The Logic of Liberal Rights

A study in the formal analysis
of legal discourse

Eric Heinze

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The Logic of Liberal Rights

Rights are becoming more complicated every day. A unified theory seems unimaginable. Yet that is what this book proposes.

The Logic of Liberal Rights uses basic logic to develop a model of argument presupposed in all disputes about civil rights and liberties. No prior training in logic is required, as each step is explained. This analysis does not merely apply general logic to legal arguments. It is specifically tailored to the issues of civil rights and liberties. It shows that all arguments about civil rights and liberties presuppose one fixed structure. There can be no original argument in rights disputes, except within the confines of that structure. Concepts arising in disputes about rights, like 'liberal' or 'democratic', are not mere abstractions. They have a fixed and precise character.

This book integrates themes in legal theory, political science and moral philosophy, as well as the philosophy of logic and language. For the advanced scholar, it provides a model presupposed by leading theoretical schools (liberal and critical, positivist and naturalist). For the student, it provides a systematic theory of civil rights and liberties. Examples are drawn from the European Convention on Human Rights but no special knowledge of the Convention is assumed, as the issues analysed arise throughout the world. Such issues include problems of free speech, religious freedom, privacy, torture, unlawful detention and private property.

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Contents

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Cases and sources

Cases brought under the European Convention on Human Rights

Cases from other jurisdictions

Sources

AC	Appeal Cases (United Kingdom)
AJDA	*Actualité juridique, droit administrative*
All ER	*All England Reports*
BverfGE	*Entscheidungen des Bundesverfassungsgerichts*
CE	Conseil d'État (France)
Dalloz	*Recueil Dalloz*
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
Eur. Comm'n H.R. Dec. and Rep.	*Decisions and Reports of the European Commission of Human Rights*
Eur. Ct H.R. (ser. A)	*Publications of the European Court of Human Rights, Series A*
GG	Grundgesetz (Germany)
GW	Grondwet (Netherlands)
HR	Hoge Raad (Netherlands)
ICCPR	International Covenant on Civil and Political Rights
NJ	*Nederlandse Jurisprudentie*
UDHR	Universal Declaration of Human Rights
US	*United States Reports*

Because it is logically incoherent . . .
rights discourse is a trap.
Duncan Kennedy

Introduction

In 1987, several men were arrested in Britain for engaging in acts of sadomasochism. The acts included application of hooks and needles to the genitalia, hot-iron branding and beatings with implements such as nettles and spiked belts. Although the acts resulted in flow of blood and scarring, there was no evidence of serious injuries. Several of the participants were convicted on charges of criminal misconduct.[1] Three of them then brought a complaint against the conviction under the European Convention of Human Rights. In the case of *Laskey, Jaggard and Brown v. United Kingdom*,[2] the European Court of Human Rights found that their right to privacy had not been violated.

How would a roomful of legal scholars analyse that case? A libertarian might argue that freely consenting adults ought to be able to do with their bodies whatever they please. A Christian conservative might argue that homosexual acts of any kind violate God's law. A black-letter lawyer might distinguish sexual sadomasochism from lawful sexual activity not involving violence, or from lawful violent activity not involving sex. An exponent of critical legal studies might argue that the very process of inscribing the controversy within an individual-versus-the-state idiom alienates from law the very persons whose interests the law should embrace. A feminist might argue that even exclusively male participants perpetuate a culture of brutality which reinforces violence against women. A critical race theorist might argue that sadomasochism recapitulates questionable practices of domination and servitude. A postmodernist might argue that, far from promoting a culture of oppression, sexual sadomasochism parodies and subverts it. A practitioner of law and economics might argue that the question of the acts' legality should be decided on the basis of the total cost incurred by society when such acts are illegal, discounted by the costs incurred when they are legal.

What might these scholars agree on? Of course, it is possible that there is no genuine discussion taking place at all – that they are just talking past each other. But let's assume they are not. Let's assume that all participants believe the remarks of all other participants to be pertinent. In that case, the possibility of meaningful disagreement among them already

presupposes some agreement about the terms of their disagreement. The participants must already, if only tacitly, have agreed on something, before any coherent disagreement can take place. Consider some analogies. The claim 'The earth revolves around the sun' can be pitted against the claim 'The sun revolves around the earth' only if there is already prior agreement on the possibility of one celestial body travelling around another. The claim 'Hamlet ought to have killed Claudius' can be meaningfully pitted against the claim 'Hamlet ought not to have killed Claudius' only on the prior assumption that the conduct of this fictional character can be evaluated in ethical terms.

For *Laskey*, or any other case, we could postulate P_1, P_2, P_3, . . . P_n, as the set of prior propositions without which no coherent disagreement about the case can take place. What elements would that set contain? One might think that it must include some purely factual information: the acts committed, the arrests, the trial, the convictions, the sentencing, the appeals. Yet our question is not 'What would this roomful of scholars agree about?' Rather, we are asking 'What must they agree that they *dis*agree about?' Assuming agreement on the facts, what is their normative disagreement?

We might say that their disagreement is about 'interpretation'. The libertarian interprets the case in secular terms; the Christian conservative interprets it in theological terms; the black-letter lawyer interprets it in doctrinal terms, and so on. We could then postulate the propositions P_1, P_2, P_3, . . . P_n as a body of *Urtheorie* – of 'anterior' or 'background' or 'pre-interpretative' theory – which must be assumed in order for any coherent disagreement to emerge. Our search is not for ethically defensible or rhetorically persuasive concepts, but for those concepts which make arguments recognisable as arguments about liberal rights – concepts without which liberal rights discourse[3] would be unthinkable.

Assuming the existence of background concepts P_1, P_2, P_3, . . . P_n, we would want to know how many there are. By the end of the book, we will arrive at the answer $n = 6$. But why is rights discourse closed in that way, and how closed is it? What does that closure mean about what can and cannot be said? Do lawyers, judges or legal scholars forever delude themselves into thinking that they are inventing new arguments, when in fact they are just reproducing different versions of P_1, P_2 . . . P_6? Do they *only* recapitulate those background concepts, or do they also go further? What does it mean to 'go further'? In what sense have the background concepts already decided how much further an argument can go? How determinate are the background concepts?

The early years of the European Convention found the Court with a docket barely thick enough to provide a few weeks' work. Its case law through the mid-1960s amounted to a meagre bundle of intellectually vacuous reports. Decisions were delivered with the slightest *ratio decidendi*, and rarely with significant concurring or dissenting opinions. Yet, by the 1990s, the Court

was regularly issuing long, complex judgments. Individual judges were writing separate opinions, often staging lively disagreements. That development has been part of a broader historical pattern. Since the 1970s, civil as well as common law countries, such as Britain, Germany, France and the Netherlands, have witnessed the same growth of judicial activity in civil rights and liberties. That expansion in the quantity and complexity of decisions has not delivered a progressive refinement of the case law; it remains as difficult as ever to identify principles linking past decisions or providing guidance for future ones. The leading treatises[4] reveal not a code of lucid principles, but a maze of tenuous results. Adding the great variety of claims which are now brought, one might conclude that no organising principles could ever be found. Yet the background theories will show that such a conclusion is not entirely accurate. We will see that even contradictory results continue to presuppose a fixed, determinate, formal coherence. Most importantly, we will see that the model represents a common structure presupposed by disagreements not only between litigants, or across cases, but also across theoretical schools: liberal and critical, positivist and naturalist. We will find a common structure presupposed by approaches as different as Kelsenian positivism and critical legal studies.

Law and logic

The aim of this book will be to develop a method of formal-logical analysis as a means of identifying the background concepts. As such techniques will be unfamiliar to some scholars, the method assumes no prior familiarity with logic or the philosophy of language.

Western logic derives largely from Aristotle, and from scholastic philosophy of the Middle Ages. In the nineteenth and twentieth centuries, philosophers and mathematicians such as Frege, Russell, Carnap and Tarski revised classical approaches, augmenting the power of logical analysis through symbolic notation forms. Yet lawyers and legal scholars are often ambivalent about logic. Certainly, no one doubts the logical character of an ordinary, law-applied-to-fact deduction, for example:

(1) If Croft has omitted to pay her employee at or above the minimum wage, she is subject to a fine of €10,000.
(2) Croft has omitted to pay her employee at or above the minimum wage.
∴ Croft is subject to a fine of €10,000.

But many have doubted whether logic can illuminate the subtler or more ambiguous elements of law. In the early nineteenth century, during the German codification debates, Savigny frowned on the ideal of deducing law from a system of abstract norms.[5] Oliver Wendell Holmes ushered in

American legal realism, proclaiming that 'the life of the law has not been logic: it has been experience'.[6] By 1935, the philosopher Alfred Ayer would trumpet to a broader readership that the truths of logic are 'a mere body of tautologies',[7] 'entirely devoid of factual content'.[8] Jurists could hardly be blamed for concluding that a heap of tautologies must be of little use to law.

Of course, Ayer never meant to be dismissive. While conceding that principles of logic cannot fulfil our search for knowledge about the world, he maintained that they do 'guide us' in that search:[9]

> A being whose intellect was infinitely powerful would take no interest in logic and mathematics. For he would be able to see at a glance everything that his definitions implied, and, accordingly, could never learn anything from logical inference which he was not fully conscious of already. But our intellects are not of this order. It is only a minute proportion of the consequences of our definitions that we are able to detect at a glance. Even so simple a tautology as '91 × 79 = 7189' is beyond the scope of our immediate apprehension.[10]

Similarly, a complex legal corpus does not reveal its conceptual scheme at a glance. That is where formal analysis can help. Today, the subtlety of symbolic techniques allows a degree of precision that was unknown in Savigny's or Holmes's day.

It was once thought that the goal of logic in legal theory would be the elaboration of a distinct legal logic – a model that would distinguish legal reasoning from, say, moral, political, sociological, or other kinds of reasoning.[11] That ambition mirrored the aim of traditional legal positivists to describe law as a distinct and autonomous system. Yet the recent tendency to renounce 'totalising' approaches to law[12] is reflected in the general agreement that no clear line can be drawn around any distinct sphere of legal reasoning.[13] Consider again the syllogism about Croft. Although the subject matter is ostensibly legal, that general form of reasoning is not specific to law. Even Kelsen, whose work exemplifies the search for characteristics unique to law, agreed that there is no distinct legal logic, but only general logical forms applied to law.[14]

If logic is unable to elicit a distinct form of legal reasoning, can it nevertheless illuminate the theory or practice of law? Three principal approaches have emerged. The first and oldest draws upon *traditional logic*: legal argument is analysed with reference to syllogistic structures familiar from classical logic, like the foregoing syllogism. Once maligned as 'mechanical',[15] the versatility of that approach has again drawn attention in studies such as those by Soeteman,[16] Rhodes and Pospesel,[17] and Meier.[18] The second approach involves *deontic logic.* Deontic logic sets forth fundamental relationships among concepts of obligation, permission and prohibition.[19] It has been developed in its most useful form only in recent decades, notably by von Wright.[20] The third approach, and the most influential in

Anglo-American scholarship, is *Hohfeldian analysis*.[21] Hohfeld found that the one word 'right' was being used in ways so divergent as to produce errors in legal reasoning. He sought to ascertain precise distinctions among such concepts as 'claim' (now commonly called 'claim-right'), 'privilege' (now commonly called 'liberty'), 'power' and 'immunity'. Subsequent scholars have refined Hohfeld's system to the point of making it a cornerstone of analytic jurisprudence.[22] These three approaches are not mutually exclusive. Some scholars have wedded deontic and Hohfeldian approaches[23]; and the traditional approach commonly hovers in the background of deontic and Hohfeldian analyses.[24]

This book proposes a fourth method, and can perhaps be understood by situating it with respect to the others. In view of our focus on rights, Hohfeld might at first seem to be of particular importance. Yet Hohfeld does not provide the only formal analysis of rights discourse. (No knowledge of Hohfeld is assumed in this book. The following remarks are intended only for those who might be wondering how the model will resemble or depart from Hohfeld.) In order to focus on certain distinct elements of rights discourse, Hohfeld must bracket out other ones. Following Hohfeld, the men in *Laskey* might have argued that a given man X possessed the 'power' to create a 'liberty' in another man Y for Y to hit X, which in turn endowed both X and Y with an 'immunity' from state intervention. The state might then have responded that X never had any such original power, and thus failed to create any subsequent liberty in X, or immunity in X and Y against the state. On that reading, the dispute turns on *whether* that original power exists in X, and not on how that power is distinct from a right, liberty or immunity.

Hohfeld asks: What is a right? What is a liberty? What is a duty? He responds by inter-defining, and ascertaining the links among, those and related terms. In this study, the question will be: What is a 'liberal right'? What does it mean for a norm to count as a right within a 'liberal regime'? We will seek a systematic, formal account of those concepts, principally through a formal account of the elements of harm and consent. The questions posed about our roomful of scholars can, then, be stated in more general terms: What concepts must be present for them to be discussing *Laskey* as a dispute about 'liberal' rights? Of course, those issues have preoccupied liberal theorists from Locke and Kant to Rawls and Nozik. In two ways, however, this study will differ from theirs. First, those theorists seek a 'macro' account of liberal government and society. By contrast, this study undertakes a 'micro' analysis. It identifies only concepts of 'liberalism', 'paternalism' and 'democracy' generated within a designated legal corpus, and which liberal rights discourse presupposes. Second, this study only examines those theories. It does not advocate or challenge them. It is descriptive, not prescriptive.

It is easy to believe that courts are forever confronted with new disputes, which raise unforeseen issues and require original arguments. It is easy to

believe that law is always changing, and legal argument always changing with it, such that creativity on the part of lawyers, judges or scholars can provide illuminating insights. Yet those impressions are only partly accurate. In this study, it will be suggested that arguments about liberal rights, however novel or unusual they may appear, are constrained within the fixed set of background concepts. Those concepts can be stated in definitive terms. We cannot alter them without destroying the very conditions for a jurisprudence of liberal rights.

This book is introductory, but does not provide a general introduction to the field of law and logic. Its purpose is to answer the question initially posed: What body of *Urtheorie* can we discover in liberal rights discourse? It does not ask whether the background concepts are good or bad. It asks only what they are. It is not a 'logic of the better result': it does not propose a model of how controversies should be decided. Indeed, we will see that bad decisions, in so far as they remain within the formally liberal bounds of the background theories, are identical in structure to good ones.[25]

In view of that aim, one might question whether the analysis undertaken in this study is really logic at all, particularly if we understand logic to consist in the analysis of the validity of inferences drawn from premises to conclusions. This study will be concerned with the translation of arguments about rights into precise symbolic language, with the relationships between components of that language, and with the way those arguments then serve as premises to conclusions about whether an asserted right has been violated. It will not, however, require any elaborate calculus for validity testing, for the simple reason that that would not be the most interesting feature of the model. This book could be understood as a preliminary formalisation, which would then pave the way for further refinement, with a view towards a detailed calculus for validity testing. In my view, however, it is those preliminary structures which are the most important. Once the background theories have been ascertained, the ways in which they are then used by jurists or scholars to reason from premises to conclusions will ordinarily be clear through common intuition, without the need for a formal calculus.[26] Although a 'mini-calculus' will be developed, it will serve the limited goal of ascertaining relationships among elements of the model, and will not provide a full-blown technique for validity testing.

If that preliminary function accurately describes this book, then it might be argued that this study is more an exercise in semantics than in logic. I do not entirely disagree. Yet a study of *The Semantics of Liberal Rights* would raise broader questions of rhetoric, hermeneutics or speech pragmatics. The model proposed in this book is limited to the identification of formal concepts presupposed by arguments adduced, in any given case, in favour of, or in opposition to, an assertion that a liberal right should be recognised or applied. It is that relationship of presupposition which, in my view, justifies an understanding of the model as 'logical'.

Overview

By the time of the framing of the Universal Declaration of Human Rights in 1948, concepts of human rights had grown to include economic, social and cultural rights, such as rights to minimum levels of food, employment or education. Since that time, additional concepts of rights have gained ground, such as concepts of peoples' and minorities' rights.[27] This study will focus on individual civil rights and liberties, with particular attention to the case law of the European Convention. That restriction will be imposed for the practical reason that even that more limited corpus is enormous. Social, economic, cultural or group rights may indeed be amenable to formal analysis, but that project will have to wait for another day. Of course, it is now widely accepted that no clear distinctions can be drawn among these various sets of rights. Civil rights and liberties are widely construed to impose affirmative obligations on states.[28] We will consider the consequences.

The earlier and middle parts of the book are largely concerned with the translation of basic components of rights discourse into symbolic form. In the final chapters, the background theories are represented as combinations of those symbols. The results will not be surprising. The six background theories presented in the final chapters are formal concepts of liberalism, paternalism and democracy – concepts already familiar in rights theory. It is generally accepted that rights discourse 'implies' such concepts in a common-sense way. Our task will be to see how, and to what degree, they are implied as a logical matter. Throughout much of the book, readers unfamiliar with formal analysis may wonder why the search for background theories requires a symbolic language. In the final chapters it will become clear that the background theories could not be expressed with ease or precision in ordinary language.[29]

This study contains no analysis of discrimination law. Discrimination raises questions not about whether a right is enjoyed at all, but rather whether it should be enjoyed equally. As I have argued in *The Logic of Equality*,[30] that feature entails a formal structure which, while compatible with the one examined in this book, contains distinctive elements of its own. Also, there is no analysis of the jurisprudence of US constitutional law. That omission may come as a surprise, in view of this book's emphasis on judicial balancing. However, it is precisely because US constitutional law is so complex that it requires a study of its own.[31]

In Parts I to III, as the overall structure and constituents of the model are introduced, special attention is paid to a relatively small number of cases decided under the European Convention of Human Rights.[32] As many of the cases to be examined originated from the UK, the later chapters include a few examples from domestic French, German and Dutch law.[33] However, no familiarity with any of these jurisdictions will be required, as the issues analysed are already widely familiar, including freedom of

expression, freedom of religion, privacy, torture, unlawful detention and private property. This book's hypothesis will be that identical forms of argument are to be found in any corpus conventionally recognised as a system of civil rights and liberties, despite the fact that different corpuses may include different rights, or may offer variable degrees of actual protection. As already noted, our roomful of scholars could agree upon factual matters, such as the acts committed or the circumstances of the arrest. But that is not the level of anterior agreement we are seeking. An examination of appellate-level cases will allow us to assume matters of fact to be stipulated, so as to focus on normative disagreements.

A summary of the contents is as follows. Part I examines persons and entities who will be called the *agents* of rights discourse. Chapter 1 prepares the way by introducing some preliminary concepts, beginning with the familiar idea that rights must be balanced against restrictions. The contentious case – court A adjudicating complaint X brought by party *p* against party *q* – is adopted as an exemplar of that balancing process. In Chapter 2, an initial schema of agents is adopted to distinguish between the persons or entities who make arguments, who will be called *parties*, and the persons or entities about whom arguments are made, who will be called *actors*. In Chapters 3 and 4, we examine how the arguments of two kinds of parties – *the claimant*, who asserts a right, and *the respondent*, who seeks a restriction on the right – provide a framework for the model. Chapters 5 to 8 are concerned with actors. Chapters 5 to 7 explore one kind of actor, who will be called *the individual actor*. The focus is on the relationship between individual actors who desire to exercise rights and individual actors who are thereby affected. In Chapter 8, another kind of actor is introduced, namely, all of *society*. We consider what it means to treat such a vast entity as an 'actor'. The relationships among actors, and among arguments about them, are examined in greater detail in Chapters 9 and 10.

In Parts II and III, we turn to two kinds of *interests* which are commonly understood to be attributed to actors in rights arguments: *harm* and *consent*. Part II introduces a formal concept of harm. Chapters 11 and 12, by means of two *harm axioms*, examine how every rights argument presupposes some concept of harm. In Chapters 13 to 16, the various components of the harm axioms are translated into symbolic form. By the time we reach Chapters 15 and 16, the language is sufficiently developed to allow comparisons with standard rights discourse. Part III introduces a formal concept of consent. Chapter 17 examines various meanings of the concept of consent, with particular attention to the traditional distinction between consent in fact and consent in law. In Chapter 18, it is argued that any assertion about harm implies some corresponding assertion about consent, thus generating strict 'pairings' between the harm and consent components of any argument. In Chapter 19, we return to the distinction between consent in fact and in law, in order to refine the concept of consent.

In Parts IV and V, the elements of agents, harm and consent are situated within larger schemes. Part IV prepares the way for identifying the background theories. In Chapter 20, assertions about actors, harm and consent are correlated to arguments about the *breach* or *non-breach* of a right. In Chapter 21, arguments about breach and non-breach are used as a basis for postulating a body of background theories which underlie all arguments. In Chapter 22, the background theories are divided into two general kinds: *individualist* and *collectivist*. In Part V, the background theories are developed in detail. In Chapters 23 and 24, we examine two *individualist* theories which are identified as *liberal*. In Chapter 25, we examine a third individualist theory which is identified as *paternalist*. In Chapter 26, we examine three *collectivist* theories, two of which are identified as *democratic*, and one as *anti-democratic*. Again, there is nothing new about such concepts. However, formal analysis allows us to express and to compare them in terms of a discrete number of shared components.

Part I
Agents

1 Rights and restrictions

Rights are subject to restrictions. This book will examine how arguments are used to strike that balance. Yet the concepts of 'right' and 'restriction' are broad. We begin by adopting a set of 'position axioms' governing the use of those terms. All axioms adopted in this book are compiled in Appendix 1.

1.1 Liberal rights

There is a core of norms which widely recur within regimes of liberal rights, governing such interests as freedom of expression or belief, fair arrest and trial, or humane conditions of detention.[1] Beyond that core, there is no obvious uniformity in the way rights are defined or ascertained. Uncertainty about what is meant by, or included within, 'liberal rights' raises questions about the scope of our analysis. Will it apply to *all* liberal rights? How could such a claim be tested, if there can be no clear agreement on what those rights are?

Consider the following provisions. Article 5 of the German Basic Law provides that 'freedom of reporting by radio and motion pictures is guaranteed. There shall be no censorship'.[2] Article 7 of the Dutch Constitution provides that '[t]here shall be no prior supervision of the content of a radio or television broadcast'.[3] Are those two passages different? Similar? Identical? How would we find out? Through a bilingual dictionary? Through an empirical study? Of what significance would be the fact that both states are parties to the European Convention of Human Rights, or to the International Covenant on Civil and Political Rights?

Generality

One response might be that the two provisions do not express two distinct rights, but rather express only two instances of one broader right, such as a right of free speech, or a right of free expression. But that response merely cloaks the same problem in a new guise, as we must then ask in what ways those two instances are similar or different.

The problem does not arise only with respect to comparisons between jurisdictions. Even within a single jurisdiction, it is not always clear which norm is at issue. In *Laskey*, what is the right sought by the men? A right to engage in certain sadomasochistic acts? Or a right to engage in certain *sexual* acts, which would include certain sadomasochistic acts? Or a still broader right of *intimate association*, which would include certain sexual acts, which would in turn include certain sadomasochistic acts? Or an even broader right of *privacy*, which would, in turn, include each of those? Such questions raise the familiar issue of the correct level of generality at which a legal norm is to be formulated.[4]

Of course, before the European Court, the men can invoke only norms set forth in the treaty and its protocols.[5] The answer to our question might then be: 'the men seek to have the article 8 right of privacy interpreted to protect certain sadomasochistic acts'. Yet that response is purely conventional. It relies on the language which the drafters of the instrument happened to adopt. Only certain historical and cultural circumstances, but nothing in principle, would have prevented the drafters from adopting, say, a more specific 'right of sexual conduct' or 'right of intimate association'. As a functional matter, there may be no difference between saying, in more specific terms, that the men seek 'a right to engage in certain sadomasochistic acts', and saying, more broadly, that the men seek 'protection for certain sadomasochistic acts, as part of the broader article 8 right to privacy'. Similarly, we could combine those two levels of generality by saying that the men seek 'a *right* to engage in certain sadomasochistic acts, as part of the broader article 8 *right* to privacy'.

The point is not that there are never differences among levels of generality. For example, one might want to say that the right at stake in *Laskey* is part of a broader right of 'self-expression'. That formulation, however, could raise issues of free expression under article 10, distinct from those raised under article 8. The point is only that different levels of generality do not *necessarily* comport differences in substance. There are some instances in which they are just two ways of stating the same thing. We therefore adopt:

> **Axiom of Generality**: There is no necessary distinction between a norm in itself and a norm enunciated as part of a broader norm.

By extension, for our purposes there will rarely be any relevant difference between 'recognising' and 'applying' a right. In most cases, those locutions merely reflect more general ('applying') or more specific ('recognising') levels of generality. A categorically distinct act of recognition would occur only where there is no higher level of generality.

Recognition

But we still have not answered the initial question: What norms will count as liberal rights for our analysis? For several reasons, it would be impossible to adopt an 'extensional' definition of liberal rights – a list which would be both exhaustive and unambiguous. No single list could provide a full account of all jurisdictions maintaining regimes of liberal rights. Even a list for one jurisdiction would be impossible. It would require clarity and agreement on the scope of each right, which is barely to be found in practice, and, in any event, shuns enumeration in list form, as any treatise will demonstrate. Moreover, such a list would exclude future developments. Nor is any 'intensional' definition imaginable – a definition which would provide a prior, fixed criterion for identifying which norms do and do not count as liberal rights. In view of endless ambiguities and disagreements surrounding many rather specific rights, we could hardly expect greater clarity or agreement at a higher level of abstraction.

Could we begin with Hohfeldian theory, drawing initial distinctions between concepts of 'claim-right', 'liberty', 'immunity' and 'power'? In *Laskey*, the two crucial sets of arguments are the men's arguments *favouring* an interpretation of article 8 so as to protect their sadomasochistic conduct, pitted against the state's arguments *opposing* that interpretation. It is *those* arguments which we will seek to examine. As noted in the Introduction, the difference between them does not turn on any Hohfeldian distinction. Similarly, we might want to begin with such deontic categories as 'obligation', 'permission' and 'prohibition'. Yet the question of how those terms apply to the interests at stake in a given case can be decided only after some determination of what those interests are.

None of the foregoing approaches provides a satisfactory starting point. Instead, we will adopt a conventional description:

> **Axiom of Recognition**: A right is liberal if it is recognised within a corpus conventionally regarded as a body of liberal rights.

We will examine specimens from an existing corpus of law generally regarded as a corpus of 'liberal rights' or 'civil rights and liberties', without assuming from the outset any conceptual link between those labels and that corpus. Ascertaining that link will be the aim of the book.

It may appear odd to use the term 'axiom' for a principle which depends on a conventionally defined corpus. Yet that step underscores two points. First, it would be difficult to frame a concept of an isolated or free-floating liberal right within an otherwise non-liberal regime. We will see that a right becomes liberal within a comprehensive body of norms. The background theories will arise as a unified network. We will have to analyse a variety of rights in order to identify them. Second, the word 'recognised' is key, as illustrated by a trivial example. Assume a legal rule that prohibits

detonation of atomic bombs by civilians. Dexter challenges the rule, claiming that he can express his views on life only by detonating atomic bombs. Any arguments on the merits will then consist of Dexter's assertion that he has a right to detonate atomic bombs pitted against the state's assertion that he has no such right. For purposes of our model, the right exists as a liberal right in so far as Dexter's arguments succeed ('are recognised'), and does not exist in so far as they fail ('are not recognised'). Every other claim will be treated identically. The triviality or ludicrousness of Dexter's claim is irrelevant. Yet if the Axiom of Recognition is purely conventional, how can we hope to identify norms that are distinctly 'liberal'? How are 'liberal' rights to be distinguished, say, from 'ordinary', private-law rights? That question is examined in Section 1.4.

1.2 Restrictions

The only aim of this study is to ascertain the background theories. That point will be repeated on a number of occasions, as it will justify a series of simplifying assumptions which might otherwise be unwarranted. Those assumptions will include definitions of certain specified terms – like 'harm' or 'consent' – to allow them to cover a broader range of circumstances than would be customary in ordinary usage, and to do so in a way that will be free of the ambiguities of ordinary language. We can now turn to one example.

Rights can be obstructed in countless ways. In this study, all means of obstructing the exercise of rights will be called *restrictions*. Just as we are assuming no fixed criteria governing the content of rights, we will assume no fixed criteria governing the range of possible restrictions. Hence, a simplifying principle:

> **Axiom of Restrictions**: A restriction is any means by which a person or entity impedes the right-seeker in, or penalises the right-seeker for, the exercise of an asserted right.

That axiom raises a number of difficulties, which must be addressed in turn.

Variety of 'restrictions'

The term 'restriction', defined so broadly, embraces any number of familiar concepts: 'deprivation', 'denial', 'encroachment', 'incursion', 'infringement', 'interference', 'limitation', 'regulation'. Those terms commonly comport differences in meaning or nuance, and are not all interchangeable in standard legal usage. For example, a 'deprivation' may be distinguished from a 'limitation' or 'regulation' in order to denote a full denial of a right (e.g. where private property is wholly appropriated by the state

without compensation) as opposed to a partial constraint (e.g. where discrete restrictions are imposed on the use of property which nonetheless remains profitably usable). Similarly, distinctions between acts and omissions can leave the blanket term 'restriction' sounding inapposite when applied to an omission: if a state is accused of not doing enough to give effect to a right, we would not colloquially refer to such inaction as a 'restriction'. Moreover, in a case of extreme abuse, such as extrajudicial killing or torture, it might sound banal to speak merely of a 'restriction' on the corresponding right. However, the term 'restriction' will be used to include all of those circumstances, in so far as they all comport *a purpose or effect of extinguishing or diminishing the right-seeker's enjoyment of an asserted right.* (The only significant distinction which will be drawn will be between that concept of 'restriction' and the concept of 'breach' or 'violation'. The terms 'breach' or 'violation' will be used to denote a judicial determination about the *legality* of the restriction.[6]) Such an axiom may seem unwelcome, in so far as it obliterates subtleties which one would have thought to be useful in law. It must be stressed that we are seeking to eliminate that variety of terms not for all purposes, but only for the very narrow purposes of a formal model, for which any distinctions among them are irrelevant.

Completed and prospective acts and omissions

In some cases, a restriction may literally mean that the party seeking to exercise a right is prevented from doing so. For example, people may refrain altogether from committing acts of sadomasochism, fearing the legal consequences. Or a prior restraint may be imposed on a newspaper to prohibit publication of an article. In other cases, as in *Laskey*, the right-seekers' acts or omissions have already been completed, but have then resulted in a legal penalty. In this study, the term 'restriction' will be used in both senses. For our purposes, terms such as 'seeking recognition of' or 'seeking exercise of' a right will apply equally to past and future conduct. Similarly, we will speak of persons or entities 'seeking a restriction' on an asserted right, referring not only to prospective attempts to impede the relevant acts or omissions, but also to attempts to uphold sanctions already imposed.

'Restriction' as non-existence of a right

In some cases, there may be agreement between disputing parties that a given right is *relevant* to the act or omission in question – their disagreement being about whether the scope of that right should be extended to protect *that* act or omission. As we have seen, that disagreement may depend merely on the level of generality at which a right is articulated. If *Laskey* is understood as a dispute about a right to engage in certain acts

of sadomasochism, then the dispute between the men and the state is categorical. If it is understood more broadly in terms of the right to privacy, then the British government does not disagree about the existence of the right, but only on whether it should be construed to protect certain acts of sadomasochism.

In some cases, however, the existence of any relevant right is denied. That denial could be construed as an assertion that no restriction is being placed on any right, since there is no right to restrict. For example, the case of *Johnston v. Ireland*[7] was brought by individuals complaining about provisions of Irish law which prohibited divorce. They argued that article 12 of the European Convention, which sets forth a right to marry,[8] must also include the right to obtain a divorce.[9] The Court, however, finding that article 12 did not encompass the right to obtain a divorce, concluded that the Convention did not include any right under which the complaint could be heard.[10] That finding could be construed to mean that Irish law did not restrict any right to obtain a divorce under the European Convention, as no such right existed. For our purposes, however, a denial that a right exists will be treated as a restriction, i.e. as a restriction on an asserted right. For *Johnston*, we can say, again depending merely on our chosen level of generality, that Irish law restricted the exercise either (1) of an asserted right to obtain a divorce, under article 12; or (2) of the right to marry under article 12, interpreted to encompass a right to divorce. On either reading, we will say that the Court upheld the restriction – and not that there was no relevant right.

'Restriction' as derogation

It is widely accepted in liberal regimes that rights may be suspended during declared states of emergency.[11] For example, article 15(1) of the European Convention provides in part:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.

Under article 15(2), derogation shall not apply to certain rights:

> No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.[12]

States could seek to rebut complaints brought under Convention articles which are not excluded under article 15(2) by arguing that the obligation in question was not binding during a declared state of emergency – that,

during that period, the state's obligation, and the correlative individual right, temporarily 'ceased to exist'. It might not be customary to speak of the suspension of rights as a 'restriction', as that term ordinarily connotes a limit on a right which *is* in effect. However, as nothing in our analysis will be affected by that distinction, we will understand the concept of 'restriction' to include derogation.

'Restriction' as a countervailing right

In some cases, what we are calling a restriction might be the assertion of a countervailing right. Consider the case of John, who brings a private suit to enjoin, or to seek compensation for, the publication of a newspaper article written by another individual, Mary, on grounds of invasion of privacy. Depending on the facts which give rise to the dispute, it might be John who asserts a right of privacy, and Mary who seeks a restriction on that right by asserting her interest in free expression (e.g. where John sues for a prior restraint). Alternatively, it might be Mary who asserts a right of free expression, and John who seeks a restriction on that right by asserting his interest in privacy (e.g. where Mary subsequently appeals against a prior restraint successfully procured by John).

These scenarios also show how a case may start out as a dispute about one right, but then turn into a dispute about another. If John wins a prior restraint based on his asserted right of privacy, the litigation could continue – say, in an appellate forum, or in an international forum, such as the European Court – as a claim about Mary's right of free expression. (Indeed, there are cases in which the *same kind* of interest could be adduced both for asserting the right *and* for asserting the restriction. In a child custody dispute, for example, two disputing parents might both base their opposing claims on an interest in privacy or family life.) In such cases, how should we decide whose claim to treat as an assertion of a right, and whose claim to treat as seeking a restriction on that right?

One solution is simply to examine a dispute as it was in fact litigated. Meanwhile, as to hypothetical cases, such as the dispute between John and Mary, we can simply stipulate whose claim will be treated as asserting a right and whose claim will be treated as asserting a restriction on that right. In fact, for the most part, that is the solution we will adopt. However, a new problem then arises. If we wish to analyse more than one phase of litigation, our notation system would become untidy – that is, still feasible in principle, but unnecessarily complex – if the roles reverse when the case passes to another stage of litigation. As our aim is only to record the structure of substantive arguments about the merits of the dispute, our job will be easier if we can assign roles which remain fixed throughout all stages of the litigation.

Consider an example from the 1986 case of *Lingens v. Austria*.[13] In 1975, Lingens, an Austrian journalist, published two articles accusing the

State Chancellor, Bruno Kreisky, of having expressed sympathy with persons or events of the Nazi past. Kreisky then brought a private criminal prosecution for defamation against Lingens in the Austrian courts. (Be sure to keep these facts of *Lingens* in mind, as this case will be discussed frequently in the next few chapters.) In the abstract, such an action could, with equal plausibility, be construed in terms of Kreisky's civil rights (right to protection of reputation) or in terms of Lingens's civil rights (freedom of speech, freedom of the press).

We must nevertheless choose *some* distribution of roles. If we wanted to focus our attention on the litigation in the national courts, we could choose a distribution under which it would be Kreisky who asserts the right, and Lingens who seeks the restriction. That would be a perfectly valid distribution, and our model would apply without difficulty. However – for no reason other than a desire to use a corpus which will be familiar, and easily available, to a greater number of readers – we will use the distribution which reflects the litigation of the dispute in the judgment of the European Court. At that stage of the dispute, it was Lingens who asserted a right of freedom of expression under article 10(1), while the Austrian state, under article 10(2), defended a restriction on that right[14] that had been upheld in Kreisky's favour in the national courts.[15]

Although our overall focus in *Lingens* is, then, on the European Court, we may nevertheless wish to refer to arguments which were made in the national courts. Therefore, for the sole purpose of consistency in the recording of arguments, we will apply that same role distribution throughout all stages of the litigation. We will analyse even the phase of the dispute in the national courts in terms of Lingens's asserted right to free expression and Kreisky's assertion of a restriction on that right. In later chapters, we will examine a few cases from national courts which did not go before the European Commission or Court. In those cases, we will choose the role distribution relevant to the particular judgment we are examining.

'Restriction' as a benefit

Assume that a group of prisoners is offered the following choice: either to accept severe corporal punishment along with a chance of parole, or to forgo corporal punishment, by waiving any chance of parole. The prisoners choose the former. On their behalf, a complaint of torture or inhuman or degrading treatment is then brought under article 3 of the Convention. The state responds: 'The prisoners freely chose corporal punishment, and are receiving a benefit for it. Nothing can be both a benefit and a restriction. Therefore, no restriction has been placed on their article 3 rights.' Of course, the state's argument is fallacious. Perhaps no *one* thing can be both a benefit and a restriction. In this case, however, two things are involved. One of them (the chance of parole) may indeed be a benefit, but the other

(the corporal punishment) remains a restriction on the article 3 right. Even if we were to accept that the benefit *justifies* the restriction, that in no way means that the benefit obliterates the restriction. For our model, we will refer to *all* restrictions as such, regardless of whether they are ultimately held to be justified. (As to justifications for a 'benefit-restriction' of this type, we will see later on how they use concepts of harm and consent.[16])

1.3 Contentious character

Balances between rights and restrictions are struck in several ways. Sometimes attempts to strike the balance are worked into an authoritative text. For example, in several articles of the European Convention, as in many international and national instruments, the general statement of a right is followed by limiting provisions, as we have just seen in article 10.[17] Evidence about the intended balance between rights and restrictions may also be sought in records of the discussions and debates (*travaux préparatoires*) leading to the drafting of such a text.[18] In some jurisdictions, another means of striking the balance is through advisory opinions, whereby a court is asked to provide a general statement about the interpretation of the right, without reference to a dispute between particular parties.[19]

In the present study, the focus will be on the *contentious case*,[20] brought by one party against another within a judicial[21] forum. Two objections might be raised to that approach. First, readers from civil-law traditions may suspect that such a choice assumes a common-law bias, disproportionately emphasising the judicial function. However, the analysis will treat contentious cases only as examples of rights balancing, without regard to the legal status of judicial holdings in any given jurisdiction. Questions of judicial precedent, often prominent in common-law scholarship, will assume no special role. By the end of the book, it should be clear that the same general forms of arguments about the balance between rights and restrictions are identical in common-law and civil-law jurisdictions, and structure debate in other fora, such as legislative or administrative bodies, and among the broader public. To be sure, the focus on cases of the European Court of Human Rights arises largely from the fact that they provide detailed reasons for the decisions reached,[22] as well as separate opinions of individual judges,[23] some of which will come under scrutiny in our analysis. Nevertheless, we will see that, even in jurisdictions where it is common for a judicial decision to be issued with no extensive *ratio decidendi* (*jugement non motivé*), the relevant substantive controversies and corresponding arguments are rarely difficult to surmise.

Second, it might be objected that such an approach is unduly confrontational, neglecting processes such as negotiation or alternative dispute resolution. Yet the fact that our framework is conflictual does not mean that the parties to a dispute are precluded from friendly settlement – which,

indeed, may still proceed in the shadow of prospective litigation. The means chosen to resolve a dispute is important, but is distinct from questions about the structure of liberal rights discourse. One consequence of adopting a contentious framework is that some degree of stasis is assumed. All kinds of dialogue, negotiation, compromise and evolution of arguments may transpire around a dispute; but, ultimately, the contentious framework presupposes that there is some stand-off, that there is some insuperable disagreement as to the recognition or application of some right. That disagreement will be assumed to provide the central structure of the case.

Disputes about rights do not arise in a vacuum. They commonly arise with other legal issues. For example, if a subordinate unit of government, such as a municipality, imposes a restriction on some individual's freedom of expression, questions might arise not only about the substantive legitimacy of the restriction, but also about whether that unit of government acted within its powers. A finding that that the restriction was imposed *ultra vires* might dispose of the case, obviating the need for argument on substantive grounds.[24] In this analysis, however, we will examine only arguments about the substantive merits of claims.[25]

A further element can now be added to our conventional concept of the liberal right:

> **Axiom of Contentious Character**: A right is liberal only if it can in principle conflict with some ascertainable restriction.

That axiom does not state that any norm which can in principle conflict with some ascertainable restriction *is* a liberal right (as the sheer ability to conflict with some restriction can also be predicated of many ordinary norms in contract, property or tort which may not be incorporated within systems conventionally recognised as liberal rights regimes). Rather, more modestly, the axiom states that *if* a right is formally liberal, then it can in principle conflict with some ascertainable restriction. The axiom sets forth a necessary, not a sufficient condition for a right to qualify as liberal.

Such an axiom may seem questionable in extreme cases. Surely we can concoct nightmare scenarios in which we could imagine no possible restriction on a right. For example, it would seem that there are no grounds on which a government of a healthy and prosperous state could authorise the mass killing of children. It would seem that the right of children to be protected in that situation must be absolute, subject to no *conceivable* restriction. Here, however, we must be careful in the use of language. That scenario may preclude *plausible* restrictions on rights; it cannot, however, preclude *possible,* i.e. *conceivable* or *imaginable* ones – which, arguably, are infinite in number. *Conceivably*, it could be argued that the government wants to commit the act for purposes of controlling a contagious disease, or as a secondary effect of bombing a separatist insurgency in areas near

schools. Those rationales are horrific because they *are* conceivable. Conceivable restrictions are possible for any liberal right, and that is all that is meant by the requirement that the right be able to conflict, in principle, with some ascertainable restriction. (It is also a reason why the model will apply to hypothetical or non-judicial contexts. In legislative or popular debate, speculation about possible restrictions, with or without prior real-world precedents, is not unusual.) The axiom requires, as a minimum ingredient, a regime in which the question of balancing rights against restrictions can always arise as a formal matter, even where, as a substantive matter, everyone agrees on how certain cases would be decided.

1.4 The liberal element of legal argument

The goal of ascertaining a distinctly liberal element in rights discourse raises some preliminary questions. The term 'liberal' is commonly used to denote a set of political ideals, but can it be made precise enough to represent distinct structural components of legal argument? (The discussion in this section is not essential to the structure of the model and can be read later on.)

The 'liberal' right

In view of the conventionally defined Axiom of Recognition and the broadly defined Axiom of Restriction, can we ascertain a characteristically liberal element that would distinguish argument about civil rights and liberties from argument about other legal norms? Can argument about 'liberal' rights be distinguished categorically from argument about 'ordinary' rights in contract, property or tort? Consider a run-of-the-mill private-law dispute. Farmer Fatima has struck a deal to deliver 500 litres of fresh but perishable cream to baker Bernard. Before delivery, Bernard attempts to rescind the deal, and refuses to accept the cream when it arrives. Failing to sell the cream elsewhere, Fatima sues Bernard for her losses. What is to stop farmer Fatima from bringing a claim against baker Bernard as a 'civil' right? Indeed, if Fatima loses that suit, what is to stop her from bringing a claim against the state to the European Court?

For our purposes, nothing. Barring any procedural, jurisdictional or other non-merit-based issue,[26] the Court could accept or dismiss the complaint only on the *substantive* grounds of its 'well-foundedness'.[27] In other words, trivially, the Court must follow the Axiom of Recognition, by deciding which rights will and will not be recognised, either at the admissibility stage or through adjudication. In fact, it is perfectly plausible that a body of civil rights and liberties could include certain rights between private parties.[28] There are notorious historical precedents for the elevation of private-law rights to higher-law status, even if some have fallen into disfavour today.[29]

The question then arises as to the substantive basis for accepting or rejecting Fatima's claim. Consider the following objection. It could be contended that all individual rights, including rights in contract, property or tort, are by definition liberal. On that view, there can be no concept of liberal rights as distinct from individual rights generally. Civil rights and liberties might have a distinct moral or political status, but no legal character different from that of other rights. Let's call that argument a *theory of the implicit liberalism of rights* (in short, *the liberal theory*). It could run as follows:

1 An individual right protects an individual interest.
2 Yet an individual right protects an individual interest only if it is subject to the rule of law.
3 If an individual right, subject to the rule of law, protects an individual interest, then that individual right is a liberal right.

From those premises it follows that any individual right is *ipso facto* a liberal right.[30]

Let us assume that thesis 1 is uncontroversial.[31] What is the justification for thesis 2? Here is one example. If it is found in court that Fatima has a right to compensation from Bernard, then, under the rule of law, government may not, except in accordance with law, prevent her from collecting damages. Her right to collect compensation from Bernard is a bundle of rights. One of its strands is a right against arbitrary government interference, which presupposes the rule of law. As to thesis 3, in so far as Fatima's bundle of rights to compensation includes that right against arbitrary government interference, it is formally indistinguishable from any 'civil' right which Fatima may have against government. If government were to annul the judgment against Bernard willy-nilly, Fatima would have legal recourse, just as she would have if government imprisoned her for her religious or political beliefs. Fatima's 'public' suit against government for annulling the judgment does not meaningfully differ from her 'private' suit against Bernard: a structurally identical concept of right is maintained, but is now merely directed against government, rather than Bernard. In *Fatima v. Bernard*, the duty correlative to the asserted right is upon Bernard; in *Fatima v. State*, it is upon government.

In rebuttal, one might propose a *theory of the non-implicit liberalism of rights* (in short, *the classical-positivist theory*[32]). One could reject thesis 2 by arguing that, under an absolute Hobbesian or Austinian sovereign, Fatima could lawfully win a judgment against Bernard, even if it were possible that government might abrogate it willy-nilly. The specific content of the right would be modified so as to include that eventuality, but its overall right-duty structure would otherwise remain intact. Accordingly, a legal norm can protect an individual interest – less securely, perhaps, but still effectively – without the rule of law. (It might also be noted in passing

that the 'individual' referred to in thesis 2 could be an absolute monarch, whose 'individual interests' could by definition be protected, indeed would be better protected, without recourse to the rule of law.)

Hohfeldian analysis can accommodate either theory, as long as the assumptions made in each case are clear. On behalf of the liberal theory, it could be said that the configuration of claim-rights, liberties, powers or immunities which constitute a given right are plausible – are saved from becoming impossible fictions – only in so far as they are not subject to sudden and arbitrary abrogation. After all, what kind of claim-right, liberty, power or immunity do I have if the legal system can never assume its effectiveness? Hohfeldian analysis requires the liberal theory if we assume that the Hohfeldian categories are meaningful only when secured by some measure of settled expectations.

By contrast, the Hohfeldian categories can accommodate the positivist theory if they *are* stipulated to be perpetually subordinated to any contrary act of government. Fatima then has both (a) a claim against Bernard, subject to any contrary act of government, and (b) a claim against government, subject to the government's contrary act. To the liberal theorist's objection that the Hohfeldian concepts are eviscerated by that stipulation, the positivist will respond that the sheer possibility of arbitrary negation does not equal its actuality. To the extent that the norm is *not* abrogated by government, to the extent that (any form of) government is willing to assure execution of Fatima's judgment against Bernard, that private-law judgment operates fully to secure an individual right. The positivist sees a liberal regime as one possible legal order, but not as a necessary condition for individual rights. If Fatima can bring a suit against government for arbitrarily annulling the judgment against Bernard, that distinct strand within the bundle is indeed secured by the rule of law. However, that strand is distinct from her right to compensation vis-à-vis Bernard, which does not presuppose the rule of law. Accordingly, there can be individual rights which do not presuppose the rule of law. So there can be individual rights which are not liberal. A search for the distinguishing features of those rights which *are* liberal is, then, entirely plausible.

As that positivist challenge to thesis 2 suffices to illuminate the controversy for our immediate purposes, we need not further examine thesis 3. Our present concern is with the effects of the two theories on the background theories. If the positivist theory were correct, then we could continue in the hope of ascertaining an essential character distinct to the discourse of civil rights and liberties. If the liberal theory were correct, the fact that all individual rights are liberal would make the particular designation of a civil rights and liberties corpus within the legal system as 'liberal' appear purely conventional. Of course, a thorough confrontation between these two theories would take us well beyond the scope of this study. Moreover, in view of the already wide scope of civil rights and liberties, this study cannot undertake a systematic analysis of private-law