), and Macklem, *The Sovereignty of Human Rights* (2015) and Buchanan, *The Heart of Human Rights* (2016).

of these rights and the effects of such understandings on their content and scope. The second dimension relates to the possibility of clearer normative or conceptual analysis of human rights that is informed by their instantiation in a leading human rights practice. The third dimension concerns the range of further questions that are raised by our analysis: we conclude that more research in this area would lead to significant insights for both human rights law and philosophy.

2. RESEARCHING THE NATURE OF ECHR RIGHTS: ÉTAT DES LIEUX

In this section, we substantiate the claim that there is a need for an inquiry into the ECtHR's understanding of the nature of human rights. In a perhaps obvious sense, this kind of inquiry is important: the Court bases its judgments on an understanding of human rights, and such understanding thus becomes decisive for both applicants and domestic authorities. It is then somewhat surprising that there has not been more scholarly engagement with this question. Although there has been an exponential growth of doctrinal and normative work in European human rights law, there has not been enough exploration of the Court's understanding of the nature of human rights. At the same time, the human rights theory has also been developing at a rapid pace, and it has often claimed to be useful to, or based on, human rights practice, but the analysis of the ECtHR case-law has remained marginal in the philosophically oriented scholarship.[2]

A. ECHR Scholarship

Legal research in the field of human rights has probably never been 'doctrinal' in a pejorative sense: it has always sought to uncover the political and social foundations of legal doctrine and to engage with deeper normative questions that go beyond the purely formalistic legal analysis.[3] But it has rarely discussed the ECtHR's specific understanding of the nature of human rights, even when this was of direct relevance. Let us take one example that is illustrative of a wider trend: the recent debate about the so-called 'procedural turn' of the Court.[4] The issue concerns the tendency of the Court to grant the respondent state a margin of appreciation if the rights-interfering norm is issued in line with its democratic procedures. But this 'procedural' turn can only be analyzed in light of (at least) some premises about the nature of human rights. The institutional issue of who should decide on human rights at least partly depends on the prior question of what the best process is to work out or gain epistemic insight into the normative content of human rights and on the question of how to properly determine the justified scope of human rights protection. To resolve any of these prior questions, one would at least implicitly need to rely on some ideas about the nature of human rights.

The same point can be made about many other issues that have preoccupied the ECHR scholars. Although a lot of work has been done on reconstructing and evaluating the doctrinal mechanisms that the Court uses to determine the content and scope of human rights—such as margin of appreciation or European consensus—existing research typically focuses on consistency and clarity of these tests, or on their effects on the legitimacy of the Court,

[2] Charles Beitz does not discuss it at all (Beitz, *The Idea of Human Rights* (2009) at 14), and Andrea Sangiovanni uses the ECHR as an example but does not analyze it in depth (Sangiovanni, 'Beyond the Political-Orthodox Divide: The Broad View' in Etinson (ed), *Human Rights: Moral or Political* (2018) 174).

[3] See e.g. Marks, 'The European Convention on Human Rights and Its "Democratic Society"' (1996) 66(1) *British Yearbook of International Law* 209.

[4] Brems, 'Procedural Protection: An Examination of Procedural Safeguards read into Substantive Convention Rights' in Brems and Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2014) 137; Gerards, 'Procedural Review by the ECtHR: A Typology' in Brems and Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (2017) 127; Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and Presumptions of Convention Compliance' (2017) 15(1) *International Journal of Constitutional Law* 9.

without explicitly engaging with the question of the nature of human rights.[5] There are, of course, some prominent counter-examples. A sophisticated theoretical critique of this kind was pioneered by Letsas, who argued that different conceptions of the margin of appreciation reflect different positions about the nature of rights.[6] Since then, a significant amount of research has been discussing the foundations, benefits and pitfalls of the margin of appreciation doctrine.[7] However—although there are a number of other noteworthy exceptions that, for instance, examine the values that ground the Court's analysis[8]—much of this scholarship has not gone a step further and inquired what the use of this doctrine may imply for the Court's conception of human rights.[9] For instance, one could ask whether in granting the margin of appreciation or relying on European consensus, the Court opts for a particular understanding of human rights grounds and perhaps does not see human rights as separate from the localized institutional context of their protection, or it considers these doctrines as the tools of specification of some pre-institutional conception of human rights.[10] This issue is quite consequential, for in choosing one or the other understanding of human rights, the court might be more or less inclined to defer to other institutions or resolve the issue in an autonomous way. And even if the outcomes of a case do not turn on this question, the same outcomes may be reached on the basis of more or less persuasive reasoning, the plausibility of which will depend on a background conception of human rights.

The absence of this sort of analysis is partly a consequence of insufficiently supported assumptions about the nature of human rights. For example, it is sometimes argued that the use of the margin of appreciation and European consensus makes the Court's understanding of human rights 'relativist', thus undermining the universality of human rights.[11] Although this critique may well turn out to be justified, it implicitly presupposes a particular conception of the nature of human rights. As noted by Allen Buchanan, human rights law is frequently apprehended through what he calls the 'mirroring view', which assumes that the main function of human rights law is to realize preexisting moral rights.[12] This tendency is clear in the critique of the ECtHR's doctrines identified above: the purpose of the Court's doctrine, on this view, is 'to *track* human rights, not to *constitute* them'.[13]

Our aim is neither to object to this critique nor to undermine the view of human rights upon which it is based. Rather, we wish to draw attention to two methodological weaknesses. On the one hand, there is not enough analysis of the elements of the Court's practice from the perspective of general theories about the nature of human rights, which would be necessary to mount this kind of critique. On the other hand, the relationship between the notion of human rights and practice of human rights is seen as unidimensional, because the practice is understood as a project of discovering the content of human rights that is antecedent to it.[14] This view is too crude even from the perspective of the 'mirroring view': as Besson argues, such approaches

5 Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (2016).

6 Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) *Oxford Journal of Legal Studies* 705; Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2007).

7 Follesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson (ed), *Human Rights: Moral or Political?* (2018) 269; Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015).

8 Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (2007); Moller, *The Global Model of Constitutional Rights* (2012).

9 An exception is Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (2006).

10 Tripkovic, 'A New Philosophy for the Margin of Appreciation and European Consensus' (2022) 42(1) *Oxford Journal of Legal Studies* 207.

11 See e.g. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843.

12 Buchanan, supra n 1.

13 Sangiovanni, 'Human Rights Practices' (2020) 25(1)*Critical Review of International Social and Political Philosophy* 50.

14 Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21(3) *European Journal of International Law* 509.

eschew the potential wisdom and epistemic insight of generations of participants in a leading human rights practice.[15]

Another strand of ECHR scholarship, in contrast, almost exclusively probes the legitimate authority of the ECtHR.[16] The central question here concerns the reasons to comply with the directives of the ECtHR and the way in which the ECtHR ought to exercise its interpretive powers to stay within the limits of its legitimate authority.[17] Because the central concept of analysis is legitimate authority, the starting point of inquiry is not distinctive of human rights law or the ECtHR, but can potentially be applied to any agent exercising authority.[18] For this reason, such analysis often stays at some distance from the context to which it is applied and includes at least three distinct issues that need to be disentangled: the general question what makes an authority legitimate, the more narrow question of what makes the authority of a court legitimate and the even more specific question of what makes the authority of a human rights court—such as the ECtHR—legitimate.[19] As a consequence, it is easy to neglect the fact that the ECtHR's role is to protect human rights and that its legitimate authority will at least partly depend on the plausibility of its understanding of human rights.

For example, it has been argued that the Court's claim to authority in relation to domestic institutions cannot be based on the idea that it has a better epistemic insight into the content of human rights.[20] The Court's legitimate authority has also been explained in terms of its ability to enable the states to better comply with the reasons that apply to them anyway.[21] But notice that these arguments presuppose an understanding of human rights too, and they turn on the question of whether the ECtHR is a comparatively more appropriate institution for their protection. For example, if the argument is that domestic institutions are better placed to protect human rights because they better understand local needs, the standard against which this is to be judged is some conception of optimal human rights protection. Or, if reasonable disagreement about human rights should lead to the ECtHR's deference to more representative institutions,[22] then such deference must rely on a background conception of the limits that human rights pose to the 'reasonableness' of such disagreement. Finally, if the legitimate authority of the Court depends on it being able to positively affect the ability of the states to comply with normative reasons that apply to them anyway, then such reasons, in the context of the ECHR, will also be human rights-based reasons, which in turn need to be analyzed against the backdrop of some understanding of human rights. Again, the issue is not that these kinds of arguments are superfluous or unpersuasive, but that they can benefit from a deeper and more explicit analysis of the ECtHR's understanding of the concept of human rights.[23]

[15] See in particular Besson, 'International Human Rights Law and Mirrors' (2018) 7(2) *ESIL Reflections* 1.

[16] See generally on legitimate authority, Christiano, 'The legitimacy of international institutions' in Marmor (ed), *The Routledge Companion to Philosophy of Law* (2012) 380; Buchanan, 'Legitimacy of International Law' in Besson and Tasioulas (eds), *The Philosophy of International Law* (2010) 79; Scherz, 'Tying Legitimacy to Political Power: Graded Legitimacy Standards for International Institutions' (2021) 20(4) *European Journal of Political Theory* 631.

[17] See e.g. Bellamy, 'The Democratic Legitimacy of International Human Rights Conventions: Political Constitutionalism and the European Convention on Human Rights' (2015) 25(4) *European Journal of International Law* 1019.

[18] Raz, 'The Problem of Authority: Revising the Service Conception' (2006) 90 *Minnesota Law Review* 1003.

[19] See, generally, Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18, and in the domain of the ECHR, Bellamy, supra n 17.

[20] Wheatley, 'On the Legitimate Authority of International Human Rights Bodies' in Follesdal, Schaffer and Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (2014) 84. For an argument that explains why the Court could be in such a position, see Dothan, 'Judicial Deference Allows European Consensus to Emerge' (2017) 18 *Chinese Journal of International Law* 393.

[21] Follesdal, 'The Legitimate Authority of International Courts and Its Limits: A Challenge for Raz's Service Conception?' in Capps and Olsen (eds), *Legal Authority Beyond the State* (2018) 188.

[22] Bellamy, supra n 17.

[23] For that kind of analysis of autonomous concepts, see Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15(2) *European Journal of International Law* 279.

B. The Theory of Human Rights

The field of human rights theory has also not sufficiently engaged with the question of the nature of ECHR rights, often against its own methodological commitments. The received way of thinking about human rights has been variously referred to as 'ethical', 'orthodox' or 'naturalist'.[24] The key tenet of this view is the idea that human rights are moral rights that belong to human beings 'simply in virtue of being human'.[25] For an ethical theorists of human rights, elucidating the notion of human rights presupposes engaging in a reflective moral exploration of distinctively human feature(s)—such as their agency, interests or needs—which are sufficiently important and valuable to ground human rights.[26] In other words, practice is to be reconstructed and normatively explained from the perspective of preexisting moral human rights: ethical accounts primarily aim to provide the normative groundwork that serves as a basis of evaluation, interpretation and reform of the rights found in conventions, treaties or constitutions.[27]

This is not to say that human rights practices are irrelevant to ethical accounts. For example, Griffin explains his preferred methodology for understanding the nature of human rights as follows: 'one starts with human rights as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists of various sorts, and then sees what higher principles one must resort to in order to explain their moral weight, when one thinks they have it, and to resolve conflicts between them'.[28] And, for most ethical theorists, human rights practices are relevant also because they can determine the context and parameters within which human rights claims are made and may affect the specification of such rights.[29] Thus, on this conception, human rights practices matter both as a subject of evaluative analysis and as an important resource of ideas about the notion of human rights or about the context of their application that partly determines their specification.[30] Yet, the practice of the ECtHR is conspicuously absent from the empirical facts under scrutiny of ethical theorists.[31] This is a significant omission both in light of the fact that this is one of the most important and advanced practices of human rights protection and in light of the fact that the Court often does engage in reflective ethical reasoning that mirrors the methodological posture of ethical theorists. [32]

Although human rights practices are important for the ethical conception of human rights, they are crucial for the second major approach to the nature of human rights: the so-called 'practical' or 'political' conception.[33] The key trait of the political approach is the idea that the meaning of human rights can be inferred from the function(s) they play in the broader practice of international relations. This functional approach, pioneered by Rawls,[34] and more recently developed by Beitz and Raz,[35] offers a methodological counterpoint to the ethical conception: the nature of human rights is elucidated by paying attention to the norms of the practice and

[24] Griffin, *On Human Rights* (2008); Tasioulas, 'Taking Rights out of Human Rights' (2010) 120(4) *Ethics* 647; Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights* (2015).
[25] Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (2001) at 185.
[26] Valentini, 'Human Rights, Freedom, and Political Authority' (2012) 40(5) *Political Theory* 573.
[27] Griffin, for example, sees the use of the notion of human rights in current discourse as 'incomplete' and 'underdetermined' (Griffin, supra n 24 at 16). See also Griffin, 'First Steps in an Account of Human Rights' (2001) 9(3) *European Journal of Philosophy* 306; Besson, 'Human Rights: Ethical, Political . . . or Legal?' supra n 1.
[28] Griffin, supra n 24 at 29.
[29] See e.g. ibid. ch 4 and Tasioulas, supra n 24, 671.
[30] Etinson, 'On being Faithful to the "Practice"' in Etinson (ed), *Human Rights: Moral or Political* (2018) at 160.
[31] This can, of course, be seen as part of a broader failure to consider human rights practices in sufficient depth.
[32] Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions* (2016).
[33] Beitz, supra n 2; Raz, 'Human Rights without Foundations' in Besson and Tasioulas (eds), *The Philosophy of International Law* (2010) 321; Rawls, *The Law of Peoples: With 'The Idea of Public Reason Revisited'* (2001); Maliks and Schaffer (eds), *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice* (2017).
[34] Rawls, supra n 33.
[35] Beitz, supra n 2; Raz, supra n 33.

actions that their violation triggers.[36] The function of human rights is typically located in justification of some form of 'international concern' when the primary duty-holders on the domestic level fail to take action.[37] The political conception thus methodologically proceeds from the actual human rights norms: only once the concept of human rights is understood as it operates in social practice, it is possible to subject it to normative assessment.[38]

Because the actual social practice takes such methodological precedence,[39] it is peculiar that the proponents of the political conceptions have not examined the ECtHR practice. This is even more curious given that the ECtHR's practice is quite sophisticated and structured, and as such should probably be one of the prime test-cases for the cogency of arguments advanced by the political conception. For example, Beitz's and Raz's functional accounts should be very interested to understand how the ECtHR sees the limits of 'international concern' it can justifiably express in relation to state parties without triggering sovereignty-based protections and to examine the actions taken by state parties in response to an (adverse) judgment of the Court.[40]

In addition to the moral and the political approaches, human rights theory has been recently nourished by contributions that account for their distinctively legal nature or function. These contributions both offer an alternative to the dichotomy between the moral and the political conception and recognize the importance of immanently reconstructing the legal practice of human rights. For example, Samantha Besson has championed this approach starting from the dual (moral and legal) nature or human rights,[41] while Patrick Macklem has focused on their prototypical function within international law.[42] Although we take cue from these important contributions, our goal is to both show the relevance of extending such approaches to the context of the ECtHR and—more importantly—offer a framework that can expand their explanatory capacity. It is thus crucial to situate our project vis-à-vis these approaches. On the one hand, Macklem's project is to argue that human rights have a particular function that is 'internal to the structure and operation of international law'.[43] In his view, the purpose of legal human rights is to mitigate harms associated with international law based on the idea of sovereignty. This is where our project departs from Macklem's: we explore the Court's reasoning and ask whether it indeed functionally defines rights in relation to sovereignty or another systemic and/or foundational notion and what consequences does this have on the content and scope of rights. As we shall show, functional considerations only partly inform the Court's reasoning.

On the other hand, with respect to Besson's account, the key distinction is that we do not base our analysis on any meta-theoretical account of law and legal reasoning. Although Besson's work also aims to provide an interpretation of human rights practice, it 'considers legal (human rights) reasoning as a special form of moral reasoning and legal theory as participating in that form of

[36] Nickel, 'Assigning Functions to Human Rights: Methodological Issues in Human Rights Theory' in Etinson (ed), *Human Rights: Moral or Political* (2018) 145.

[37] Beitz, supra n 2.

[38] See e.g. Raz, supra n 33.

[39] Hessler, 'Theory, Politics and Practice' in Maliks and Schaffer (eds), *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice* (2017) 15. For critiques of political conception, see Valentini, supra n 26; Liao and Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' (2012) 9(3) *Journal of Moral Philosophy* 32; Maliks and Schaffer, supra n 33; Renzo, 'Human Rights and the Priority of the Moral' (2015) 31(2) *Social Philosophy & Policy* 127.

[40] Zysset, supra n 32; Zysset, 'Charles Beitz' Idea of Human Rights and the Limits of Law' (2022) 25(1) *Critical Review of International Social and Political Philosophy* 87.

[41] Besson, 'The Law in Human Rights Theory' supra n 1. See also Besson, 'Human Rights: Ethical, Political . . . or Legal?' supra n 1.

[42] Macklem, supra n 1.

[43] Ibid. at 2.

reasoning, as a result'[44] and sees law as 'a generator of moral norms and of moral normativity'.[45] This distinction is vital, as our account is not informed by such a view of law and legal reasoning and it is thus potentially valuable irrespective of the specific legal theory that one may subscribe to. For example, even those who do not think of legal practice as a form of moral reasoning or do not think that 'law encompasses morality'[46] can see our project as fruitful, given that it can allow them to criticize such practice on moral grounds that they may see as external to it. Relatedly, the focus of our inquiry and insights it may generate are different. Whereas Besson's account aims to provide 'the best interpretation and justification of the existing practice ... i.e. one that puts that practice in its best light',[47] our account does not aim to justify the practice. In our view, the question of how the Court itself understands the nature, content and scope of rights is distinct from whether this understanding is normatively defensible or capable of generating moral norms. There are thus important but limited synergies between our approach that seeks to uncover the premises of the ECtHR's understanding of human rights and Besson's method of constructive moral interpretation of such practice, which can come as a consequence of the analysis that we suggest needs to be undertaken.

To sum up our mapping in three points. First, the legal analyses of the ECHR have not sufficiently engaged with the question of how the ECtHR understands the nature of human rights and have not been fully informed by recent developments in human rights theory. Second, the theoretical approaches to the concept of human rights have not paid almost any attention to the ECtHR's practice: the ethical conception has not applied its conceptual template to the actual practice of regional courts, including the ECtHR, while the political conception's reconstruction of human rights practices has not accounted for the ECtHR practice, despite its prominence. Third, although the legal theory of human rights provides important insights to the project of investigating the practice of human rights, there remains a significant space for research into the ECtHR's practice that is neither committed to a meta-theoretical view about law nor to an overarching purpose of human rights law.

3. THE NATURE OF HUMAN RIGHTS: FRAMEWORK OF ANALYSIS

In this section, we articulate the key questions that can guide the analysis of the ECtHR's understanding of the nature of human rights. The first is the question of the *grounds* of human rights. By explaining the grounds of human rights, one is answering the question of why there are human rights, or—more precisely—in virtue of what human rights exist. The second is the question of the *content* of human rights. By elucidating the content of human rights, one is specifying the kinds of normative relations established by human rights. The third is the question of *scope* of human rights. By describing the scope of human rights, one is identifying the field of application of human rights: their place and reach within the framework of other values and goals, as well as their extension across space, time and persons.[48]

Analysing the ECtHR's practice through the prism of these three questions is useful for several reasons. First, although there might be elements of human rights that are not captured by this framework, it is difficult to see how there can be an account of human rights that is silent on grounds, content and scope of human rights. Second, because these different elements are closely related, leaving any of them out would yield an incomplete picture. Finally, this framework of analysis is sufficiently abstract to be acceptable to a range of different substantive

[44] Besson, 'Human Rights in Relation: A Critical Reading of the ECtHR's Approach to Conflicts of Rights', in Brems and Smet (eds), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (2017) 23 at 26.
[45] Besson, 'The Law in Human Rights Theory' supra n 1.
[46] Ibid. at 129.
[47] Besson, supra n 44 at 26.
[48] See for example Sangiovanni, supra n 2; Etinson, supra n 30.

views about the nature of human rights, while it is at the same time concrete enough to highlight the points of disagreement between them. It is, however, crucial to note two caveats. On the one hand, the framework is analytical and not normative: its aim is to offer a conceptual lens to make sense of and reflect upon the complexity of legal practice and not to defend any particular view about human rights. On the other, the framework aims to capture and systematize the basic questions of human rights theory, and it does not aspire to offer a comprehensive overview of all the possible answers to such questions. Although there is a range of further philosophical questions and views about the nature of human rights, we focus on the ones that make most sense from the standpoint of legal practice.

A. Grounds

The grounds of human rights point to a non-causal, constitutive and explanatory relation between a certain fact and a conclusion that there is a human right with a particular normative content.[49] For example, suppose that the right to privacy exists because it protects human dignity. In this case, the fact that dignity of human beings is valuable would be the ground of the human right to privacy. Human dignity would not been seen as the cause of the right to privacy, but would be understood as its constitutive determinant, and would count as an explanation of why there is such a human right.[50]

Facts about human rights are at least partly determined by normative facts. Because facts about human rights are themselves normative facts, they need to be supported by at least some normative premises.[51] But there is much disagreement about the kinds of normative considerations that count as grounds of human rights. According to monism about human rights grounds, there is one master normative value that grounds all human rights. For example, Griffin's argues that 'personhood'—understood as a kind of normative agency or the ability to choose and pursue the idea of good life—is the ultimate ground of human rights.[52] Conversely, according to the pluralists about human rights grounds, normative considerations that ground human rights are multiple and are not derived from a single most fundamental value. In the ethical camp, Tasioulas sees human rights as grounded in both human status and human interests: human status is to be respected by paying equal respect for each individual's interests derived from a conception of basic (but plural) human goods.[53]

The political approaches to human rights are also pluralistic, but they do not restrict the grounds of human rights to valuable features of human beings.[54] For Beitz, human rights are grounded in both valuable features of human beings, understood as interests that are 'intersubjectively recognizable as important or urgent',[55] and in the fact that it is 'advantageous to protect the underlying interest by means of legal or policy instruments available to the state' while the failure to protect them is a 'suitable object of international concern'.[56] This second layer of grounds includes considerations about the suitability of protection of such interests through

[49] Correia and Schnieder (eds), *Metaphysical Grounding* (2012).

[50] See e.g. Waldron, 'Is Dignity the Foundation of Human Rights?' in Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights* (2015) 117; Luban, 'Human Rights Pragmatism and Human Dignity' in Cruft, Liao and Renzo (eds), *Philosophical Foundations of Human Rights* (2015) 263; and Follesdal, 'Theories of Human Rights: Political or Orthodox–Why It Matters' in Maliks and Schaffer (eds), *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice* (2017) 77.

[51] Griffin, supra n 24 at 81; Nagel, *Concealment and Exposure: And Other Essays* (2002) 33; Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65(1) *Current Legal Problems* 1 at 7.

[52] Griffin, supra n 24 ch 2. Another example is Sen, *The Idea of Justice* (2009) ch 17.

[53] Tasioulas, supra n 51 at 9–11.

[54] Beitz, supra n 2 at 128 and 160.

[55] Ibid. at 139.

[56] Ibid. at 137.

state mechanisms and about reasons international agents have 'to bear the burdens that would be imposed by taking the actions' in case there are human rights violations.[57]

A further question concerns the nature and role of empirical, descriptive facts in the grounding base of human rights. Some ethical views consider human rights to be grounded both in valuable features of human beings and in general empirical facts about human nature and condition. Griffin calls such empirical facts 'practicalities' and takes them to be the 'second ground' of human rights, alongside 'personhood' as its normative component.[58] Practicalities include facts about human nature and nature of human societies, such as facts about 'the limits of human understanding and motivation'.[59] Importantly, practicalities 'are not tied to particular times or places' and do not undermine the ahistorical character of at least some basic human rights.[60] Conversely, for Tasioulas, human rights are also grounded in facts particular to a specific historical period.[61] The idea is that human rights are generated for more concrete historical contexts and that 'general facts about feasible institutional design in the modern world . . . play a role in determining which human rights we recognize'.[62] But, even if historically specific to 'modernity',[63] such empirical facts are supposed to be general enough to make human rights independent from 'the specific institutional arrangements that obtain at any particular time and place'.[64]

Political conceptions explicitly make the existence of human rights dependent on contingent institutional features of contemporary social world. For Beitz, justification of human rights is 'dependent on empirical generalizations about the nature of social life and the behavior of social and political institutions'.[65] On this conception, human rights are not antecedent to social relations and institutions and do not exist and cannot be grasped outside of a particular institutional context.[66] The existence of human rights partly depends on contingent matters, both in terms of what is considered to be adequate protection of such interest in contemporary social and institutional circumstances and in terms of whether it is feasible and appropriate to make such a right a subject of international concern in the current global political order.[67] In the context of the ECtHR, as we shall see below, this can, for instance, involve ascribing weight to the role of the state in setting the limits to the exercising of a particular right or freedom or to the importance of democratic institutional framework that gives rise to certain rights.

B. Content

The key questions in relation to the content of human rights concern the normative relations established by such rights and types of subjects of such relations. The content of rights is closely related to both their grounds and scope. The grounds of human rights generate their normative content: because of the different approaches to the question of grounds, the normative relations and properties of human rights will be differently understood as well. But a reflective

[57] Beitz, supra n 2 at 140. See also Raz, supra n 33 at 336. It is crucial to note, however, that there is no consensus in either ethical or political conception about the concrete grounds of human rights and that the views on this partly depend on the practice of human rights that a particular author has in mind. See e.g. Nickel, supra n 36.

[58] Griffin, supra n 24 at 37.

[59] Ibid. at 38.

[60] Ibid.

[61] Tasioulas, 'Taking Rights out of Human Rights' (2010) 120(4) *Ethics* 647 at 671.

[62] Tasioulas, 'The Moral Reality of Human Rights' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007) 75 at 77.

[63] Tasioulas, 'Taking Rights out of Human Rights' supra n 61 at 672; Tasioulas, 'The Moral Reality of Human Rights' supra n 62 at 76.

[64] Tasioulas, 'The Moral Reality of Human Rights' supra n 62 at 77.

[65] Beitz, supra n 2 at 112.

[66] Ibid. at 102.

[67] Ibid. at 139–140. Raz, supra n 33 at 335–336. This reflects doubts about unrestricted universalism of human rights in the political conception, which—as we will explain—is also visible in the role subsidiarity plays in the ECtHR's practice.

understanding of grounds will often include considerations about the kinds of human rights it generates: the best conception of values and principles that ground human rights should be the one that, among other things, yields the most attractive content of human rights.[68] Similarly, the content of human rights does not completely determine their scope. For example, suppose it is established that only individuals can have human rights and that such rights create duties for nation states only. This would specify the content of human rights—the *types* of right-holders and duty-bearers who can be in a normative relation established by human rights. But this would still not specify the concrete individuals who can justifiably claim such rights, states that are under such human rights obligations and situations in which such normative relations obtain. This further inquiry would identify the scope of human rights—the *tokens*, or the concrete subsets of right-holders and duty-bearers that stand in normative relations established by human rights in general. Given that our primary focus is the ECtHR, we shall put particular emphasis on several issues pertaining to the content of human rights that are relevant for our later analysis of the Convention.

The first question related to the content of human rights concerns the types of normative relations and duties they create. Human rights can be conceptualized as claims correlated with directed duties: on this view, human rights establish a normative relation, whereby a specific or specifiable set of duty-bearers owes a duty to a particular right-holder.[69] But it is equally possible to think of human rights as providing strong reasons for different kinds of actions and agents that may secure the conditions that eventually bring about the enjoyment of the substantive protection that the right aims to establish.[70] Such reasons or duties generated by human rights norms can be of two broad kinds. There are negative obligations that require actors to refrain from interfering with the exercise of rights and positive obligations that can take various forms but generally presuppose taking action to secure the conditions for meaningful enjoyment of human rights.[71] Although the former are relatively straightforward, the latter can incorporate a range of duties, such as the obligation to protect the right-holders from violations, facilitate their enjoyment of rights or promote human rights more generally. As we shall see in the next section, an investigation of the actual practice of human rights can assist in mapping the range of reasons associated with human rights.

The content of human rights also concerns the types of agents that stand in such normative relations. The key question in relation to the right-holders is whether contingent circumstances can generate rights that do not belong to all humans 'as such', but to particular categories of people, in virtue of their specific property or position. For conceptions of human rights inclined to see them as partly grounded in social and institutional facts, the explanation of such rights bears on the specific circumstances that threaten some groups in particular. Such dangers need not be specific to these groups—they may be shared by human beings 'as such'—but some contingent context may make these groups particularly vulnerable and thus justify specific human rights protections.[72] As we shall see in the next section, some other contingent circumstances—related to the efficacy of human rights protection—can extend the content of rights to certain collective bodies as well.

The crucial issue in terms of agents that have reasons for action in virtue of human rights concerns the role of the state. Given their factual power, there is no doubt that states are the key duty-bearers in contemporary human rights practice. The political conception of human rights

[68] Waldron, supra n 50. See also Sangiovanni, 'How Practices Matter' (2016) 24(1) *Journal of Political Philosophy* 3.
[69] O'Neill, 'The Dark Side of Human Rights' (2005) 81(2) *International Affairs* 427 at 430.
[70] Beitz, supra n 2 at 161–174.
[71] See e.g. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004).
[72] Beitz, supra n 2 at 186–196.

takes this to be the central feature of the content of human rights and argues that human rights apply 'in the first instance' to states who are under obligation to respect and protect them, and to aid those whose human rights are under threat.[73] The traditional conception, in contrast, considers a wider range of actors as duty-bearers, including individuals.[74] It is worth noting that the political conception need not be committed to the view that only institutional actors bear human rights obligations. Even if international practice places central human rights obligations upon states, and an interest is protected in the form of a human right only if it is a suitable object of international concern, it is an open normative question whether human rights duties should be imposed on states only.[75] And if the political conception is committed to the view that the normative content of human rights need not include directed duties but a range of less robust reasons for action, then it is not clear why individuals or private entities cannot have human rights-based reasons for action.

C. Scope

The scope of human rights pertains to the reach of normative relations and protections established by the content of human rights. For example, if we suppose that human rights establish directed duties between states and individuals, it is still an open question in which generalized or concrete situations such normative relations obtain. The scope of human rights thus equally concerns the range of human rights protections in *general*, i.e. the extensiveness of the catalogue of guaranteed human rights, and the breadth of human rights protection within a *particular* right, i.e. interpretations of a specific right and the situations, persons and temporal frames to which its protection applies. Both questions depend on how the balance is struck between different grounding values that count in favour or against extending the content of human rights to cover such general or particular scenarios.

The first question about scope thus concerns the catalogue of human rights. The answers to this question are often influenced by concerns about the so-called proliferation of human rights. The purported problem with proliferation is that the use of the notion of human rights is too expansive, either because realization of a number of rights is not feasible, their recognition undermines the status of human rights as particularly urgent reasons or universally acceptable (and neutral) norms, they are not consistent with the deontic structure of human rights or because they do not follow from the best understanding of human rights grounds.[76] Although some ethical accounts seem to be at least partially motivated by the purported unjustified expansion of human rights claims,[77] they are often criticized for potentially yielding a too extensive list of rights and for not offering a convincing account of their scope.[78] For instance, Raz—writing from the perspective of the political conception—argues that human rights are only a subset of general moral rights and that the main distinguishing criterion is that human rights can justify 'sovereignty-limiting measures'.[79] They are the rights that the states have a duty to protect and for which—when they fail in this duty—they cannot invoke the sovereignty-based immunity from foreign interference.[80] Although Raz does not draw implications of this sovereignty-based account for the catalogue of human rights, it does seem reasonable to suppose that the list of

[73] Ibid. at 109.
[74] Griffin, supra n 24 ch 5.
[75] Beitz, supra n 2 at 124.
[76] See more in Gilabert, *Human Dignity and Human Rights* (2018) ch 11.
[77] For example, while Griffin's goal is not to counter 'proliferation of rights', he does aim to determine which 'declared rights are not true rights'. Griffin, supra n 24 at 93.
[78] Raz, supra n 33; Sangiovanni, supra n 2.
[79] Raz, supra n 33 at 329.
[80] Ibid. at 336.

rights recognized in this way would be more limited.[81] The key question thus concerns the relation between the grounds and the scope of rights and whether a more pluralist understanding of grounds—which includes institutional or sovereignty-related considerations—effectively limits the scope of rights.

A different way of approaching the question of the catalogue of human rights in the political tradition is suggested by Beitz. For Beitz, the mistake in the traditional view is not so much the underdetermined character of the threshold criterion but its unnecessarily restrictive conception of the grounds of human rights that fails to account for the rich scope of rights found in human rights practice. As he puts it, the scope of human rights in traditional theories 'is likely to fall short of the list of protections actually found in international human rights doctrine'.[82] If this is the case, and unless there is no argument to show that proliferation of rights is a real concern, there is no reason for practice to adjust to the limits imposed by the traditional theory.[83]

These considerations also play a significant role in demarcating the scope of specific rights. Given the abstract character of their theorizing, neither orthodox nor political theories have been particularly concerned with this question, but this is precisely the point where legal practice is incredibly rich and can inform such general theories. The manner in which different grounding values are balanced to determine the scope of protection of specific rights reveals the actual breadth of human rights doctrine. Here it is possible to observe several important dimensions of the scope of any given right. In its spatial dimension, the scope of a right determines the territorial extension of its normative content. The key issue here includes the interpretation of the notion of jurisdiction that often serves as a placeholder for substantive normative views about human rights grounds and, consequently, their scope: if the grounds are understood in a more traditional way, the tendency might be to extend their scope beyond the territorial boundaries of a particular state by widening the understanding of its jurisdiction.[84] In its personal dimension, the scope of a right fixes the application of a particular right across different categories of persons. This may involve a consideration of whether a particular group requires specific protection in light of some of its properties or the range of human rights duties owed to 'distant others'. And in its temporal dimension, the scope of a right includes the extension or change of its meaning over time. Here, the questions may include whether a right applies to future generations and whether its content evolves over time or it is fixed at a particular temporal point. The key question in all instances is whether the grounds (as the normative foundation of a right) and their defined content (in terms of the kinds of normative relations established by a human right) justify extending the scope of a right to particular duty-bearers and right-holders and to a range of similar situations in the future.

4. EXAMPLES: FREEDOM OF THOUGHT AND RELIGION AND THE RIGHT TO FREE ELECTIONS

In this section, we apply our analytical framework and the distinction between grounds, content and scope to two provisions of the ECHR: freedom of thought and religion (Article 9) and the right to free and fair elections (Article 3 of Protocol 1). The goal is not to offer a comprehensive

[81] For critiques of explaining human rights in light of their sovereignty-limiting function, see Sangiovanni, supra n 2 at 182–186; Waldron, supra n 50; Liao and Etinson, supra n 39; Renzo, supra n 39.

[82] Beitz, supra n 2 at 66.

[83] Ibid. at 66–67. Rawls' theory envisages a much more restricted list of human rights, although it does not aim to elucidate the concept of human rights but to point out their role in international order. See Rawls, supra n 33 at 79–81. For the limits to the content of human rights based on agreement or consensus, see Ignatieff, *Human Rights as Politics and Idolatry* (Princeton UP) 66–68. For the critique of human rights minimalism, see Cohen, 'Minimalism about Human Rights: The Most We can Hope for?' (2004) 12(2) *The Journal of Political Philosophy* 190; Nussbaum, 'Women and the Law of Peoples' (2002) 1(3) *Politics, Philosophy & Economics* 283; Benhabib, 'Is there a Human Right to Democracy? Beyond Interventionism and Indifference' in Corradetti (ed), *Philosophical Dimensions of Human Rights: Some Contemporary Views* (2011) 191.

[84] Raible, *Human Rights Unbound: A Theory of Extraterritoriality* (2020).

overview of the Court's practice or analyze all the rights from the Convention. Rather, our aim is methodological: we want to illustrate the potential of the three-fold analytical framework developed in the last section and show how it can lead to a more perspicuous analysis of the ECtHR's practice. As we shall see below, it is not just that these two rights are facially different: Article 9 is standardly defined as entailing a wide array of obligations, while Article 3 Protocol 1 implies a set of more limited and positive duties pertaining to the functioning of the democratic process.[85] The Court's understanding of these rights reveals a variety of tendencies and approaches in relation to the grounds, content and scope of human rights that are philosophically relevant. As such, they illustrate how the tensions present in the philosophical views about the nature of human rights play out in human rights practice.

A. Grounds

Article 9 proclaims freedom of thought, conscience and religion, including the freedom to change the religion, and practice and manifest it in public or private,[86] and points to the aims that can justify limits to this freedom, including public safety, the protection of public order, health and morals or the protection of the rights and freedoms of others.[87] In contrast, Article 3 Protocol 1 (P1–3) does not contain an in-built limitation clause and provides for the right to a distinctive institutional process, namely, regular, free and fair elections.[88]

The grounds of freedom of thought, conscience and religion are best understood as plural. Consider the seminal case of *Kokkinakis v Greece*, in which the Court held that

> freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[89]

The main ground of this freedom pertains to the protected features of human beings. In the Court's view, there is a non-causal and constitutive justificatory relation between the identity formation of both believers and non-believers, based on their ability to form and pursue a conception of life, and freedom of thought, conscience and religion. This interpretation echoes, for example, Griffin's notion of personhood surveyed earlier: the Court similarly sees freedom of religion as an upshot of valuable normative agency. Because it is grounded in normative agency, this freedom only protects beliefs that are connected with the capacity of human beings to form deep convictions and that 'attain a certain level of cogency, seriousness, cohesion and importance'.[90]

But institutional considerations are not absent from the Court's reasoning about the grounds of Article 9. This is, for example, visible from the Court's distinction between the absolute and unconditional core of freedom of religion ('forum internum') and manifestation of such freedom that can be limited ('forum externum').[91] Forum internum refers to formation,

[85] *Žd anoka v Latvia* [GC] Application No 58278/00, Merits and Just Satisfaction, 16 March 2006, at para 102.
[86] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 9(1).
[87] Ibid. Article 9(2).
[88] Ibid. Protocol 1 Article 3.
[89] Application No 14307/88, Merits and Just Satisfaction, 25 May 1993, at para 31; see also *Eweida and others v UK* Application No 48420/10, Merits and Just Satisfaction, 15 January 2013, at para 79.
[90] *Campbell and Cosans v UK*, Application Nos 7511/76 and 7743/76, Merits, 25 February 1982, at para 36.
[91] See e.g. *Van den Dungen v the Netherlands* Application No 22838/93, Commission Decision, 22 February 1995.

development, refinement and change of personal beliefs, and is always protected against state interference and indoctrination.[92] Within the domain of forum internum, valuable human agency reigns supreme: this ground is sufficient to establish what counts as a belief and that an interference of the State with such a belief cannot be justified.[93] However, within the forum externum—the manifestation of beliefs—the authority of the State does play a role and can pose limits to this freedom:[94] what counts as 'interference' by the State or a 'manifestation' of belief will partly depend on how the legitimate role of the State is understood.[95]

The plurality of grounds is even more visible from the Court's reflections on the connection between freedom of religion and democracy. As already mentioned, in *Kokkinakis v Greece*, the Court held that 'democratic society' cannot exist without religious pluralism and argued that democratic pluralism 'depends on' freedom of thought, conscience and religion as one of its 'foundations'. There is thus a grounding relation between religious pluralism and democratic society. The protection of freedom of religion may causally lead to a more pluralistic and democratic society, and this causal link is salient in the Court's insistence on the beneficial effects of the right's protection on democratic values, such as cohesion, tolerance and harmony.[96] But it is not the case that the foundational values of democratic pluralism—such as tolerance—are valuable because of freedom of religion, but that freedom of religion is protected partly because it is necessary for and justified by such valuable democratic pluralism.[97] The notion of 'democratic society' as used by the Court is not preinstitutional in the orthodox sense,[98] but the two grounds need not be competing: Article 9 may be both intrinsic to valuable human agency and required by (or best protected in) a particular valuable institutional framework, the democratic one; it is also possible to conceive of the value of democratic institutional framework as being grounded in human agency. [99]

But the grounds of the right to free elections reveal a conception of democracy that is less linked to valuable features of human beings than to the institutional process as such. Although the grounds of this right could also be understood as plural, they are primarily anchored in what the Court's calls 'an effective democracy'.[100] This is partly a consequence of the wording of P1–3 that creates a positive duty for the states to hold free elections and that the Court has interpreted as also generating individual rights. These rights have been differently understood over time—from an initially 'institutional' right to holding of the free elections to 'universal suffrage' and then active and passive voting rights[101]—but they have all been directly derived from a duty to hold elections as 'a characteristic principle of democracy'.[102] As the Court puts it, 'the subjective rights to vote and to stand for election' are 'implicit' in P1–3.[103] In contrast to Article 9, where human agency or autonomy primarily ground the freedom and democracy serves either as a

92 *Ivanova v Bulgaria* Application No 52435/99, Merits and Just Satisfaction, 12 April 2007, at para 7.

93 When state coercion is implicated, the Court is more likely to find a violation of Article 5 and not conduct the analysis of Article 9. See e.g. *Riera Blume and others v Spain* Application No 37680/97, Merits and Just Satisfaction, 14 October 1999, at paras 31–35.

94 *Eweida and Others v UK*, supra n 89 at para 80.

95 See e.g. ibid. at para 82; *S.A.S. v France* [GC] Application No 43835/11, Merits and Just Satisfaction, 1 July 2014, at para 55. For instance, freedom of religion does not prevent the states from imposing sanctions on officials for membership in groups promoting racist ideas (*Sodan v Turkey* Application No 18650/05, Merits and Just Satisfaction, 2 February 2016, at paras 42 and 52), as long as they have shown bias or received instructions from such groups (ibid. at para 54).

96 *Erçep v Turkey* Application No 43965/04, Merits and Just Satisfaction, 22 November 2011, at para 62.

97 Zysset, supra n 32.

98 Zysset, 'Searching for the Legitimacy of the European Court of Human Rights: The Neglected Role of "Democratic Society"' (2016) 5(1) *Global Constitutionalism* 16.

99 Griffin, supra n 24.

100 *Mathieu-Mohin and Clerfayt v France* Application No 9267/81, Merits, 2 March 1987, at para 46.

101 Ibid. at para 51.

102 Ibid. at para 47.

103 *Labita v Italy* [GC] Application No 26772/95, Merits and Just Satisfaction, 6 April 2000, at para 201.

partial ground or as a corrective principle, democratic process as such is the primary ground of the right to free elections.

The institutional grounds of the right to free elections are visible from a range of its features, often related to the content and scope of this right. For example, the interpretation of this right may 'vary in accordance with the historical and political factors specific to each State',[104] and is dependent upon the contingent institutional features of a particular political system as long as such system respects 'the basic purpose of parliamentary elections', which is that 'fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people'.[105] This, for example, means that there is no obligation to ensure a strict equality of the right to vote.[106] These features could be understood as 'practicalities' within the framework of the ethical conception because the right to free elections can only be realized in a concrete political and electoral context. However, if the right to vote were grounded in, for example, respect for valuable human agency, the Court would probably not make its assessment crucially dependent on 'the political evolution of the country concerned',[107] or it would apply stricter criteria in terms of the equality of voting rights that would reflect the equal worth of such agency.[108] Moreover, this right applies only to the elections for the legislature, or 'at least one of its chambers',[109] and in principle does not extend to elections of the head of state or referendums.[110] If equal ability to influence the political process were the ground of this right, the Court would be more willing interpret it teleologically and expand it to other institutional processes where such ability is both crucial and connected to the notion of 'effective democracy'. Finally, in cases where valuable features of human beings are implicated, the Court is often inclined to analyze the issue under a right which may be more directly linked to ethical grounds, such as the right to private and family life (Article 8).[111]

This is not to say that valuable features of human beings do not play a role in the grounding base of the right to free elections. Such grounds are particularly relevant in relation to the active aspect of the right, which are subject to a stricter proportionality assessment, than its passive aspect, which is seen as more institutionally grounded and where a mere absence of arbitrariness in denying the right is sufficient.[112] The connection with ethical grounds is also visible in cases where the restrictions of the right are concerning from the perspective of equality and non-discrimination.[113] But—in contrast to the freedom of religion—such grounds play a secondary role and are importantly limited by the primarily institutional and political foundations of the right to free elections. Thus, although both rights have an institutional dimension, this dimension has a varying grounding function: it is the key constitutive feature of the right to free elections, and it plays an ancillary role with regard to freedom of thought and religion that is predominantly derived from ethical considerations.

B. Content

The grounds of these rights in turn affect their content. Recall that the content of a right pertains to the normative relations established by it: this includes the kinds of right-holders

[104] *Ždanoka v Latvia*, supra n 85, at para 106.
[105] *Timke v Germany*, Application No 27311/95, Commission Decision, 11 September 1995.
[106] *Mathieu-Mohin and Clerfayt v France*, supra n 100, at para 55.
[107] Ibid. at para 53.
[108] The Court would normally be much more likely to scrutinize such practices through Article 14.
[109] *Mathieu-Mohin and Clerfayt v* France, supra n 100, at para 53.
[110] *Cumhuriyet Halk Partisi v Turkey*, Application No 48818/17, Admissibility, 21 November 2017, at paras 33 and 38.
[111] See e.g. *Mółka v Poland*, Application No 56550/00, Admissibility, 11 April 2006. For such connection with freedom of expression, see *Bowman v UK* [GC] Application No. 141/1996/760/961, Merits and Just Satisfaction, 19 February 1998.
[112] *Ždanoka v Latvia*, supra n 85, at para 57.
[113] *Tănase v Moldova* [GC] Application No 7/08, Merits and Just Satisfaction, 27 April 2010.

and duty-bearers and the types of obligations that obtain between them. As explained, within the forum internum, the key consideration that generates the content of freedom of religion is valuable human agency. This in turn both extends and restricts its content. Because the grounds pertain to normative agency rather than to the value of any particular (religious) belief, this freedom is interpreted widely and includes, for instance, 'metaphysical conception of man which conditioned his perception of the world and justified his action'.[114] For example, protected beliefs include pacifism,[115] political ideology,[116] atheism[117] and veganism.[118] The notion of normative agency in the background of this freedom also specifies the right-holder(s) in a wide manner, and Article 9 is thus seen as 'a precious asset for atheists, agnostics, sceptics and the unconcerned'.[119] But the focus on normative agency also determines the intensity of protected beliefs and thus limits the content of the freedom. To be protected by Article 9, the beliefs must reflect a 'weighty and substantial aspect of human life and behavior',[120] and the Court has refused to protect a number of beliefs that were not be seen as indispensable to a cogent belief-framework.[121]

Institutional and political considerations come to the fore within the forum externum, where the freedom implies the right to manifest[122] or not to manifest a belief,[123] as well as the freedom not to disclose a belief to the state.[124] The key concern here is the state as a duty-bearer and the link between this freedom and democratic pluralism. The Court, for example, emphasizes 'the State's role as the neutral and impartial organiser of the exercise of various religions, faiths and beliefs' and 'the State's duty of neutrality and impartiality'.[125] Such institutional constraints are crucial in determining the content of the freedom and include the idea that the State can 'legitimately prevent' the application of legal rules 'of religious inspiration prejudicial to public order and the values of democracy'[126] and the notion that 'democracy must . . . be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups . . . to maintain and promote the ideals and values of a democratic society'.[127] The role of the State as the key duty-bearer, responsible for protection of religious freedom based on democratic values, such as pluralism, cohesion, tolerance, stability and harmony, is also reflected in a range of positive obligations.[128] These positive obligations can relate to establishing both the

[114] *Union des Athées v France* Application No 14635/89, Commission Decision, 6 July 1994, at para 79.
[115] *Arrowsmith v UK* Application No 7050/75, Commission Report, 12 October 1978, at para 69.
[116] *Hazar and others v Turkey* Application No 62566/00, Admissibility, 10 January 2002.
[117] *Angelini v Sweden* Application No 10491/83, Commission Decision, 3 December 1986.
[118] *CW v UK* Application No 18187/91, Commission Decision, 10 February 1993.
[119] *Kokkinakis v Greece*, supra n 89 at para 31.
[120] *Campbell and Cosans v UK*, supra n 90 at para 36.
[121] See e.g. *Tığ v Turkey* Application No 8165/03, Admissibility, 24 May 2005, *Van den Dungen v the Netherlands* Application No 22838/93, Commission Report, 22 February 1995, and *Gross v Switzerland* [GC] Application No 67810/10, Admissibility, 30 September 2014, at para 58. For example, the belief in personal autonomy was rejected as the basis of a wish to commit assisted suicide (*Pretty v UK* Application No 2346/02, Merits, 29 April 2002, at para 82) or not wear a seatbelt (*Viel v France* Application No 41781/98, Admissibility, 14 December 1999), suggesting that autonomy is neither unlimited nor sufficient to generate the normative content of the freedom without being exercised in a deep and comprehensive way.
[122] *Buscarini and Others v San Marino* [GC] Application No 24645/94, Merits and Just Satisfaction, 18 February 1999 at para 39.
[123] *Kokkinakis v Greece*, supra n 89, at para 31.
[124] In exceptional cases, some substantiation of the genuineness of belief might be required. See e.g. *Kosteski v the former Yugoslav Republic of Macedonia* Application No 55170/00, Merits, 13 April 2006, at para 39, *Dyagilev v Russia* Application No 49972/16, Merits and Just Satisfaction, 10 March 2020, at para 62, *Neagu v Romania* Application No 21969/15, Merits and Just Satisfaction, 10 November 2020, at para 34.
[125] *Bayatyan v Armenia* [GC] Application No 23459/03, Merits and Just Satisfaction, 7 July 2011, at para 120.
[126] *Refah Partisi (the Welfare Party) and Others v Turkey* [GC] Application Nos 41340/98; 41342/98; 41343/98; 41344/98, Merits and Just Satisfaction, 13 February 2003, at para 128.
[127] *United Communist Party of Turkey and Others v Turkey* [GC] Application No 19392/92, Merits and Just Satisfaction, 30 January 1998, at para 95; and *Refah Partisi (the Welfare Party) and Others v Turkey*, supra n 126, at para 128.
[128] See Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Article 1; and *İzzettin Doğan and Others v Turkey* [GC] Application No 62649/10, Merits and Just

regulatory framework for protection and effective mechanisms of enforcement of the right[129] and can 'necessitate measures to ensure respect for freedom of religion affecting the very fabric of individuals' interpersonal relations'.[130] The notion of 'democratic society' also generates the positive duty of the states to 'secure religious tolerance and peaceful relations between groups of believers' by engaging in 'neutral mediation'.[131] Such (non-directed) duties cannot be fully explained on the basis of human agency only, but incorporate the idea that Article 9 also serves to give effect to the values of democratic society.

A similar link between institutional grounds and content is visible in relation to the right to free elections: given its institutional grounding, the content of this right consists mainly of positive obligations. As the ECtHR explains in *Ždanoka v Latvia*, the right to free elections 'differs from other rights . . . as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom'.[132] The content of the right is thus often expanded to cover a range of duties that aim to protect the functioning of democratic process, such as careful regulation of ascertaining, processing and recording the results of voting,[133] objective coverage of elections by the media,[134] establishing an effective system of appeals for the protection of electoral rights[135] and ensuring that candidates can sit as members of parliament once elected.[136] The Court often derives such specific duties directly from general democratic principles, without making explicit recourse to individual rights. For example, in *Timke v Germany*, the Commission confined its reasoning to the distinctively democratic principle that parliaments ought to reflect the will of the people and be able to translate such will into policy:

> the question whether elections held at reasonable intervals must be determined by the reference to the purpose of parliamentary elections. That purpose is to ensure that fundamental changes in prevailing public opinion are reflected in the opinions of the representatives of the people. Parliaments must in principle be in a position to develop and execute its legislative intentions—including longer term legislative plans. Too short an interval between elections may impede political planning for the implementation of the will of the electorate. Too long an interval can lead to the petrification of political groupings in Parliament which may no longer bear any resemblance to the prevailing will of the electorate.[137]

Given that the electoral rights are derived from the process of representation, their content can equally be abridged when the democratic process is not significantly affected. For example, in *Kovach v Ukraine*, the Court found that there is no violation of the right to free elections 'in the absence of genuine prejudice to the outcome of the elections at issue', because such consequences are a necessary condition of 'an interference with the free expression of the people'.[138] The duties of the state are thus primarily directed towards ensuring that there is

Satisfaction, 26 April 2016, at para 96, and *Jakóbski v Poland* Application No 18429/06, Merits and Just Satisfaction, 7 December 2010, at para 47.

129 *Osmanoğlu and Kocabaş v Switzerland* Application No 29086/12, Merits, 10 January 2017, at para 86.

130 *Siebenhaar v Germany* Application No 18136/02, Merits and Just Satisfaction, 3 February 2011, at para 38.

131 *Supreme Holy Council of the Muslim Community v Bulgaria* Application No 39023/97, Merits and Just Satisfaction, 16 March 2005, at paras 79–80.

132 *Ždanoka v Latvia*, supra n 85, at para 102.

133 *Davydov and Others v Russia* Application No 75947/11, Merits and Just Satisfaction, 30 May 2017, at para 284–285.

134 *Communist Party of Russia and Others v Russia* Application No 29400/05, Merits and Just Satisfaction, 19 June 2012.

135 *Namat Aliyev v Azerbaijan* Application No 18705/06, Merits and Just Satisfaction, 8 April 2010, at para 81.

136 *M v UK* Application No 10316/83, Commission Decision, 7 March 1984.

137 *Timke v Germany*, supra n 105, at para 160.

138 *Kovach v Ukraine* Application No 39424/02, Merits and Just Satisfaction, 2 July 2008, at para 56. See also *IZ v Greece* Application No 18997/91, Commission Decision, 28 February 1994 and *Babenko v Ukraine* Application No 43476/98, Admissibility, 4 May 1999.

no damage to the outcomes of the electoral process, even if there is potentially an interference with individual interests of the right-holders. In other words, the content of the right is directed towards free and fair elections as an overall process and not towards protection of each and every vote or candidacy as such.

The predominantly institutional and political grounds of this right also affect its content in terms of the types of duty-bearers and right-holders. For example, based on an expansive understanding of representation, the Court has ventured into dicta that could be read as establishing duties for elected politicians to act in line with their electoral promises; as it held in *Ahmed and Others v United Kingdom*, 'members of the public also have a right to expect that the members whom they voted into office will discharge their mandate in accordance with the commitments they made during an electoral campaign'.[139] And in *Riza v Bulgaria*, the Court has expanded the range of right-holders to include political parties and concluded that 'the relevant party, as a corporate entity, could claim to be a victim under Article 3 of Protocol No. 1 independently of its candidates'.[140] Importantly, the interpretation here does not suggest that political parties merely have a standing to protect the right, but are in fact right-holders under P1–3. There is thus a tangible effect of the institutional grounds of P1–3 on its content, both in terms of the kinds of duties it establishes and in terms of the types of duty-bearers and right-holders.

C. Scope

As explained, the scope of a right concerns its extension in relation to other rights and societal aims, and space, time and persons. When deciding on freedom of religion, the Court first needs to establish whether the claim involves this freedom or some other right[141] and whether the quality or intensity of belief qualify it for the protection under freedom of religion.[142] But once the interference with a right has been established, it moves on to determine whether a violation of the right has occurred and in so doing delineates the scope of the right.

Although the limits of the right from Article 9(2) pertain to the manifestation of belief, they also apply to the scope of positive obligations to secure conditions for enjoyment of this right.[143] The reasons for limiting its scope include interests of public safety, safeguarding of public order, health or morals, or protection of rights and freedoms of others. Unlike other similar provisions from Articles 8, 10 and 11, freedom of thought, conscience and religion cannot be limited for reasons of 'national security', and the scope of this freedom is thus determined more expansively. In explaining this feature, the Court makes a direct connection between the grounds of freedom of religion and its scope: 'the non-inclusion of that particular ground for limitations in Article 9 reflects the primordial importance of religious pluralism as "one of the foundations of a 'democratic society' within the meaning of the Convention"'.[144]

As is the case with other rights subject to limitations, the Court determines whether the interference with the right is justified in principle and proportionate,[145] and the state needs to demonstrate that there are no less intrusive measures available to attain the same goal.[146]

[139] See e.g. *Ahmed and Others v UK* Application No 22954/93 Merits and Just Satisfaction, 2 September 1998, at para 53 (in relation to Article 10).

[140] *Riza and Others v Bulgaria* Application No 48555/10, Merits and Just Satisfaction, 13 October 2015, at para 141. See also *Georgian Labour Party v Georgia* Application No 9103/04, Merits and Just Satisfaction, 8 October 2008, at paras 72–74.

[141] For example, the expropriation of a religious group's resources has been analyzed under the right to property. See e.g. *The Holy Monasteries v Greece* Apps No 13092/87, 13,984/88, Merits and Just Satisfaction, 9 December 1994.

[142] See e.g. *Pretty v UK*, supra n 121, at para 61; and, more recently, *Gross v Switzerland*, supra n 121, at para 58.

[143] *Jakóbski v Poland,* supra n 128, at para 47.

[144] *Nolan and K v Russia* Application No 2512/04, Merits and Just Satisfaction, 12 February 2009, at para 73, citing *Kokkinakis v Greece*, supra n 89, and *Ivanova v Bulgaria*, supra n 92, at para 79.

[145] *Leyla Şahin v Turkey* [GC] Application No 4474/98, Merits and Just Satisfaction, 10 November 2005, at para 110.

[146] *Biblical Centre of the Chuvash Republic v Russia* Application No 33203/08, Merits and Just Satisfaction 12 June 2014, at para 58.

This balancing exercise not only determines the scope of the freedom in relation to other values, aims and rights but also often answers a range of questions about the space within which understandings about the right are generated, their development over time and persons to which the right is applied. For instance, in *Wingrove v UK*, the Court has found that the scope of the freedom develops over time and depends on a range of contingent issues such as the growing number and diversity of religious views.[147] It has also established that the meaning of the right can be formulated on the European level (the so-called 'European consensus' doctrine), but—if such meaning is absent—the local meaning should take precedence and the state itself should decide on the issue (by applying the 'margin of appreciation' doctrine).[148] The Court is willing to lower the level of its scrutiny and allow a wider margin of appreciation 'within the sphere of morals or, especially, religion'.[149] In other words, when the content of freedom of religion is applied to a particular context, this may result in a limitation of its scope and deference to local understandings of how to balance it with other competing interests, especially when it comes to determining the 'necessity' of limiting the scope of the right.[150] Although local institutions are indeed more likely to understand the historical, cultural and political context, this does point to a certain level of contingency of this freedom's scope. In granting the 'wide' margin of appreciation to the states, the Court shows sensitivity to their self-determination and sovereignty, as emphasized by the political conception of rights.

Article P1–3, in contrast, does not contain a list of limitations, and the states can justify restrictions of the scope of the right on the basis of so-called 'implied limitations' that only need to respect the rule of law and 'general objectives of the Convention'.[151] Importantly, the Court limits the scope of the right with a reference to its political or 'collective' grounds that only 'imply' specific individual rights, leading to a less stringent scrutiny.[152] The margin of appreciation is granted when the core perimeter of the right is secured, which broadly corresponds to conditions for elections that 'must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage'.[153]

The consequence is that the scope of the right is much more subject to contingent circumstances of a political system and institutional and political considerations that are unrelated to the interests of the right-holder. Temporal and spatial restrictions are reflected in the Court's recognition that the 'legislation on the matter varies from place to place and from time to time', that 'features that would be unacceptable in the context of one system may accordingly be justified in the context of another' and that there is consequently no 'obligation to introduce a specific [electoral] system'.[154] In relation to extension of the right to different categories of persons, the Court draws on the purpose of parliamentary representation: for example, based on the importance of links between voters and their polity, the Court found that there is neither an obligation to grant voting rights to non-residents[155] nor a duty to make arrangements for voting of non-residents even if they are granted such rights.[156] Similarly, it held that a long residency criterion for voting in certain overseas territories was justified in light of contingent features of such a territory, such as its 'turbulent political and institutional history' and the fact that it was

[147] *Wingrove v UK* Application No 17419/90, Merits and Just Satisfaction, 25 November 1996, at para 60.
[148] See also *Bayatyan v Armenia*, supra n 125, at paras 121–122; *S.A.S. v France*, supra n 95, at para 129.
[149] *Wingrove v UK*, supra n 147, at para 58.
[150] *Handyside v UK* Application No 5493/72, Merits, 7 December 1976, at paras 49–50.
[151] *Ždanoka v Latvia,* supra n 85, at para 102.
[152] Ibid. at para 115.
[153] *Lykourezos v Greece*, Application No 33554/03, Merits and Just Satisfaction, at para 52.
[154] *Mathieu-Mohin and Clerfayt v France,* supra n 100, at para 54.
[155] *Shindler v UK* Application No. 19840/09, Merits and Just Satisfaction 7 May 2013, at para 109–115.
[156] *Sitaropoulos and Giakoumopoulos v Greece* [GC] Application No. 42202/07, Merits, 15 March 2012.

'in a transitional phase prior to the acquisition of full sovereignty'.[157] The range of reasons for limiting the scope of the right is extensive and often depends on distinctly political reasons, such as 'political stability of . . . the government',[158] promoting 'the emergence of a sufficiently clear and coherent political will'[159] and 'avoiding any fragmentation of the political groups'.[160]

5. CONCLUSION

We pursued three interconnected goals in this article. First, we argued that the ECtHR's understanding of the nature of human rights is important, that it has not been studied in sufficient depth and that it can only be approached if the gap between legal and philosophical scholarship on human rights is bridged. Second, we offered a framework of thinking about this question that is capable of bridging that gap, based on the notions of grounds, content and scope of human rights. The aim was to devise an analytic and methodological grid that would capture the most important elements of different strands of philosophical thinking about the nature of human rights and—at the same time—be appropriate for the analysis of legal doctrine. Third, we applied this framework to Articles 9 and P1–3 ECHR to show how such analysis can be conducted.

This kind of analysis can lead to a number of significant insights, relevant for both legal-doctrinal and philosophical human rights scholarship. For example, we have shown that the ECtHR locates the grounds of human rights partly in valuable features of human beings and partly in considerations pertaining to institutional framework. This, in turn, affects how the content of the right is understood in terms of duties and duty holders and how the scope of the right is delineated. Whereas legal commentary of the ECHR should be interested to trace the role of these different grounds and their effect on the content and scope of freedom of religion, philosophical accounts of human rights could see this practice either as a subject of critique or as the basis of an empirically informed conceptual exploration of human rights.

There are, of course, limitations to the analysis that we could accomplish here, both in terms of articulating the subtleties of relevant philosophical views and in terms of applying our framework to a range of other rights and legal doctrines. But our goal was not to offer an all-encompassing account of the nature of human rights and their understanding by the ECtHR; rather, we aimed to provide the analytic tools for a more fruitful conversation between legal and philosophical human rights scholarship, and, hopefully, open up a meaningful space for future cross-disciplinary research. Such research could both illustrate the complexity of the ECtHR practice and subject it to a scrutiny that would be informed by the basic questions of human rights theory. It could, for example, focus on a wider range of ECHR rights to analyze the specific features of human beings—such as their interests or status—that the Court uses to ground rights and inquire how other institutional and political grounds—such as state sovereignty and democratic self-determination—are balanced against these features. It could also explore the intensity and types of reasons and duties generated by such grounds to determine the content of different rights and then probe the effects this has on the scope of rights in their temporal, spatial and personal dimension. Future research could also take more prominently into account—and further problematize and challenge—the received distinctions between categories of rights (e.g. derogable and non-derogable, positive and negative), different ways in which the process of balancing is conducted (e.g. in the proportionality test) and the role the key doctrines of the ECtHR play in formulating and limiting its conception of human rights (e.g. margin of

[157] *Py v France*, Application No. 66289/01, Merits, 11 January 2005, at paras 61–62.
[158] *Oran v Turkey*, Application Nos 28,881/07 and 37,920/07, Merits and Just Satisfaction, 14 April 2014, at para 66.
[159] *Partija 'Jaunie Demokrāti' and Partija 'Mūsu Zeme' v Latvia*, Apps No 10547/07 and 34049/07, Admissibility, 29 November 2007.
[160] *Cernea v Romania*, Application No 43609/10, Merits and Just Satisfaction, 27 February 2018, at para 49.

appreciation and European consensus). All of this would lead to a more complete and accurate picture of the ECtHR's understanding of human rights; a picture—as we hope to have shown—that would benefit from the framework of analysis suggested here and that would inform a range of important debates in human rights law and philosophy.