Interpreting the ECHR in light of the increasingly high standards being required by human rights: Insights from social ontology

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ABSTRACT

This article looks to make sense of those cases where the ECtHR changes its position on interpretation in light of the increasingly high standards being required by human rights, when the Court applies the doctrine of evolutive interpretation to the ECHR' object and purpose, as a Convention for the protection of 'human rights' (e.g., *Selmouni v. France*). This raises two questions: What do we mean when we speak about 'human rights'? Can the demands of human rights can change over time? Looking to the insights from social ontology, we can think of human rights as a social institution, emerging with the adoption of the Universal Declaration of Human Rights and evolving with changes in human rights practices. Understood this way, reliance on the increasingly high standard doctrine becomes defensible when ECtHR judgments are consistent with evolving practices on human rights, and the moral values that underpin the UDHR.

KEYWORDS: ECHR, interpretation, *Selmouni v. France*, human rights theory, social ontology.

1. INTRODUCTION

This article looks to make sense of those cases where the European Court of Human Rights (ECtHR) changes its position on the interpretation of the European Convention on Human

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Rights (ECHR) in light of 'the increasingly high standard being required in the area of the protection of human rights' (e.g., *Selmouni v. France*).[1] In these cases, the Court applies the international law doctrine of evolutive interpretation to the object and purpose of the ECHR, as a Convention for the collective enforcement of certain 'human rights.' This raises two foundational questions: What do we mean when we speak about 'human rights'? Is the ECtHR correct in thinking the demands of 'human rights' can change over time?

The article proceeds as follows. After this introduction, the next section outlines the ECtHR' approach to interpretation, highlighting those cases where the Court changes its position by reference to the changing demands of human rights. It then shows that neither naturalistic theories, nor political theories on human rights can explain both the moral demands of human rights and accept the possibility of a change in those demands. Instead, this work draws on the insights from social ontology to show that human rights is a social institution no different from any other social institution (e.g., chess, money, the law, or the State). The social institution of human rights first emerged with the practices of human rights at the United Nations, with the idea of 'human rights' being explained in the Universal Declaration of Human Rights (UDHR). As beliefs and practices on human rights evolve, so do the demands of human rights – albeit limited by the moral principles that underpin the UDHR. Understood this way, the ECtHR' doctrine on the 'increasingly high standard being required in the area of the protection of human rights' becomes defensible provided two conditions are met: (1) the judgment is consistent with evolving beliefs and practices on human rights; and (2) the judgment is consistent with the moral values that underpin the Universal Declaration. A review of the case-law reveals that these criteria are generally met when the ECtHR invokes the increasingly high standard doctrine, but there are cases where the Court inappropriately invokes the doctrine to explain the evolution of its case law, and (more problematically) to reduce the protection afforded by the Convention. The article concludes with a summary of the main claims.

2. HOW TO INTERPRET A CONVENTION ON 'HUMAN RIGHTS'?

[1] *Selmouni v France* Application No 25803/94, Merits and Just Satisfaction, 28 July 1999, at para 101.

The European Court of Human Rights has repeatedly emphasised that the 'starting point'[2] for its interpretation of the ECHR must be the rules in the Vienna Convention on the Law of Treaties,[3] which direct the ECtHR to consider:[4] (1) The ordinary meaning to be given to ECHR treaty terms; (2) The context provided by the Convention,[5] including its preamble, which confirms the ECHR was adopted to ensure the protection of certain rights in the Universal Declaration of Human Rights;[6] (3) The object and purpose of the ECHR, as an instrument for the protection of certain human rights for individual human beings;[7] (4) The subsequent practice of the Contracting Parties;[8] and (5) Any relevant rules of international law.[9]

The ECtHR has, also, developed (what it calls) 'additional means of interpretation' through its case-law, specifically – as outlined in *Mihalache v. Romania* – the principles of autonomous

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[2] *Hassan v UK* Application No 29750/09, Merits, 16 September 2014, at para 100.
[3] See, for example, *Magyar Helsinki Bizottság v Hungary* Application No 18030/11, Merits and Just Satisfaction, 8 November 2016, at para 118. ('The Court has emphasised that, as an international treaty, the Convention must be interpreted in the light of the rules of interpretation provided for in Articles 31 to 33 of the Vienna Convention'.)
[4] See, Articles 31 and 32, Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, especially Article 31(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Article 32 allows recourse to supplementary means of interpretation, including the *travaux préparatoires*. There has been little reliance on the preparatory work of the ECHR 'partly because the travaux are not always helpful and partly because of the emphasis upon a dynamic and generally teleological interpretation of the Convention that focuses, where relevant, upon current European standards rather than the particular intentions of the drafting states': Harris, et al., *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights*, 4th edn (2018) at 22 (references omitted).
[5] Article 31(2), VCLT explains that 'context' means the context of the treaty. See, *Mihalache v Romania* Application No 54012/10, judgment 8 July 2019, at para 92. ('[T]he context of the provision in question is a treaty for the effective protection of individual human rights'.)
[6] *Golder v United* Kingdom Application No 4451/70, Merits and Just Satisfaction, 21 February 1975, at para 34. ('[T]he most significant passage in the Preamble to the European Convention is the signatory Governments declaring that they are "resolved… to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration"'.)
[7] See, for example, *Soering v UK* Application No 14038/88, Merits and Just Satisfaction, 07 July 1989, at para 87 ('the object and purpose of the Convention as an instrument for the protection of individual human beings'); and *Mamatkulov and Askarov v Turkey* Application Nos 46827/99 and 46951/99, Merits and Just Satisfaction, 4 February 2005, at para 101. ('The object and purpose of the Convention as an instrument for the protection of individual human beings'). Whilst the ECtHR refers rather generally to the 'the protection of individual human beings', it must have in mind the protection of their human rights – the ECHR does not, for example, protect the individual from meteor strikes, or ill-health, or bad luck – it protects the individual from a violation of certain of their human rights.
[8] Article 31(3)(b), VCLT allows recourse to any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
[9] Article 31(3)(c), VCLT allows recourse to any relevant rules of international law applicable in the relations between the parties.

interpretation, evolutive interpretation, and the margin of appreciation doctrine.[10] Autonomous interpretation explains that certain Convention terms, such as 'tribunal' and 'witness,' will be defined by the ECtHR, and not by the national laws of the States parties.[11] Evolutive interpretation reflects the Court's understanding that the Convention is a 'living instrument' which must be interpreted in the light of present-day conditions.[12] The margin of appreciation doctrine permits States parties a certain measure of discretion in the interpretation of the Convention.[13] Thus, in *Vo v. France*, the ECtHR decided not to intervene in the debate as to when life begins in order to make sense of 'everyone's' right to life (Article 2, ECHR).[14]

The European Court of Human Rights also makes great play of the 'special character' of the ECHR as a treaty for the protection of human rights when interpreting the Convention.[15] The genesis of this *pro homine* approach lies in the 1975 *Golder* judgment, when the Court rejected calls for a 'cautious and conservative' approach to the interpretation of the ECHR,[16] concluding that the express right to a fair hearing *in* the civil courts implied a right of access *to* those courts, explaining that this was not 'an extensive interpretation forcing new obligations on the Contracting States', but one 'based on the very terms of [Article 6, ECHR] read in its context and having regard to the object and purpose of the Convention'[17] (note the implied reference to the Vienna Convention rules on treaty interpretation).

Like all treaties, the European Convention on Human Rights creates binding international law obligations, telling the Contracting Parties how they should behave. Unlike many treaties, the ECHR established a Court to have the final say on the interpretation and application of the

[10] *Mihalache v Romania* Application No 54012/10, Merits and Just Satisfaction, 8 July 2019, at para 91.
[11] Harris, et al., supra note 4, at 20.
[12] *Loizidou v Turkey* Application No 15318/89, Preliminary Objections, 23 March 1995, at para 71.
[13] McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by The Human Rights Committee' (2016) 65 *International and Comparative Law Quarterly* 21, at 22.
[14] Vo v France Application No 53924/00, Merits, 8 July 2004, at para 82.
[15] *Soering v UK* Application No 14038/88, Merits and Just Satisfaction, 07 July 1989, at para 87. ('In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms'.)
[16] *Golder v United Kingdom* Application No 4451/70, Separate Opinion of Judge Sir Gerald Fitzmaurice, 21 February 1975, at para 39.
[17] *Golder v United Kingdom* Application No 4451/70, Merits and Just Satisfaction, 21 February 1975, at para 36.

Convention.[18] Any change in interpretation by the ECtHR requires, then, a clear justification, because a State party complying with the 'old' position will be found categorically in violation of its international law obligations, once the Court adopts its 'new' understanding. The ECtHR accepts that the importance of legal certainty requires it not depart, without good reason, from its established jurisprudence, but considers that a failure to maintain a 'dynamic and evolutive' approach to interpretation would risk rendering the interests of legal certainty a bar to 'improvement'.[19]

The European Court of Human Rights explains any change in its approach to interpretation by reference to its 'living instrument doctrine',[20] which broadly maps onto the Vienna Convention rules. First, the ECtHR will change its position when there has been a change in the human rights practices within the Contracting Parties,[21] which are taken to reflect a revised understanding of the demands of Convention rights.[22] This can be seen in *Tyrer v United Kingdom*, the first case to invoke the living instrument doctrine, where the Court noted that it 'cannot but be influenced by the developments and commonly accepted standards in [the Contracting Parties]'.[23] Second, the Court will change its approach when there has been a change in the relevant rules of international law.[24] Thus, in *Rantsev v. Cyprus and Russia*, the ECtHR concluded that the traditional concept of 'slavery,' as defined in the 1926 Slavery

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[18] Article 32 (1), European Convention on Human Rights ('ECHR'). ('The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention'.)
[19] *Micallef v Malta* Application No 17056/06, Merits and Just Satisfaction, 15 October 2009, at para 81.
[20] Mowbray, 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (2009) 9 *Human Rights Law Review* 179, at 198.
[21] Cf. Article 31(3)(b), VCLT.
[22] *Scoppola v Italy* (No. 2) Application No 10249/03, Merits and Just Satisfaction, 17 September 2009, at para 104. ('[The Court must] have regard to the changing conditions [...] in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved'.) Whilst consensus has been invoked by the ECtHR to justify 'a dynamic interpretation of the Convention' (*A, B and C v Ireland* Application No 25579/05, Merits and Just Satisfaction, 16 December 2010, at para 234), the ECtHR does not always wait for complete agreement to reach a new understanding of Convention rights, with the case-law referring, inter alia, to a 'common approach, an 'emerging consensus,' and a 'general trend'. See, Łącki, 'Consensus as a Basis for Dynamic Interpretation of the ECHR: A Critical Assessment' (2021) 21 *Human Rights Law Review* 186, at 193 (and case-law cited).
[23] *Tyrer v United Kingdom* Application No 5856/72, Merits, 25 April 1978, Ser. A26, at para 31.
[24] Cf. Article 31(3)(c), VCLT. See, for example, *Demir and Baykara v Turkey* Application No 34503/97, Merits and Just Satisfaction, 12 November 2008, at para 68. ('The Court … has taken account of evolving norms of …. international law in its interpretation of Convention provisions.') See, generally, Polgari, 'The Role of the Vienna Rules in the Interpretation of the ECHR: A Normative Basis or a Source of Inspiration?' (2021) 14 *Erasmus L Rev* 82, at 94; and Ulfstein, 'Interpretation of the ECHR in light of the Vienna Convention on the Law of Treaties' (2020) 24 *International Journal of Human Rights* 917, at 921.

Convention, had evolved in more recent international law instruments to encompass forms of modern slavery, including human trafficking.[25] Third, the ECtHR will change its position on interpretation when there has been a change in the ordinary, i.e., dictionary, meaning of a Convention term.[26] This is the international law doctrine of evolutive interpretation,[27] which directs the Court to consider, 'What do the words in the ECHR (*now*) mean?' Thus, for example, the notion of 'family' now extends far beyond the traditional concept prevalent in 1950, when the Convention was adopted,[28] and is no longer confined to marriage-based relationships.[29]

More importantly for our purposes, the European Court of Human Rights also invokes the living instrument doctrine to explain a change in its approach to interpretation in light of the increasingly high standard being required in the area of the protection of human rights. Here, the ECtHR appears to be going beyond the standard approach to evolutive interpretation (which allows for the updating of the ordinary meaning of treaty terms), and applying the doctrine on evolutive interpretation to the object and purpose of the Convention, as a treaty for the protection of 'human rights.'[30] There is no problem with this, in terms of international law doctrine. The object and purpose of any treaty is explained using words. The doctrine of evolutive interpretation recognizes that the ordinary meaning of words can change over time. The necessary consequence must be that, if the meaning of the words used to describe the

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[25] *Rantsev v Cyprus and Russia* Application No 25965/04, Merits and Just Satisfaction, 7 January 2010, 2010, at para 282.
[26] Cf. Article 31(1), VCLT. ('A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty'.)
[27] *Dispute regarding Navigational and Related Rights* (Costa Rica v Nicaragua) [2009] ICJ Rep 213, at para 66. See, generally, Bjorge, 'The Convention as a Living Instrument: Rooted in the Past, Looking to the Future' (2016) 36 *Human Rights Law Journal* 243; Dörr, 'The Strasbourg Approach to Evolutionary Interpretation,' in Abi-Saab, et al. (eds) *Evolutionary Interpretation and International Law* (2019) 115; and, Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties and the European Court of Human Rights', in Orakhelashvili and Williams (eds), *40 Years of the Vienna Convention on the Law of Treaties* (2010) 55.
[28] Harris, et al., supra note 4, at 505.
[29] *Kroon and Others v The Netherlands* Application No 18535/91, Merits and Just Satisfaction, 27 October 1994, at para 30.
[30] In *Mihalache v. Romania*, the Court expressly links evolutive interpretation to the object and purpose of the Convention, explaining that, '[I]n order to interpret the provisions of the [ECHR] in the light of their object and purpose, the Court has developed additional means of interpretation through its case-law, [including] evolutive interpretation': *Mihalache v Romania* Application No 54012/10, Merits and Just Satisfaction, 8 July 2019, at para 91. See, also, Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 *German Yearbook of International Law* 11, at 23. ('[A]n evolutive interpretation must be possible since it normally corresponds to the object and purpose of the treaty.')

object and purpose of the treaty changes, so does the object and purpose of the treaty – including, in this case, a Convention for the protection of 'human rights.'

The increasingly high standard doctrine was first invoked in *Selmouni v. France*, in the context of Article 3 (prohibition on torture).[31] The applicant had complained he had been subjected to various forms of ill-treatment, including being repeatedly punched and kicked, dragged along by his hair, urinated over, and threatened with violence. The ECtHR began by noting that the categorization of mistreatment as 'torture' depended on the actions crossing the threshold from inhuman and degrading to torture because of their severity. The Court then made the following statement:

> '[H]aving regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions" …. the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that *the increasingly high standard being required in the area of the protection of human rights* and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies.'[32]

The Court was satisfied that the physical and mental violence, considered as a whole, constituted torture for the purposes of Article 3 of the Convention.[33] The important point, for our purposes, is that reference to 'the increasingly high standard being required by human rights' reflects a belief that the demands of human rights can change over time.

3. EXPLAINING A CHANGE IN THE DEMANDS OF 'HUMAN RIGHTS'

The previous section outlined the ECtHR's approach to the interpretation of the ECHR, showing how the Court relies on the living instrument doctrine to make sense of the Convention 'in the light of present-day conditions [and not] in accordance with the intentions of their

[31] Article 3, ECHR. ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment.')
[32] *Selmouni v France* Application No 25803/94, Merits and Just Satisfaction, 28 July 1999, at para 101.
[33] Ibid. 105.

authors as expressed more than forty years ago.'[34] Former Vice-President of the Court, Françoise Tulkens explains the point this way:

> '[I]t should be borne in mind that Convention rights are not Dead Sea Scrolls. [ECtHR judges] are not museum curators but actors. We are here to think human rights [and] to bring them to life'.[35]

The meaning of the term, 'human rights' has been the subject of extensive scholarly comment in recent years, with two dominant approaches emerging in the literature: naturalistic (or practice-independent) scholarship, and political (or practice-dependent) writings. [36] Both accounts agree that human rights norms reflect standards of morality – either pre-existing moral standards (naturalistic scholars),[37] or new moral standards (political scholars).[38] Either way, to violate someone's human rights is considered morally wrong.[39] The approaches disagree on the relevance of practice: For naturalistic (practice-*independent*) scholars, human rights exist even if there is no practice of human rights; For political (practice-*dependent*) scholars, the notion of human rights is defined by the practice of human rights. The problem, for our purposes, is that neither approach can satisfactorily explain those cases where the ECtHR changes its position on interpretation in light of the increasing demands of human rights. Naturalistic scholars can explain the moral demands of human rights, but do not accept the possibility of change; Political scholars, by way of contrast, accept the possibility of change, but they cannot explain why human rights practice creates moral obligations, or clarify whether deleterious human rights practice reduces the moral demands of human rights.

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[34] *Loizidou v Turkey* Application No 15318/89, Preliminary Objections, 23 March 1995, at para 71.
[35] Tulkens, 'Judicial Activism v Judicial Restraint: Practical Experience of This (False) Dilemma at the European Court of Human Rights' (2022) 3 *European Convention on Human Rights Review* 293, at 299.
[36] See, generally, Liao and Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' (2012) 9 *Journal of Moral Philosophy* 327; also, Tripkovic, 'A New Philosophy for the Margin of Appreciation and European Consensus' (2022) 42 *Oxford Journal of Legal Studies* 207, at 208 and 211.
[37] See, for example, Finnis, *Natural Law and Natural Rights*, 2nd edn (2011) at 214.
[38] See, for example, Perry, 'The Morality of Human Rights' (2020) 42 *Human Rights Quarterly* 434, at 438. ('The morality of human rights – the morality embodied in the Universal Declaration – is… the first truly global political morality in human history.')
[39] Haule, 'Some Reflections on the Foundation of Human Rights: Are Human Rights an Alternative to Moral Values?' (2006) 10 *Max Planck Yearbook of United Nations Law* 367, at 368. ('The human rights discourse of this age seems to substitute the moral and ethical discourse.')

3.1. Naturalistic accounts of human rights

The traditional way of thinking about human rights has been to contend that a human right is a right we have simply by virtue of being human; understood this way, human rights is a contemporary idiom for natural rights.[40] Joel Feinberg explains the argument this way: 'a natural right is a moral right derived from "the nature of man", conferred on human beings as parts of their original constitutions, like their biological organs, bones, and muscles.'[41] Human rights, on this understanding, are possessed by all members of the species, *homo sapiens*, in all places, at all times[42] – whether, or not, there is any practice of human rights in, for example, legal doctrines, political practices, or social discourses (hence the reference to practice-*independent* scholarship).

Naturalistic scholars explain the existence of human rights by a simple process of deductive reasoning:[43] *Homo sapiens* are different from other animals in meaningful ways; By identifying those differences, we can deduce those *human* rights logically and necessarily required to protect our humanity. The most important recent contribution along these lines can be found in James Griffin's, *On Human Rights* in which he explains the point this way:

> 'Human life is different from the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be… And we try to realize these pictures."[44]

From this distinctive nature of 'being human,' Griffin deduces the logical and necessary human rights to choose our own path through life (the right to agency), to the minimum provision of resources and capabilities necessary to allow us to act on those choices (the right to minimum welfare), and the correlative obligation on others not to forcibly prevent us from pursuing what we regard as a worthwhile life (the right to liberty).[45]

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[40] Finnis, supra note 37, at 198 ('"human rights" being a contemporary idiom for "natural rights"').
[41] Feinberg, 'In Defence of Moral Rights' (1992) 12 *Oxford Journal of Legal Studies* 149, at 153.
[42] Cranston, *What are Human Rights?* (1962) at 36.
[43] See, generally, MacDonald, 'Natural rights' in Waldron (ed), *Theories of Rights* (1984) 21,) at 25. (A common feature is that natural rights follow the intrinsic or essential nature of man: 'Thus they are known by reason.')
[44] Griffin, *On Human Rights* (2008) at 32.
[45] Ibid. at 33.

For naturalistic scholars, the human rights we already possess simply by virtue of being human are imperfectly codified in international law instruments, like the European Convention on Human Rights. We have seen that the ECtHR is required to interpret the ECHR in light of its object and purpose as a treaty for the protection of certain 'human rights.' For naturalistic scholars, this expression, 'human rights,' is explained by our distinctive nature of being human, which Griffin, for example, understands in terms of our capacity for normative agency – the agency involved in living what we consider to be a good life for ourselves. Whilst the societal context for normative agency can change (e.g., the shift from pre-industrial to post-industrial societies), our fundamental nature of 'being human' does not change – *Homo sapiens* are (and always have been) a certain kind of self-conscious, normative agent.

For naturalistic scholars, the essential nature of being human does not change over time; nor do the demands of human rights. According to Griffin's personhood account, for example, we always have the rights to agency, minimum welfare, and liberty, because these rights protect the distinctive nature of our humanity (i.e., our normative agency). The logical and necessary consequence must be that the European Court of Human Rights makes a mistake when it changes its position on the interpretation of the ECHR in light of the changing demands of human rights – unless we have a new scientific understanding of what it means to be human.[46] But there are cases where the ECtHR does change its position; So, either the Court is wrong to change its position on the interpretation of the Convention in light of the changing demands of human rights, or naturalistic scholars are wrong to conclude the demands of human rights cannot change over time.

Take the example of the human right of transexual persons to marry. For the naturalistic scholar, John Finnis, human rights express certain essential truths about the human condition.[47] The essential nature of human beings is that we procreate biologically through sexual reproduction. Finnis sees the function of marriage as protecting the 'biological union' of 'the reproductive organs of husband and wife'.[48] Marriage, he maintains, is only available to

[46] See, for example, *L. and V. v Austria*, where the ECtHR reversed its position on equal ages of consent in light of 'recent research according to which sexual orientation is usually established before puberty': *L. and V. v Austria* Application Nos 39392/98 and 39829/98, Merits and Just Satisfaction, 9 January 2003, at para 47.
[47] Finnis, supra note 37, at 214.
[48] Finnis, 'Law, Morality, and Sexual Orientation' (1993) 69 *Notre Dame L Rev* 1049, at 1066.

couples of a type with the potential for biological reproduction.[49] Necessarily and logically, then, on this understanding, the human right to marry could only be enjoyed by those in a category of relationship with the potential for biological reproduction – and this will not include all couples with a transexual partner. For naturalistic thinkers, claimed truths about the nature of being human and the related content of human rights do not change over time. But the European Court of Human Rights has right of transexual persons to marry. In *Christine Goodwin v. United Kingdom*, the Court reversed its position on legal gender recognition for transexuals,[50] without relying on new scientific knowledge,[51] concluding that, whereas in the past, the Contracting Parties could decide whether, or not, to recognize a change in a person's gender, this was '*no longer* sustainable'.[52] The ECtHR then found a violation of Article 12 (right to marry), concluding that it was *not* persuaded the terms 'men' and 'women' must refer to a determination of gender 'by purely biological criteria'.[53] So, either the Court was wrong to change its position on the right of transexual persons to marry, or it is wrong to contend that human rights follow our biological nature of being human (which does not change fundamentally over time), and therefore the demands of human rights (properly understood) do not change over time.

3.2. Political accounts of human rights

In recent years, a competitor, political (or practice-*dependent*) tradition has emerged, reflecting a conscious effort to de-couple discussion on human rights from the religion-informed discourses on human rights.[54] There are three distinct strands in this literature: Scholars who see human rights as limiting the political power of the State;[55] Writers who focus on the role of human rights in international relations (e.g., justifying intervention in the name of human

[49] Finnis, 'Marriage: A Basic and Exigent Good' (2008) 91 *The Monist* 388, at 389 ('marriage's point is twofold: procreation and friendship'). See, further, Finnis, 'The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations' (1997) 42 *Am. J. Juris.* 97.
[50] See, *Rees v United Kingdom* Application No 9532/81, Merits, 17 October 1986, at para 38.
[51] *Christine Goodwin v United Kingdom* Application No 28957/95, Merits and Just Satisfaction, 11 July 2002, at para 83. ('The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals'.)
[52] Ibid. para 90 (emphasis added).
[53] Ibid. para 100.
[54] See, for example, Rawls, *The Law of Peoples* (1999) at 68.
[55] See, Goodale, 'Human Rights and the Politics of Contestation' in Mark Goodale (ed), *Human Rights at the Crossroads* (2012) 31, at 37; and Nickel, *Making Sense of Human Rights*, 2nd edn (2007) at 55.

rights);[56] and Work that highlights the centrality of international law to the practice of human rights.[57] What links all these writings is a rejection of the naturalistic position that human rights 'are morally important "pre-political" rights that belong to all human beings in virtue of their humanity.'[58]

Whereas naturalistic scholars believe we have human rights even if there is no practice of human rights, political scholars contend that it is wrong to think about human rights without reference to the practice of human rights, on the understanding that words and concepts – like 'human rights' – are given meaning by usage in practice (hence, reference to practice-*dependent* theories). The most important contribution within this practice-dependent tradition is Charles Beitz' *The Idea of Human Rights*, in which he explains:

> 'A practical conception takes the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights.'[59]

Political scholars do not look to develop a self-standing philosophical conception of human rights, with Beitz making the point that 'a practical conception prescinds from taking any philosophical view about the nature or basis of human rights'.[60] Instead, Beitz employs an inductive methodology, looking for patterns in human rights doctrines, discourses, and practices to develop an idealized model of human rights which reveals the objective, function, and content of human rights.[61] The objective of human rights (according to Beitz) is to protect urgent individual interests against certain predictable threats in a world order composed of States;[62] the function of human rights is to justify external intervention in the domestic affairs

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[56] Raz, 'Human Rights without Foundations,' in Besson and Tasioulas (eds), *The Philosophy of International Law* (2010) 321, at 329. (Human rights are those rights 'whose violation is a reason for action against States in the international arena'.)
[57] Buchanan, *The Heart of Human Rights* (2014).
[58] Campbell, 'Human rights morality and human rights practice: An interactive approach,' in Campbell and Bourne (eds), *Political and Legal Approaches to Human Rights* (2017) 3, at 3.
[59] Beitz, *The Idea of Human Rights* (2009) at 102.
[60] Ibid. at 103.
[61] Ibid. at 105. ('We want to understand how these objects called "human rights" operate in the normative discourse of global political life.') Relevant source materials include instances of political action to protect human rights, and the provisions of the core UN human rights treaties and work of their supervisory bodies: ibid. at 107.
[62] Ibid. at 109

of sovereign States;[63] and the content of human rights (revealed in the practice) includes the rights to personal security and liberty, adequate nutrition, and some degree of protection against the arbitrary use of power by the State.[64]

Political (practice-dependent) scholars can have no problem with the ECtHR changing its position on the interpretation of the ECHR in light of changing human rights practices. This is already allowed under the international law rules on treaty interpretation, which require the ECtHR to interpret the Convention in light of any evolution in the international doctrine or domestic practice on human rights.[65] Thus, in *Bayatyan v Armenia*, the Court reversed its position on the right to conscientious objection,[66] noting that its refusal to recognize the right in the past 'was a reflection of the ideas prevailing at the material time.'[67] Explaining its decision, the Court made reference to both changes in the practices of the Contracting Parties, and an evolution in the position of the UN Human Rights Committee.[68]

There are, however, two problems with the plasticity in the notion of human rights implied by the political tradition. First, we must remember that any discussion about human rights is fundamentally a discussion about morality (explaining why it is wrong to violate someone's human rights).[69] If human rights is an expression of morality, then political scholars need to make clear why contingent practices on human rights should explain the moral demands of human rights. This is the Is/Ought problem familiar to moral philosophers,[70] i.e., the difficulty of explaining why an empirical description of what 'Is' the case, in terms of human rights doctrine and practice, should determine what 'Ought' to be the case, in terms of the moral reasons for action created by human rights. Beitz, himself, avoids this problem, maintaining

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[63] Ibid. at 115. (The fact external actors have *pro tanto* reasons for intervention is 'perhaps the most distinctive feature, of contemporary human rights practice.')
[64] Ibid. at 110; also, at 137 – 138.
[65] See Article 31(3), VCLT, which allows recourse to subsequent practice and relevant rules of international law.
[66] The consistent case law of the European Commission on Human Rights (from the 1960s to the 1990s) left it to States parties to decide whether, or not, to recognize a right of conscientious objection. See, for example, *G.Z. v Austria* Application No 5591/72 Commission decision, 2 April 1973.
[67] *Bayatyan v Armenia* Application No 23459/03 Application No 23459/03, Merits and Just Satisfaction, 7 July 2011, at para 101.
[68] Ibid. at para 108.
[69] Ignatieff, *Human Rights as Politics and Idolatry* (2001) at 53. ('[Human rights] has become the lingua franca of global moral thought.')
[70] See, generally, Gewirth, 'The "Is-Ought" Problem Resolved' (1973-4) 47 *Proceedings and Addresses of the American Philosophical Association* 34.

there can be different reasons for people supporting, adhering to, and acting in the name of human rights.[71] But what about those people who do not accept and recognize the moral demands of human rights? What reasons can I give to the sceptical government official, intent on torturing me, that I have the moral right not to be tortured?

The second problem with the plasticity of human rights implied by the political tradition is the possibility that deleterious human rights practice might reduce the moral demands of human rights (recall, the notion of 'human rights' is defined by its practice, with no underlying moral philosophy). Given the ECtHR is required to interpret the ECHR in the light of its object and purpose as a Convention for the protection of certain 'human rights,' this raises the question as to whether deleterious human rights practice might reduce the protection afforded by the Convention? There is no clear answer to this in the literature on the interpretation of the ECHR,[72] but surely it would be awkward to conclude that violating human rights reduces the demands of human rights – and, at the same time, to maintain that violating human rights is morally wrong.

4. INTERPRETING THE ECHR: INSIGHTS FROM SOCIAL ONTOLOGY

The objective of this paper is to make sense of, and critique, those cases where the European Court of Human Rights changes its position on the interpretation of the ECHR by reference to the increasingly high standard being required in the area of the protection of human rights. To do this, we need to (1) take a position on what is meant when we talk about 'human rights,' and (2) take a position on whether the demands of human rights can change over time. The previous sections highlighted the problems the naturalistic and political accounts of human rights have in accounting for the Court's increasingly high standard doctrine, meaning we need to look elsewhere for a theory of human rights that can both explain and justify the ECtHR' approach. The argument here is that we should look to the insights from social ontology to make sense of the increasingly high standard doctrine. The following sections first explain the difference between brute facts (which are true whatever people say and believe) and social facts (which depend on We-beliefs and practices), before showing how those social institutions

[71] Beitz, supra note 59, at 103–104.
[72] Harris, et al., supra note 4, at 10.

that structure human social interactions (like chess, money, the law, and the State), also emerge from We-beliefs and practices – and then applying this understanding of the social world to 'human rights.'

4.1. Making sense of the social world

The neuroscientist, Lisa Feldman Barrett makes the point that 'Most of your life takes place in a made-up world… We all live in a world of *social reality* that exists only inside our human brains.' Nothing in physics or chemistry determines, for example, that some object counts as money, but money is 'real to us anyway. Socially real.'[73] The philosopher, Elizabeth Anscombe explains this in terms of the difference between 'brute facts,' which are true whatever you say and think (e.g., the brute fact of gravity means that your pen just will fall towards the floor), and 'social facts,' which are only true because we believe and say they are true (e.g., the fact of money). Anscombe gives the example of delivering a box of apples and leaving a bill.[74] Delivering the apples is a brute fact of the world; it does not matter what language terms we use (e.g., the objects can be labelled 'apples,' or 'fruit' without any meaningful difference). Saying that the piece of paper counts as 'a bill,' by way of contrast, does make a difference – leaving a bill is different from leaving a £10 note, even though, as a brute fact, both are pieces of paper.

The job of social ontology is to explain the existence and meaning of social facts, i.e., those facts that emerge from the beliefs and interactions of human beings.[75] The standard example is money,[76] defined as any generally accepted medium of exchange.[77] Money is not a brute fact of the world; its existence cannot be explained by the laws of physics or chemistry. But money is still a fact of the world – a social fact. By saying that something (e.g., shells, gold, paper, digital data, etc.) counts as money, and then acting as if that something is money, we create the

[73] Feldman Barrett, *Seven and a Half Lessons about the Brain* (2020) at 110.
[74] Anscombe, 'On Brute Facts' (1958) 18(3) *Analysis* 69, 72.
[75] Lawson, 'A Conception of Social Ontology,' in Pratten (ed). *Social Ontology and Modern Economics* (2014) 19, at 30.
[76] See, for example, Epstein, *The Ant Trap: Rebuilding the Foundations of the Social Sciences* (2015) at 82.
[77] 'money, n.' OED Online, Oxford University Press, March 2022. ('Any generally accepted medium of exchange which enables a society to trade goods without the need for barter'.)

social fact of money. Take the example of shell money (*Tafuliae*) on the island of Malaita.[78] The fact that shells count as money cannot be explained by their physical properties, but only by the fact the Langa Langa believe that shells are money and use shells as units of exchange. These We-beliefs and practices mean that shells count as money on Malaita (but only on Malaita) – and anyone who says that shells are not money on Malaita is objectively wrong about this fact of the social world.

The influential work of writers like Margaret Gilbert, John Searle, and Raimo Tuomela has resulted in a standard model of social ontology, constituted by three elements: reflexivity, performativity, and collective acceptance.[79]

The first element is reflexivity, which captures the notion that social facts are created by human beliefs, expressed in the form of language. In the case of money, by saying that something (e.g., shells, gold, paper, digital data, etc.) counts as money, we create the social fact of money. Saying makes it so. We can then use shells, gold, paper, digital data, etc. as money. The point applies to all social facts, whether we are talking about the King in chess, or the King of Spain. Nothing about the physical properties of a sculptured piece of wood makes it the King in chess, with the right to castle; Nothing about the physical properties of Felipe VI, makes him King, with the right to appoint the Prime Minister. Saying makes it so in both cases. The philosopher of language, John Searle explains that we create social facts by saying something equivalent to "Let this social fact be true!"[80] In our examples: Chess players created the King by saying something equivalent to "Let there be a King in chess!" The people of Spain created King Felipe VI by saying something equivalent to "Let this person be King!"[81]

The second element is performativity. It is not enough for us to *say* that something is a fact, we must also *act* as if that something is a fact. Raimo Tuomela's favoured example is the use of squirrel pelts as money in Finland until the fourteenth century CE.[82] Squirrel pelts are brute

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[78] Teobasi Tadokata, 'Tafuliae | shell money.' Available at: museumsvictoria.com.au/melbournemuseum/resources/tok-stori-vikitolia-pasifiki/solomon-islands/tafuliae-shell-money/ [last accessed 25 May 2023].
[79] Guala, 'The Philosophy of Social Science: Metaphysical and Empirical' (2007) 2(6) *Philosophy Compass* 954, at 961–963.
[80] Searle, *Making the Social World* (2010) at 100.
[81] These declarations can be explicit (e.g., "Felipe VI is our King!") or implicit (e.g., where a group acts as if Felipe VI is the King): Ibid. at 13.
[82] Tuomela, *The Philosophy of Social Practices: A Collective Acceptance View* (2002) at 125.

facts of the world. The use of squirrel pelts as money, by way of contrast, only 'occurs through the members of the collective in question "performatively" accepting [squirrel pelts] as money.'[83] Medieval Fins had to both declare that squirrel pelts counted as money, and then to act as if squirrel pelts were money (this is the required performative element).[84] We can reconstruct this in the following terms: Squirrel pelts were seen by medieval Fins as a valuable and readily tradable unit of exchange in the marketplace.[85] A few people started using squirrel pelts as money. This encouraged others to use them as money, with the consequence that squirrel pelts became a stable unit of exchange. A chain reaction of bootstrapped inferences made possible the establishment of the social fact of squirrel pelts as money as the result of a self-fulfilling prophecy.[86] The result was that, for this group, at this time, squirrel pelts counted as money. When Fins stopped using them as money, squirrel pelts lost their status of being money.[87]

The final element in the standard model of social ontology is *collective* acceptance. It is not enough for me alone (working in the 'I' mode) to believe some social fact is a fact. Social facts are facts because '*We*' have a shared and joint commitment to collectively accept the relevant social fact.[88] Take the example of Bitcoin. It is not sufficient for me alone to believe that Bitcoin is money. Bitcoin does not count as money just because 'I' believe that Bitcoin is money; 'We' must believe that Bitcoin is money for Bitcoin to count as money. The 'We,' in this context, includes all those for whom Bitcoin is money, i.e., all those for whom this claimed social fact is true.[89] Reference to collective acceptance captures the idea that the creation and maintenance of social facts, like the social fact of money, requires 'We' mode acceptance: It is the 'We-beliefs' and 'We-practices' of the social group – i.e., those who accept that the social fact is true – which creates the social fact.[90]

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[83] Tuomela, 'Collective Acceptance, Social Institutions, and Social Reality' (2003) 62 *American Journal of Economics and Sociology* 123, at 124.
[84] Tuomela, 'An Account of Group Knowledge,' in Schmid, et al. (eds), *Collective Epistemology* (2013) 75, at 96.
[85] See, generally, Menger, *On the Origins of Money* ([1892] 2009) at 48.
[86] See, on this point, Barnes, 'Social Life as Bootstrapped Induction' (1983) 17 *Sociology* 524, at 538.
[87] Tuomela and Balzer, 'Collective Acceptance and Collective Social Notions' (1999) 117 *Synthese* 175, at 177.
[88] See Gilbert, *Living together: Rationality, Sociality, and Obligation* (1996) at 361 ff.
[89] Gilbert, *On Social Facts* (1989) at 168 ('"We," in this context, 'refers to a set of people each of whom shares, with oneself, in some action').
[90] Tuomela, *The Philosophy of Social Practices: A Collective Acceptance View* (2002) at 176.

Social ontology makes two main claims, then. First, when trying to make sense of the world, we must be clear whether we are labelling brute facts or constituting social facts – the point applies whether we are talking about 'apples,' 'bills,' 'money,' or 'human rights.' Second, social facts are constituted by three elements: Reflexivity, which explains how we create social facts through language; Performativity, which explains that social facts must be constantly re-performed; and Collective acceptance, which explains that social facts are only true for the members of the group that believes those facts to be true. Simply put: Social facts are created by the We-beliefs and practices of the social group which believes a particular social fact to be true.

4.2. Social institutions

For the purposes of social ontology, social institutions are defined to include all systems of social rules that structure human social interactions.[91] Examples include the social institutions of chess, money, the law, and the State. These social institutions are not brute facts of the world, unconnected to what humans say and do; they are social facts, depending on We-beliefs and practices.[92]

The game of chess is just one example of a social institution that structures human social interactions using social rules. Chess is not a brute fact of the physical world; Its existence depends on the We-beliefs and practices of those who play the game. Chess players believe and say that their behaviours, when playing chess, are regulated by the rules of the game (reflexivity); They play the game in the way required by the rules (performativity); and Playing chess is a group activity – 'I' can only play chess, if 'We' collectively accept that we have a shared and joint commitment to play chess together according to the rules of the game (collective acceptance). One of the regulative rules is that 'White goes first,' meaning that it would be 'wrong' (under the rules of chess) for Black to go first. Why does White go first? They just do, under the rules of the game: If you accept and recognize you are playing chess,

[91] See, for example, Hodgson, 'What Are Institutions?' (2006) 40(1) *Journal of Economic Issues* 1, 2. ('[W]e may define institutions as systems of established and prevalent social rules that structure social interactions.').
[92] Hindriks, 'Restructuring Searle's Making the Social World' (2011) 43 *Philosophy of the Social Sciences* 373, at 373. ('Institutions are normative social structures that are collectively accepted.')

then you ought to play by the rules of the game,[93] meaning that White has the right to go first, and Black has the obligation to let them go first.[94]

When we speak about the social institution of chess, we are really talking about the social institutions (*plural*) of chess. A social institution is a social institution of a particular type, i.e., one defined by certain core characteristics of that kind of social institution. Chess is a game of skill played by two people on a chequered board with 32 pieces, with the object being to place the adversary's King in checkmate.[95] Some people play chess according to the rules of the International Chess Federation (FIDE),[96] but the social institution of chess is not defined by the FIDE Laws – chess existed for more than 1000 years before the establishment of FIDE in 1924. There are though limits to what counts as chess. You are still playing chess if, in a friendly game, you both accept and recognize that you can tidy up your pieces without first declaring, 'j'adoube';[97] You are not playing chess, if you both decide the objective of the game is to create interesting patterns with the 32 pieces on the chequered board. My point is that, whilst all social institutions will evolve over time, with changes in the We-beliefs and practices of those who accept and recognize the social institution in question, there are limits on the extent to which those beliefs and practices can change and still be beliefs and practices within the frame of the social institution of that type: E.g., football is still football with a video assistant referees (VAR); it is not football if any player can carry the ball in their hands – thus, when Webb Ellis picked up the ball, he stopped playing football and started playing rugby[98] (the relevant point is that football and rugby are different social institutions).

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[93] Searle, *Making the Social World* (2010) at 102. Social ontology explains, why, sometimes, what 'is' the case, also explains what 'ought' to be the case. See, classically, Searle, 'What is a Speech Act?', in Black (ed), *Philosophy in America* (1964) 219. (If you factually recognize and accept a social institution, then you ought to comply with the rules of that social institution. The point applies whether you are talking about the social institutions of promising, chess, football, or human rights.)

[94] The point applies equally to the game of blindfold chess, played on a mental model of the board. In blindfold chess, there are no physical artefacts to give expression to the players' rights and obligations, but the person 'holding' the White pieces still has the right to go first. See, generally, Smith, 'John Searle: From Speech Acts to Social Reality' in Smith (ed), *John Searle* (2003) 1, at 32. Blindfold chess is not the only social institution to rely on imagined artefacts to reflect the possession of rights or obligations, with, for example, Neil MacCormick making the point that 'Legal norms are … "thought-objects", not items among the physical furniture of the universe': MacCormick, *Institutions of Law* (2007) at 292. We can, of course, make the same point about the 'possession' of abstract human rights.

[95] 'chess, n.1'. OED Online. March 2023. Oxford University Press.

[96] FIDE Laws of Chess taking effect from 1 January 2023. Available handbook.fide.com/chapter/E012023 [last accessed 12 May 2023].

[97] Article 4.2., ibid.

[98] See, 'William Webb Ellis'. Available: en.wikipedia.org/wiki/William_Webb_Ellis [last accessed 17 May 2023].

4.3. Social morality

Social ontology can easily explain social morality without recourse to meta-ethics. Social morality is the morality accepted and recognized by the members of a particular social group.[99] According to the logic of the standard model of social ontology, social morality is produced by those social institutions which frame their regulative rules in terms of morality, allowing for the characterization of behaviour as morally 'right' or 'wrong.'[100] Take the example of an organized religion. The religion exists because its adherents believe and say it exists (reflexivity); Adherents comply with the requirements of the religion (performativity); and these We-beliefs and practices are shared collectively by those who follow this religion (collective acceptance). Some of the religion's regulative rules will be framed in terms of the demands of morality. Breaking these regulative rules is (morally) 'wrong,' according to the rules of the religion (allowing for justified moral critique). Understood this way, the existence of the rules of social morality is no more mysterious than the existence of the rules of chess. Social morality is not a brute fact of the moral universe;[101] Social morality is a social fact created by collective We-beliefs and practices.

Somewhat surprisingly, many writers on social ontology appear reluctant to apply the standard insights from social ontology to human rights,[102] often falling back on the approach of the naturalistic scholars. We see this most clearly in John Searle's work.[103] Searle begins his

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[99] Social morality must be distinguished from individual morality, where 'I' decide the difference between 'right' and 'wrong.'

[100] 'moral, adj.' OED Online (2022). ('Of or relating to human character or behaviour considered as good or bad; of or relating to the distinction between right and wrong, or good and evil, in relation to the actions, desires, or character of responsible human beings; ethical.')

[101] Cf. Cooper, 'Two Concepts of Morality' (1966) 41 (155) *Philosophy* 19, at 19. ('Morality, like law and religion, is plainly a social phenomenon; unless there were such a thing as human society, there would be no such thing as morality.')

[102] Cf., however, Burman, 'A Critique of the Status Function Account of Human Rights' (2018) 48 *Philosophy of the Social Sciences* 463, at 470. ('[T]he claim that human rights… can exist without collective recognition is false.') See, generally on the debate on human rights in social ontology, Hindriks, 'Restructuring Searle's Making the Social World' (2013) 43 *Philosophy of the Social Sciences* 373; Lobo, 'A Critique of Hindriks' Restructuring Searle's Making the Social World' (2015) 45 *Philosophy of the Social Sciences* 356; and Lobo, 'Human Rights and Status Functions, before and after the Enlightenment' (2019) 49 *Philosophy of the Social Sciences* 31.

[103] See, for example, Searle, *Making the Social World* (2010) at 179 ('If you think that the law maker or law giver in the ideal state should formulate laws in accordance with natural laws, laws of the natural order, then it is a very short step to say that human rights are also a form of natural law').

discussion by pointing out that 'we do not *discover* that people have universal human rights the way we discover that they have noses on their faces.'[104] One of these is a brute fact, the other a social fact. So far, so good. But there is then an unexpected shift in the approach, as Searle looks to explain the existence of human rights without the need for a social institution to create human rights. Most rights, he notes, exist within social institutions (e.g., the right of White to go first in chess). But there are rights, Searle contends – human rights, which 'I do not have in virtue of my institutional memberships… but rights that I have solely in virtue of being a human being.'[105] The argument can be expressed as follows: Anything that is biologically human thereby has a human status, and because of that status possesses universal human rights.[106] To explain the content of human rights, we require, then, 'a biological conception of what sorts of beings we are [and] a conception of what is valuable, actually or potentially, about our very existence.'[107] Searle's own understanding leads him to the following list of human rights: the rights to life, physical integrity, personal property, free speech, association, religion and belief, travel, privacy, and silence ('in an increasingly noisy world I would suggest the right to silence as a strong candidate for inclusion').[108]

Searle's argument that human rights can exist without a social institution of human rights does not work for two related reasons, however.

First, human rights are social facts; they are regulative rules concerned with the allocation of rights and obligations (e.g., the right not to be tortured and the correlative obligation not to torture). The point becomes clear if we consider what it means for me to say, "*It is a fact* that I have the moral human right not to be tortured." There are 3 kinds of facts: Brute facts; Social facts; and Metaphysical facts. Brute facts (e.g., the fact of gravity) are empirically verifiable through an application of the scientific method; they are objectively true, whatever people say or believe. Human rights are not brute facts; They cannot be explained by the laws of physics, chemistry, or biology – a CT-scan of the human body will show organs, bones, and muscles; it will not reveal any 'human rights.' Social facts (e.g., the fact of money) are empirically

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[104] Searle, ibid. at 176 (emphasis in original). See, generally, Corlett, 'Searle on Human Rights' (2016) 30 *Social Epistemology* 440.
[105] Ibid. at 174. Also, at 182. ('[I]n the [case] of human rights there is no preexisting institution that defines the rights.')
[106] Ibid. at 199.
[107] Ibid. at 190
[108] Ibid. at 191.

verifiable by reference to manifestations of We-beliefs and practices; they are objectively true if people believe they are true (and act as if they are true). Human rights are objective social facts, provided there is empirical evidence that people believe in human rights and practice human rights. Metaphysical facts are claimed propositions which are not empirically verifiable, either by reference to scientific laws or We-beliefs and practices (otherwise they would be brute facts or social facts).[109] Metaphysical facts cannot be shown to be true or false; they are either believed or not believed. Belief in some metaphysical fact depends on faith. For many, 'Human rights is an article of faith'.[110] Some believe the existence of human rights is explained by the 'fact' human beings are created in the image of God.[111] This is true for those who believe it is true; it is not objectively true. Logically and necessarily, then, the only satisfactory way to explain the *objective* fact of human rights is by reference to collective We-beliefs and practices; only then can I say, with confidence, to a sceptical government official, "*It is a fact* that I have the moral human right not to be tortured."

Second, once we accept that human rights are social facts, this logically and necessarily implies the existence of a social institution (in this case, the social institution of 'human rights') – because the recognition and acceptance of any social rule logically and necessarily implies the existence of a social institution responsible for that rule. Take the straightforward example of 'heads or tails,' a game of chance in which two players try to predict which way up a tossed coin will fall to make a decision – e.g., who has the right to play White in chess.[112] To play heads or tails, the players must accept and recognize a complex system of social rules, e.g., that a piece of metal functions as a decision-making device, what counts as 'heads,' and that the person who calls correctly 'wins.' Playing a single game of heads or tails (once), then, logically and necessarily implies the existence of a system of social rules – and social ontology defines a social institution as any system of social rules that structures human social interactions.[113] There is a circular relationship, then, whereby acting as if you are bound by a regulative rule creates the social institution responsible for that rule. In our example, agreeing that the person

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[109] Cf. Alfred Jules Ayer, *Language, Truth and Logic*, Vol. 1 (Dover, 1952), p. 41.
[110] Dembour, *Who believes in human rights? Reflections on the European Convention* (2006) at 2.
[111] Cf. Waldron, 'The Image of God: Rights, Reason, and Order' (2010 NYU School of Law, Public Law Research Paper No. 10-85. Available at SSRN: https://ssrn.com/abstract=1718054 (accessed 25 May 2023).
[112] In chess, White goes first (Article 1.2, FIDE rules, supra note 96), but there are no rules to determine who plays White.
[113] Supra note 91. The game of 'heads or tails' meets Searle's own test for a social institution: Cf. Searle, 'What is an institution?' (2005) 1 *Journal of Institutional Economics* 1, at 19.

who calls ‘heads’ wins and has the right to play White, creates the social institution of ‘heads or tails,’ with its complex of social rules. Regulative rules cannot exist outside of the context of the social institutions responsible for the rule – a point that applies whether you are talking about ‘heads or tails,’ or ‘human rights.’

4.4. Human rights as social morality

From the perspective of the standard model of social ontology, the existence of ‘human rights’ is no more mysterious than the existence of heads or tails, or the game of chess, or money, or the law, or the State – or any other social institution. We have human rights because people believe in human rights (reflexivity); people practice human rights (performativity); and people have a shared and joint commitment to recognize and accept human rights (collective acceptance). Because the social institution of human rights frames its regulative rules in terms of the demands of morality (explaining that it is morally wrong to violate someone’s human rights), this creates moral reasons for action and allows for justified moral critique in cases of violations of human rights.

4.4.1. Reflexivity: ‘Let there be human rights!’

Reflexivity captures the idea that beliefs, expressed in the form of language, create the social world. Saying makes it so. By saying, in effect, “Let there be human rights!”, States created the social fact of human rights. The opening words of the Charter of the United Nations read as follows:

> “We the Peoples of the United Nations … reaffirm [our] faith in fundamental human rights”.

With the adoption of the Charter, States reaffirmed their faith in an idea which had only emerged during discussion on the post-War architecture of the international community. The term ‘human rights’ was first used by US President, Franklin D. Roosevelt in his 1941 Four Freedoms Address to Congress, when he declared that ‘Freedom means the supremacy of

human rights everywhere'.[114] The related concepts of freedom and human rights then helped to define the Allied cause against fascism. In the 1941 Atlantic Charter, the Allied powers expressed their hope to see a peace established in which 'all the men in all lands [could] live out their lives in freedom from fear and want'.[115] In the 1942 Declaration by United Nations, they expressed the view that 'complete victory over their enemies [was] essential to defend life, liberty, independence and religious freedom, and to preserve *human rights* and justice in their own lands as well as in other lands'.[116]

States created human rights by saying, in effect, "Let there be human rights!" The objective social fact of human rights can be inferred from the language used in the UN Charter, which talks about 'encouraging respect for human rights',[117] 'the realization of human rights',[118] and the promotion of 'universal respect for, and observance of, human rights'.[119] If, as a matter of (social) fact, there was no such things as 'human rights,' then what was the Charter referring to?

In 1948, the UN General Assembly explained the meaning of the expression 'human rights' with the adoption of the Universal Declaration of Human Rights.[120] The Universal Declaration affirmed that both civil and political rights and economic social and cultural rights counted as human rights. Taken together, the provisions of the Universal Declaration reflect five foundational moral principles:[121] the equal status of all human persons;[122] the need for protection of the physical and psychological integrity of the individual;[123] the right to

[114] Roosevelt, excerpted from the State of the Union Address to the Congress, January 6, 1941.
[115] 'The Atlantic Charter', reprinted *Yearbook of the United Nations 1946-47*, 2.
[116] 'The Declaration by United Nations', reprinted *Yearbook of the United Nations 1946-47*, 1 (emphasis added).
[117] Article 1(2), UN Charter.
[118] Article 13, UN Charter.
[119] Article 55(1), UN Charter.
[120] Universal Declaration of Human Rights, UNGA Res 217(III)A (10 Dec 1948).
[121] Wheatley, *The Idea of International Human Rights Law* (2019) at 175–180.
[122] The importance of equal status is clear from the first two provisions: Article 1, Universal Declaration of Human Rights provides that 'All human beings are born free and equal in dignity and rights'; Article 2 that the rights in the Declaration are to be enjoyed 'without distinction of any kind'. The principle is reaffirmed in Article 6 (right to recognition as a person before the law) and Article 7 (equality before the law).
[123] The right to physical integrity is recognized in Article 3 (right to life, liberty and security of person); Article 5 (prohibition on torture); Article 9 (prohibition on arbitrary arrest and detention); Article 13 (right to freedom of movement); and implied by the right to a fair trial in Articles 10 and 11. The right to psychological integrity can be observed in Article 12 (right to privacy, family and home); and Article 17 (right to property).

personhood or meaningful agency;[124] the requirement for full participation in the political, economic, social and cultural, etc. life of the community;[125] and the right to minimum welfare.[126] These five moral principles emerged from the We-beliefs and practices of States and the drafters of the Universal Declaration on the meaning of 'human rights.' One consequence is that any human rights argument (properly so called) must be consistent with these five underlying moral principles – otherwise, it is not an argument about 'human rights' (in the same way that you are not playing chess, if you both decide the objective of the game is to create interesting patterns on the board with the 32 pieces).

Two questions remain: Why do we have human rights (at all)? Why do we have *these* human rights? The answer, in both cases: We just do – according to the logic of social ontology, which tells us that social facts, including the regulative rules of social institutions, emerge from contingent We-beliefs and practices. Social facts and social institutions are either recognized and accepted, or they are not. The justification for a social institution is a different question to its existence and meaning. In the case of human rights, there is no requirement to justify the existence of human rights (just as there is no requirement to justify the existence of the game of chess), or to justify individual human rights (or the rule in chess which says, 'White goes first'). The justification for human rights (or individual human rights) is a different question to the existence and meaning of human rights – and there are many different justifications in the literature for accepting and recognizing human rights (or individual human rights). But this absence of agreement on justification does not change the objective social fact of human rights. Human rights exist because they are accepted and recognized, nothing more is required. If this argument seems unsatisfactory, recall the absence of debate on the justification for human rights in the drafting of the Universal Declaration: When asked what philosophy informed the Declaration, its principal draftsperson, John Humphrey replied, 'no philosophy whatsoever.'[127]

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[124] The right to personhood, or meaningful agency, is seen in Article 4 of the Universal Declaration (freedom from slavery); Article 16 (the right to marry and to found a family); Article 18 (freedom of thought, conscience and religion); Article 19 (freedom of opinion and expression); Article 20 (freedom of peaceful assembly and association); and Article 26 (right to education, which 'shall be directed to the full development of the human personality').

[125] See the rights to political participation (Article 21); to work (Article 23); to rest and leisure, including periodic holidays with pay (Article 24); and to participate in the cultural life of the state (Article 27).

[126] See the right to an adequate standard of living, including food, clothing, housing and medical care, and the right to social security in the event of circumstances beyond the individuals control (Article 25(1)).

[127] Quoted Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) at 58.

4.4.2. Performativity: The Practice of Human Rights

The second element in the standard model of social ontology is performativity. It was not enough for States to say there were human rights, they had to act as if there were human rights. We see this first with the targeting of apartheid South Africa. The issue of systematic racial discrimination in South Africa came to the General Assembly in its inaugural session in 1946. To the shock of the South African government, the United Nations decided the matter fell within its jurisdiction and asserted that the treatment of the minority population, 'should be in conformity with… the relevant provisions of the Charter'.[128] The General Assembly continued to adopt resolutions on the subject of apartheid and, in 1953, expressed its regret that South Africa had failed to engage with diplomatic efforts and instead had proceeded 'with further legislation contrary to the Charter and the Universal Declaration of Human Rights'.[129] Here, the General Assembly was not making a legal judgment, but a moral one, because universal human rights *law* norms did not emerge until the late 1960s, when the prohibition on systematic racial discrimination crystalized as a customary rule.[130]

By accepting and recognizing human rights, States accepted and recognized they ought to comply with the demands of human rights (in the same way that those who play chess accept and recognize they ought to play by the rules of the game). Non-compliance with human rights is wrong – according to the social institution of human rights. Because the demands of human rights are framed in terms of the demands of morality, violating human rights allows for justified moral critique, often in the form of 'naming and shaming'.[131] We see this, for example, with the Human Rights Council's process of Universal Periodic Review,[132] which examines the human rights performances of States against the standards in the Universal Declaration of

[128] UNGA Res 44(I) (8 Dec 1946) at para 2.
[129] UNGA Res 719(VIII) (11 Nov 1953) at para 5
[130] See, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16, at para 131.
[131] See, on this point, Risse and Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices,' in Risse et al., *The Power of Human Rights: International Norms and Domestic Change* (1999) 1, at 26–27.
[132] Human Rights Council, UNGA Res 60/251 (15 March 2006) at para 2.

Human Rights.[133] The process of Review has been described variously as a secular trial,[134] a truth-telling mechanism,[135] and a public audit ritual, in which the State under review gives an account of its performance.[136] None of this implies judgment in light of legal commitments – this is the job of the UN human rights treaty bodies. The function of the Universal Periodic Review is to evaluate the performance of States against the moral code of human rights contained in the Universal Declaration of Human Rights.

4.4.3. Collective Acceptance: 'We' beliefs & practices on human rights

The final element in the standard model of social ontology is collective acceptance, making clear that social facts are the result of We-beliefs and practices. One consequence is that social institutions can only regulate the lives of those subjects who collectively accept and recognize the social institution in question. In the case of human rights, this might suggest that the relevant We-beliefs and practices must be those of the 8 billion people on the planet;[137] But not everyone believes in human rights;[138] So, how do we explain the existence of universal human rights?

The social institution of human rights was created when States said, "Let there be human rights!" Specifically, human rights were created when *those speaking for States* said, "Let there be human rights!" Human rights is just another example of a social institution created by the We-beliefs and practices of those speaking for States.[139] Others include the social institutions of international law and the United Nations. By, for example, saying, "Let there be the United

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[133] Human Rights Council, 'Institution-building of the United Nations Human Rights Council', Res 5/1 (18 June 2007) at para 1.
[134] Kälin, 'Ritual and Ritualism at the Universal Periodic Review: A Preliminary Appraisal,' in Charlesworth and Larking (eds), *Human Rights and the Universal Periodic Review* (2015) 25, at 26.
[135] Billaud, 'Keepers of the Truth: Producing 'Transparent' documents for the Universal Periodic Review' in Charlesworth and Larking (eds), *Human Rights and the Universal Periodic Review* (2015) 63, at 73.
[136] Cowan, 'The Universal Periodic Review as a Public Audit Ritual,' in Charlesworth and Larking (eds), ibid. 42, at 45.
[137] See, on this point, Fotion, 'Searle on Human Rights' (2011) 71 *Analysis* 697, 701.
[138] Reporting on the use of human rights language around the world, Michael Ignatieff explains that 'Abstractions like human rights were frequently employed by jurists, professors, and politicians, but featured little, if ever, in the language of their poorer fellow citizens': Ignatieff, 'Human Rights, Global Ethics, and the Ordinary Virtues' (2017) 31 *Ethics & International Affairs* 3, at 7.
[139] See, generally, on this point, Tuomela, *The Philosophy of Sociality: The Shared Point of View* (2007) at 129.

Nations!",[140] and then acting as if the UN existed, States created the objective social fact of the United Nations Organization. The International Court of Justice explained the point this way: The original members of the Organization had the power 'to bring into being an entity possessing *objective* international personality, and not merely personality recognized by them alone'.[141] The same point applies to human rights: By saying, "Let there be human rights!", States created human rights. The existence of human rights is, then, no more mysterious than the existence of the United Nations – and no one says belief in the United Nations Organization is a foolish thing.

4. 5. Back to the interpretation of a Convention on 'human rights'

The Vienna Convention directs the ECtHR to interpret the ECHR in light of its object and purpose, as a Convention for the 'collective enforcement of certain of the rights stated in the Universal Declaration [on Human Rights]' (ECHR, preamble). In *Selmouni v. France*, and other cases, the ECtHR changed its position on the interpretation of the Convention in light of the increasingly high standard being required in the area of the protection of human rights. There are two implications of this: (1) to interpret the ECHR, we need to understand what is meant when we speak about 'human rights'; (2) that understanding must be capable of changing over time, otherwise we must conclude that the Court is wrong to change its interpretive position in light of the increasingly high standard being required by human rights.

This article has shown that we can think of 'human rights' as a social institution, emerging from the We-beliefs and practices of States on human rights, with the meaning of 'human rights' explained in the Universal Declaration of Human Rights, with its five underlying moral principles of equal status; physical and psychological integrity; personhood; participation in the life of the community; and minimum welfare. This social institution has evolved with changing We-beliefs and practices on human rights – albeit limited by its five underlying moral values (otherwise the relevant belief or practice is not a belief or practice related to 'human rights' – in the same way that creating interesting patterns with chess pieces on the board is not a practice related to the game of chess). Understood this way, the European Court of Human

[140] The opening words of the UN Charter read as follows: 'We the Peoples of the United Nations… do hereby establish an international organization to be known as the United Nations.'
[141] *Reparation for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174, at 185 (emphasis added).

Rights' doctrine on the increasingly high standard being required in the area of the protection of human rights becomes defensible provided two conditions are met: (1) The judgment must follow evolving We-beliefs and practices on 'human rights'; and (2) The judgment must be consistent with the foundational moral principles that underpin the very idea of 'human rights.'

4.5.1. ECtHR case-law on the increasingly high standard doctrine

The European Court of Human Rights first invoked the increasingly high standard doctrine in the context of Article 3 (prohibition on torture).[142] In 1978, the Court had decided the 'five techniques' used in Northern Ireland (i.e., wall-standing, hooding, subjection to noise, sleep deprivation, and food deprivation) 'did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.'[143] Subsequently, the UN Human Rights Committee explained that, in the context of human rights, 'the scope of protection required goes far beyond torture as normally understood',[144] including acts that cause mental suffering,[145] in order to protect 'the physical and mental integrity of the individual.'[146] In 1999, the ECtHR returned to the categorization of torture in *Selmouni v. France*, concluding that, having regard to the fact the ECHR is a living instrument, 'certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future.' The change is justified by reference to 'the increasingly high standard being required in the area of the protection of human rights'.[147] In these circumstances, the

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[142] Article 3, ECHR. ('No one shall be subjected to torture or to inhuman or degrading treatment or punishment.')

[143] *Ireland v United Kingdom*, Application No 5310/71, Merits and Just Satisfaction, 18 January 1978, at para 167. The *OED* defines torture as the infliction of severe bodily pain, as punishment or a means of persuasion: "torture, n." OED Online, Oxford University Press, March 2023.

[144] Human Rights Committee, General comment No. 7 on Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment), adopted Sixteenth session (1982) at para 2.

[145] General comment No. 20 on Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), adopted Forty-fourth session (1992) at para 5. See, also, Article 1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85. ('For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person'.)

[146] General comment No. 20, ibid. at para 2

[147] *Selmouni v France* Application No 25803/94, Merits and Just Satisfaction, 28 July 1999, at para 101. The increasingly high standard doctrine is well established in the case-law on Article 3. See, *Dikme v Turkey* Application No 20869/92, Merits and Just Satisfaction, 11 July 2000; *Mouisel v France* Application No 67263/01, Merits and Just Satisfaction, 14 November 2002; *Elçi and Others v Turkey* Application Nos 23145/93 and 25091/94, Merits and Just Satisfaction, 13 November 2003; *Henaf v France* Application No 65436/01, Merits, 27 November 2003, 2003-XI; *Öcalan v Turkey* Application No 46221/99, Merits and Just Satisfaction, 12 May 2005; *Mubilanzila Mayeka and Kaniki Mitunga v*

Court concluded that the applicant being repeatedly punched and kicked, dragged by his hair, urinated over, and threatened with violence constituted torture for the purposes of Article 3.[148] Here, the ECtHR's application of its increasingly high standard doctrine meets both required criteria: (1) The judgment is consistent with evolving We-beliefs and practices on the meaning of torture; (2) It promotes the foundational human rights moral value of protecting the physical and psychological integrity of the individual.

In *Siliadin v. France*, the ECtHR invoked the increasingly high standard doctrine in the context of Article 4, ECHR ('No one shall be held in slavery or servitude').[149] The applicant had arrived in France from Togo, aged 15, with the promise of work, that her immigration status would be regularised, and that she would be sent to school. She was then 'lent' to Mr and Mrs B, for whom she worked, unpaid, for 15 hours per day, every day, only leaving the house to take their children to school. In these circumstances, the Court concluded she had been held in servitude, within the meaning of Article 4.[150] Issues around contemporary forms of slavery and the related problem of domestic servitude (especially for undocumented migrants) have become a major subject of concern for human rights bodies.[151] In this case, the ECtHR concluded that the lack of specific laws on domestic slavery constituted a further violation of the ECHR, noting that children are entitled to State protection in the form of effective deterrence against 'serious breaches of their personal integrity'.[152] In reaching this decision, the Court invoked 'the

Belgium Application No 13178/03, Merits and Just Satisfaction, 12 October 2006; *Riad and Idiab v Belgium* Application Nos 29787/03 and 29810/03, Merits and Just Satisfaction, 24 January 2008; *Beganović v Croatia* Application No 46423/06, Merits and Just Satisfaction, 25 June 2009; *Al-Saadoon and Mufdhi v United Kingdom* Application No 61498/08, Merits and Just Satisfaction, 2 March 2010; *Davydov and Others v Ukraine* Application Nos 17674/02 and 39081/02, Merits and Just Satisfaction, 1 July 2010; *Nechiporuk and Yonkalo v Ukraine* Application No 42310/04, Merits and Just Satisfaction, 21 April 2011; *Shishkin v Russia* Application No 18280/04, Merits and Just Satisfaction, 07 July 2011; *Korobov v Ukraine* Application No 39598/03, Merits and Just Satisfaction, 21 July 2011; *Teslenko v Ukraine* Application No 55528/08, Merits and Just Satisfaction, 20 December 2011; *Kulish v Ukraine* Application No 35093/07, Merits and Just Satisfaction, 21 June 2012; and *Belousov v Ukraine* Application No 4494/07, Merits and Just Satisfaction, 07 November 2013.

[148] *Selmouni v France*, ibid. at para 105.

[149] *Siliadin v France* Application No 73316/01, Merits and Just Satisfaction, 26 July 2005, at paras 121 and 148.

[150] Ibid. at para 129.

[151] See, for example, the Mandate of the UN Special rapporteur on contemporary forms of slavery. Available: www.ohchr.org/en/special-procedures/sr-slavery [last accessed 31 May 2023].

[152] *Siliadin v France*, supra note 149, at para 143. See, further, *C.N. v United Kingdom* Application No 4239/08, Merits and Just Satisfaction, 13 November 2012, at para 75; Also, *C.N. and V. v France* Application No 67724/09, Merits and Just Satisfaction, 11 October 2012, at para 106.

increasingly high standard being required in the area of the protection of human rights'.[153] Again, this is perfectly justifiable: (1) The judgment is consistent with evolving We-beliefs and practices on the need to protect individuals from exploitation through labour; (2) It promotes the foundational moral human rights values of physical and psychological integrity, and personhood.

The ECtHR has also invoked the increasingly high standard doctrine in the context of Article 8, ECHR (right to respect for private life).[154] In *R.B. v Hungary*, the applicant complained of a lack of State protection from racist verbal abuse directed at her during a series of anti-Roma rallies. The Court accepted that hate speech necessarily implicated the applicant's private life, because of its impact on the feelings of self-worth and self-confidence of members of the relevant minority ethnic group. The failure of the State to put in place effective measures to protect the applicant from harassment motivated by racism, including verbal assaults and physical threats, resulted in the finding of a violation of the Convention.[155] The judgment is noteworthy: The ordinary meaning of the words in the ECHR do not suggest this interpretation; nor did the human rights practices of the Contracting Parties; or the relevant rules of international law. Instead, the ECtHR referred to the increasingly high standard being required in the area of the protection of human rights to reach its decision.[156] Again, the judgment is defensible: (1) It is consistent with the evolving positions of UN human rights bodies on the need to protect individuals from racist hate speech;[157] and (2) The judgment promotes the foundational human rights moral values of psychological integrity and personhood.

There are, though, cases where the European Court of Human Rights has mistakenly and wrongly referred to the increasingly high standard doctrine.

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[153] *Siliadin v France*, ibid. at para 148.
[154] Article 8(1), European Convention on Human Rights. ('Everyone has the right to respect for his private and family life, his home and his correspondence.')
[155] *R.B. v Hungary* Application No 64602/12, Merits and Just Satisfaction, 12 April 2016, at para 91.
[156] Ibid. at para 84. See, also, *Sandra Janković v Croatia* Application No 38478/05, Merits and Just Satisfaction, 5 March 2009, at para 47; and *A. v Croatia* Application No 55164/08, Merits and Just Satisfaction, 14 October 2010, at para 67.
[157] See, for example, *World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Durban*, 2001, UN Doc. A/CONF.189/ 12. See, also, United Nations Strategy and Plan of Action on Hate Speech (May, 2019). Available: www.un.org/en/genocideprevention/hate-speech-strategy.shtml [last accessed 28 February 2023]; and Committee on the Elimination of Racial Discrimination, General recommendation No. 35, on 'Combating racist hate speech,' UN Doc. CERD/C/GC/35, 26 September 2013, at para 8.

In cases involving Article 11 (freedom of association),[158] the ECtHR seems to confuse the increasingly high standard doctrine with the evolution of its jurisprudence more generally. In *Demir and Baykara v. Turkey*, for example, following a review of its own case-law, the Court identified 3 essential elements of the right of association (the rights to form and join a trade union; the prohibition of closed-shops; and the right for a trade union to seek to persuade the employer to hear what it has to say),[159] before going on to say:

> 'This list is not finite. On the contrary, it is subject to evolution depending on particular developments in labour relations. In this connection, it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights'.[160]

As we have seen, the ECtHR refers to the living instrument doctrine to explain any change in its approach to interpretation.[161] This is perfectly consistent with the Vienna Convention rules on treaty interpretation and occurs in response to a change in the human rights practices within the Contracting Parties; a change in the relevant rules of international law; a change in the ordinary meaning of a Convention term (the doctrine of evolutive interpretation); and in light of the increasingly high standard being required in the area of the protection of human rights (doctrine of evolutive interpretation applied to the object and purpose of the ECHR, as a Convention for the protection of 'human rights'). The ECtHR only needs to invoke the increasingly high standard doctrine when the change in its approach to interpretation does not reflect domestic human rights practices or evolving international law rules. In *Demir and Baykara v. Turkey*, the ECtHR appears to have confused the evolution of its own case law – in light of changing domestic practices and international law rules – with the increasingly high

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[158] Article 11(1), ECHR. ('Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.')
[159] *Demir and Baykara v Turkey* Application No 34503/97, Merits and Just Satisfaction, 12 November 2008, at para 145.
[160] Ibid. at para 146. The ECtHR makes the same point in *Norwegian Confederation of Trade Unions (LO) and Norwegian Transport Workers' Union (NTF) v Norway Application No* 45487/17, Merits and Just Satisfaction, 10 June 2021, at para 96.
[161] See, supra, section 2.

standard doctrine, which allows the ECtHR to move ahead of settled practices and agreed rules in line with emerging (but not settled) beliefs and practices on 'human rights.'

More problematically, in *Mangouras v. Spain*, the Grand Chamber of the European Court of Human Rights wrongly invoked the increasingly high standard doctrine to *reduce* the protection afforded to an individual under the Convention. In that case, the applicant was Master of a tanker responsible for an oil spill that caused massive environmental and ecological damage to the Spanish coast. He was arrested and remanded in custody for 83 days, only being released following the lodging of a 3 million euros guarantee. Article 5 (3), ECHR provides that 'Everyone arrested or detained … shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.' Reflecting on whether the level of guarantee was justified, the ECtHR made the point that it could not overlook the growing and legitimate international concern around environmental offences. These 'new realities' had to be taken into account when interpreting Article 5(3), with the Court, at this point, making reference to 'the increasingly high standard being required in the area of the protection of human rights'.[162] The ECtHR then concluded that, in view of the 'disastrous environmental… consequences of the oil spill,' the requirement for a 3m euros guarantee was justified,[163] and there was no violation of the Convention.[164] The issue is not whether the ECtHR was wrong to recognize the State's legitimate interests in environmental protection, or to conclude that the 3m euros guarantee was justified; the point is that the Court wrongly invoked the increasingly high standard doctrine to reduce the protection afforded by human rights: (1) The judgment does not reference evolving We-beliefs and practices on 'human rights'; (2) It does not promote one of the foundational moral values in the Universal Declaration of Human Rights (in fact the opposite). *Mangouras v. Spain* cannot, then, be regarded as a defensible invocation of the increasingly high standard doctrine by the ECtHR.

5. CONCLUSION

[162] *Mangouras v Spain* Application No 12050/04, Merits and Just Satisfaction, 28 September 2010, at para 87.
[163] Ibid. at para 92.
[164] Ibid. at para 93.

This article has shown the importance of human rights theory to the interpretation of the European Convention on Human Rights. Whilst the rules in the Vienna Convention on the Law of Treaties provide the starting point the interpretation, scholars and practitioners working with the ECHR cannot escape the fact that this is a Convention for the protection of 'human rights,' with the necessary consequence that they must (if only implicitly) take a position on the meaning of the term, 'human rights': Is human rights a modern idiom for natural rights; Is it defined (in a rather circular fashion) by the practice of human rights; Or, as argued here, should we think of human rights as a type of social institution, emerging from the We-beliefs and practices of States?

The specific objective here was to make sense of those cases where the European Court of Human Rights changes its position on interpretation in light of the increasingly high standard being required in the area of the protection of human rights. We see this first in *Selmouni v. France*, where the Court changed its position on the meaning of 'torture.' The increasingly high standard doctrine is now well established in the case-law on Articles 3, 4, and 8. The cases are noteworthy because the ECtHR does not look to the standard methodologies that explain a change in treaty interpretation (i.e., that the practices of the States parties have developed, relevant rules of international law have evolved, or the ordinary meaning of a treaty term has changed). Instead, the ECtHR looks to apply the doctrine of evolutive interpretation to the object and purpose of the ECHR, as a Convention for the protection of 'human rights.'

To make sense of those cases where the ECtHR changes its interpretive position in light of the increasing demands of 'human rights,' we need to be clear what we mean when we talk about human rights and be clear whether this notion of human rights can change over time. Neither issue can be resolved by consulting to the Court's jurisprudence. The meaning of 'human rights' can only be explained by reference to the theoretical work that looks to explain the term's meaning. The problem, for our purposes, is that neither of the dominant approaches in the literature can satisfactorily explain those cases where the ECtHR changes its position on interpretation in light of the increasing demands of human rights. Naturalistic scholars can explain the moral demands of human rights, but do not accept the possibility of change; Political scholars, by way of contrast, accept the possibility of change, but cannot explain why human rights practice creates moral obligations, or clarify whether deleterious practice reduces the moral demands of human rights.

This article looked to resolve these issues by reference to the insights from social ontology, explaining that we can think of human rights as a social institution which emerged from the We-beliefs and practices of States, framing its regulative rules (e.g., 'Do not torture') in terms of the demands of morality (explaining why torture is objectively, morally wrong – according to human rights). Human rights emerged when States said, "Let there be human rights!" The ongoing collective acceptance of human rights is manifested through the human rights practices of States and non-State actors. Whilst this understanding from social ontology shares some similarities with the political (practice-dependent) accounts, it differs in two important respects: First, social ontology can explain why the rules of social institutions create reasons for action, explaining that, if you recognize and accept a social institution, you ought to comply with the rules of that institution; Second, not everything framed as a human rights practice counts as a human rights practice. Human rights practices must demonstrate a fidelity to the five underlying moral principles that underpin the notion of human rights, first explained in the Universal Declaration (i.e., equal status; physical and psychological integrity; personhood; participation in the life of the community; and minimum welfare). There can be different human rights practices within different human rights institutions, but they must remain faithful to these five moral principles – otherwise, they are not, by definition, social practices of the type, 'human rights.'

The job of the European Court of Human Rights is to interpret the ECHR in light of its object and purpose, as a Convention for the protection of 'human rights.' In doing this, the Court cannot but be influenced by changes in We-beliefs and practices on human rights in other human rights institutions. These changes in We-beliefs and practices change our understanding of the demands of 'human rights,' but these changes must be consistent with the five moral principles that define social institutions which can be categorized as 'human rights' institutions. The logical and necessary consequence must be that the ECtHR is only justified in relying on the increasingly high standard doctrine to enhance the protection afforded by the ECHR when it looks to evolving We-beliefs and practices on human rights to understand the demands of human rights, and its judgment promotes one of the five moral principles that underpin the very notion of human rights.

The ECtHR is, then, justified in invoking the increasingly high standard doctrine when two conditions are met: (1) The judgment is consistent with evolving We-beliefs and practices on human rights; and (2) The judgment promotes at least one of the five foundational moral

principles that explain the notion of 'human rights.' Looking at the case-law, the ECtHR' invocation of the doctrine in cases involving Article 3 (meaning of torture), Article 4 (prohibition on servitude), and Article 8 (prohibition on racially motivated verbal violence) are defensible because they reflect our evolving understandings of the demands of human rights and promote foundational human rights moral principles. The invocation of the doctrine in relation to Article 11 was a mistake, as the Court was simply reflecting on the fact its jurisprudence had evolved over time. The invocation of the increasingly high standard doctrine in *Mangouras v. Spain* was wrong and problematic, because the judgment did not reference evolving We-beliefs and practices on human rights, nor did it promote any of the five moral values underpinning the very notion of 'human rights.'