



Introduction

Over the past decade and a half, the supervisory organ of the European Convention on Human Rights (hereafter, also ‘the ECHR’ and ‘the Convention’), the European Court of Human Rights (hereafter also ‘the ECtHR’ and ‘the Court’), has been confronted with several widely disputed, highly controversial, and ethically and morally charged cases under its Article 8 jurisprudence.¹ Some of these cases include revisiting issues that have occurred before the Court already (questions pertaining to abortion and transsexuality); some of them, however, have raised completely novel challenges for the ECtHR (issues related to assisted dying and assisted reproduction). What binds these cases together is that, in one way or another, the applicants’ expectations, wishes, or choices regarding their personal lives have not been met. According to the Court, these cases evoke and engage the application of the right to respect of autonomy.

In this book I ask whether the concept of autonomy as expressed in the Court’s reasoning is an appropriate tool for regulating matters pertaining to reproduction or medical practice. Is autonomy a suitable model for regulating for what is essentially a matter of interpersonal relationships? What is the value of and justification for the concept of autonomy as interpreted by the ECtHR under its Article 8 jurisprudence? What is the potential impact that the practice of the ECtHR, expressed and shaped through its autonomy-based case law, has on the dispositions and behaviour of the individuals, and more broadly, on the social relationships of these individuals? These are the questions guiding the inquiry undertaken in this book about the meaning and the underlying normative purposes and effects of the concept of autonomy the ECtHR now regularly uses when deciding cases about assisted dying, sexuality, and reproductive rights; matters pertaining to one’s identity, self-determination, fulfilment of choices, and control over one’s body and mind.

¹ Article 8 provides for a right to respect for private and family life, home and correspondence.

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Excerpt

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Three sets of interrelated issues have motivated me to write this book, which simultaneously demonstrate why it is particularly important at this time to inquire into the ECtHR autonomy-related case law. First, this study is based on an understanding of the impact of law's expressive powers on human behaviour; second, it is driven by concerns about the dangers of individualism; and third, the research is provoked by the possible link between the language of human rights and the excessive individualism now prevailing in Western societies.

The expressiveness of law and the European Court of Human Rights

Sometimes judges and courts want to project their work as something that remains strictly within the bounds of the 'legal world', so that the effect of judgments is predominantly related to bringing about material consequences for the parties involved, or for those similarly situated. The courts sometimes like to give the impression that judicial elaborations do not have any significant influence or effect on a wider social life or morality. Social and legal worlds, according to this paradigm, belong to two different universes. The former president of the ECtHR, Luzius Wildhaber, is firm that 'it is not . . . the Court's role to engineer changes in society or to impose moral choices.'² It is an understandable stance, especially given the often-expressed charge that the increasingly powerful judiciary and their creative ways of interpreting and developing human rights pose a threat to democracy.³ Yet, notwithstanding the judiciary's effort to distance itself from its impact on the development of social values and practices, this effort might only serve to conceal from us some of the problems with how law influences individual behaviour and social relations.

The study undertaken in this book takes the converse position. It is informed by the idea that law cannot be separated from the social world and reality around us. Law is part of the social fabric, and has the power to shape, to guide, and to make an impact on the dispositions and behaviours of those acting within its sphere.⁴ In other words, the thesis presented in this book rests on the premise that law is a powerful and influential mechanism that can serve to convey and to promote certain socially valued attitudes, norms, and mores and to provide guidance for

² L. Wildhaber, 'The European Court of Human Rights in Action', (2004) 21 *Ritsumeikan Law Review* 83–92, 86.

³ See e.g. L.R. Helfer, 'Consensus, Coherence and the European Convention on Human Rights', (1993) 26 *Cornell International Law Journal* 133–65.

⁴ J.H.H. Weiler, 'Europe – Nous coalisons des États, nous n'unissons pas des hommes', available at www.iilj.org/courses/documents/2009Colloquium.Session9.Weiler.pdf, 6.

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[More information](#)

how to behave according to these values and norms. This is to say that 'law does not simply serve society, it defines and helps to constitute that society and its members: law is one of the discursive practices, institutional structures and intellectual media for organising and acting in the world.'⁵

From a slightly different perspective, my purpose here is to make a difference between what scholars term as law's expressive and regulatory functions; to make a difference between what '[law] says as opposed to what it does'.⁶ In the former, law affects behaviour 'expressively' by making statements, in the latter, law controls behaviour directly through its prescriptions and sanctions.⁷ This is not to say that law's regulatory and expressive functions cannot exist simultaneously, but to emphasise that these functions do not necessarily cohere. Sometimes, 'law has an expressive influence on behaviour independent of the effect created by its sanctions'.⁸ By regulating behaviour, law does not only express what sort of behaviour is appropriate strictly for the concerned parties or those similarly situated, but makes, at the same time, wider claims on values and dispositional mores.

Following this reasoning, we can start to see the ECtHR – a court of 'unparalleled influence, authority and prestige'⁹ – performing what theorists call 'law's expressive functions': We see ECtHR judgments going beyond telling parties how they must behave in particular contexts and circumstances, to make statements that potentially have a more general effect in terms of impact and change in people's behaviour.

During the six decades of its existence,¹⁰ the Court has been the primary instrument for interpreting the rights and freedoms defined in the Convention.¹¹ For many, the ECHR system represents a success story of

⁵ A.C. Hutchinson, *Waiting for C.O.R.A.F: A Critique of Law and Rights* (University of Toronto Press Incorporated, 1995), p. 53.

⁶ R.H. McAdams, 'An Attitudinal Theory of Expressive Law', (2000) 79 *Oregon Law Review* 339–90, 339; see also L.A. Kornhauser, 'No Best Answer?', (1998) 146 *University of Pennsylvania Law Review* 1599–1637; J. Mazzone, 'When Courts Speak: Social Capital and Law's Expressive Function', (1999) 49 *Syracuse Law Review* 1039–66.

⁷ C.R. Sunstein, 'On the Expressive Function of Law', (1996) 144 *University of Pennsylvania Law Review* 2021–53, 2024.

⁸ McAdams, 'An Attitudinal Theory of Expressive Law', 339.

⁹ J.-P. Costa, *Dialogue Between Judges: What Are the Limits to the Evolutive Interpretation of the Convention? 2011* (European Court of Human Rights, Council of Europe, 2011), 43.

¹⁰ The first members of the ECtHR were elected by the Consultative Assembly of the Council of Europe in 1959. The first session of the Court took place on 23–28 February 1959.

¹¹ The ECHR was opened for signature in Rome on 4 November 1950 and entered into force in September 1953. Text available at www.conventions.coe.int/Treaty/EN/CadreListeTraites.htm.

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Excerpt

[More information](#)

individual human rights protection,¹² upholding the ‘strongly developed European value system, concretised by the ECHR and the jurisprudence of the ECtHR’.¹³ The ‘growing and diverse body of case law’ is said to ‘have transformed Europe’s legal and political landscape’.¹⁴ Judgments from Strasbourg, according to Mowbray, have sometimes gone as far as to cause the ‘evolution of societies’.¹⁵ Many European states have – directly or indirectly – incorporated the Convention into domestic law, which means that the interpretation of domestic constitutional norms is either complemented or informed by the values emerging from the Convention rights. Analysts note that legal commitments and enforcement mechanisms entered into under the ECHR have engendered such a consistent compliance that ‘ECHR judgments are now as effective as those of any domestic court’.¹⁶ Consequently, the Convention has come to represent an ‘abstract constitutional identity’¹⁷ for the entire European continent, and the ECtHR has ‘effectively become the constitutional court for greater Europe’.¹⁸ Last but not least, the Court itself has indeed identified the Convention as a ‘constitutional instrument of European public order’.¹⁹

¹² Helfer, ‘Consensus, Coherence and the European Convention on Human Rights’; A. Moravcsik, ‘The Origins of Human Rights Regimes: Democratic Delegation in Post-War Europe’, (2000) 54(2) *International Organizations* 217–52, 218–19; L.R. Helfer, A.-M. Slaughter, ‘Toward a Theory of Effective Supranational Adjudication’, (1997) 107 *Yale Law Journal* 273–391, 293–97.

¹³ E. de Wet ‘The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order’, (2006) 19 *Leiden Journal of International Law* 611–32, 611.

¹⁴ Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’, (2008) 19(1) *European Journal of International Law* 125–59, 126. C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Abingdon: Routledge-Cavendish, 2007), 25. Douzinas argues that the Convention introduced a radically new system under the international law, which gave individuals the right to submit applications to the ECtHR alleging the violations of their rights by the actions of their state. In the case of an adverse finding by the Court, the defendant state is under the obligation to comply with the judgment. As a result of the Court’s rulings, states have changed their laws, for example, on homosexuality, on the treatment of transsexuals, and on telephone tapping.

¹⁵ A. Mowbray, ‘The Creativity of the European Court of Human Rights’, (2005) 5(1) *Human Rights Law Review* 57–79, 79.

¹⁶ Moravcsik, ‘The Origins of Human Rights Regimes’, 218.

¹⁷ S. Greer, ‘What’s Wrong with the European Convention on Human Rights?’, (2008) 30 *Human Rights Quarterly* 680–702, 684.

¹⁸ Ibid.; see also S. Greer, *The European Convention on Human Rights* (Cambridge University Press, 2006).

¹⁹ Case of *Loizidou v Turkey* (App.15318/89), Judgment of 23 March 1995, para 75.

Given this acknowledgement of the constitutional character of the ECHR and its function to uphold the European value system ('European public order') the decisions of the ECtHR contribute both to the integration of its norms into states' positive law, and most important for present purposes, to the formation of individuals' value systems.²⁰ As such, Convention rights can be seen as particularly important institutional and rhetorical means of expressing, contesting, and enhancing values that European society sees as being essential to humanity or to the good life of its members. In this way, the judicial interpretations of the Court 'send messages and signals' to society and express what kind of values count, and in what ways. Sometimes the expressive powers of the Court are even explicitly recognised: 'The European system for the protection of human rights . . . is the legal expression of the European humanism . . . This system enshrines . . . a veritable "European public order" which expresses the essential requirements of life in society.'²¹

When ECtHR holds, then, that the right to autonomy applies to a variety of cases pertaining to interpersonal relationships, including those of reproduction, assisted suicide, and abortion, only a small number of people may be directly affected by the Court's decision. But the importance lays in the attention European society pays to the Court's rulings. When the Court makes a decision, it is often taken to be expressing Europe's core values and principles. The expressive effect of the Court's judgments, or its expressive function, is often at stake here.²²

For these reasons I consider it to be of the utmost importance to discuss and analyse the significance and power of the concept of autonomy in modern European human rights law. When the ECtHR uses the concept of autonomy by which to decide cases under its Article 8 jurisprudence, it simultaneously articulates principles that constrain and influence how we construct our interpersonal relationships. Through the implementation of autonomy in its case law, the Court defines human relations, the way individuals relate to each other and to their community, sometimes apart from the direct outcomes of a particular case for the parties concerned. The principles and values that the ECtHR expresses and legitimises assume, in this way, an aspirational function regarding how we think

²⁰ See e.g. E. Wicks, 'The Rights to Refuse Medical Treatment under the European Convention on Human Rights', (2001) 9 *Medical Law Review* 17–40, 19–20.

²¹ J.-M. Sauvé, *Dialogue Between Judges: The Convention Is Yours*, 2010 (European Court of Human Rights, Council of Europe, 2010), 37–44, 38.

²² Sunstein, 'On the Expressive Function of Law', 2028.

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Excerpt

[More information](#)

individuals should orient their behaviour.²³ The way the ECtHR interprets autonomy is, hence, crucial to our normative understanding about how to relate to each other in interpersonal relationships, to our perceptions to matters of life and death, and what we should expect from ourselves and from the state. The growing appeal and invocation of personal autonomy in cases pertaining to various interpersonal relationships make it essential to better understand the workings of the particular concept of autonomy that the ECtHR has chosen to endorse as a human right.

‘Age of individualism’

My second motivational reference point for writing this book relates to a claim that echoes around a lot these days. In the mostly distressed and concerned voices of social scientists, ethicists, media representatives, and members of the general public, we hear that we live in an age of individualism characterised by an ethic of individual achievement and self-fulfilment. Independence, self-reliance, and individual advancement are now said to be primary tasks and aspirations in life. It is said that ‘[i]ndividualistic, competitive societies make some of us positively unhappy. The highest obligation people feel is to make the most of themselves, to realise their potential. This is a terrifying and lonely objective. Of course they feel obligations to other people too, but these are not based on any clear set of ideas. The old religious worldview is gone; so too is the post-war religion of social and national solidarity. We are left with no concept of the common good or collective meaning.’²⁴ ‘We appear to have lost the instinct for kindness and the willingness to extend the hand of friendship. Our responses to children, to older people, to strangers, are all conditioned by a concern not to offend and a fear of getting involved . . . [I]ndividual advancement is seen as more significant than the ability to care for others.’²⁵ A participant in the Joseph Rowntree Foundation’s survey about today’s social evils in the United Kingdom placed individualism on top of its list and made the following diagnosis of contemporary social life: ‘Everything seems to be based around money and owning things. The more you have, the more successful you

²³ McAdams, ‘An Attitudinal Theory of Expressive Law’; Sunstein, ‘On the Expressive Function of Law’; Mazzone, ‘When Courts Speak’.

²⁴ R. Layard, ‘Happiness Is Back’, *Prospect Magazine*, March 17, 2005.

²⁵ J. Unwin, ‘Our Society Has Lost the Instinct for Kindness’, *The Guardian*, June 11, 2009.

Cambridge University Press

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Excerpt

[More information](#)

are. There's nothing wrong with having enough, but there's pressure on people to go for more and more.'²⁶

On one hand, these lines of criticism of the state of our society delineate sets of characteristics that mark and frame the contemporary (Western) individual's desires and ideals – the search for self-fulfilment, self-development, self-realisation; the creation of one's identity by choosing, shaping, controlling, and being the author of one's life. 'There is hardly a desire more widespread in the West today than to lead "a life of one's own"', says German sociologist Ulrich Beck, the leading thinker of 'individualisation' theory.²⁷ As he says, if one asks people around the (Western) world what drives them in life or what they aim to achieve, the answers you commonly hear are: money, work, power, love, God etc. But, as Beck argues, more and more often all these different goals in life aim to serve one core purpose, 'the promise of a "life of one's own"': 'Money means your own money, space means your own space . . . Love, marriage and parenthood are required to bind and hold together the individual's own, centrifugal life story.'²⁸ Taken at face value, there may be nothing wrong with such goals.

On the other hand, however, the sceptics' remarks above point to the possible 'by-products' of attaining this ideal of a 'life of one's own'. The upshot of individualism, for many, is not the realisation of its positive, idealistic aspects: the flourishing of self-creation, individual self-cultivation, or the liberation of previously disadvantaged social groups. Rather, individualism connotes a set of worrisome consequences: we are becoming competitive, greedy, anxious, self-absorbed, lonely, and fearful individuals who lack kindness, compassion, empathy, care, and respect towards others. The highest obligation people feel is to concentrate on themselves, to make the most of themselves, and high achievement of one's personal goals. Consequently, there is a sense of unease about the effect this desire for individual achievement has on the quality of relationships in families (as evidenced in family breakdowns and poor parenting and care for the elderly), in medical practice (the alleged decline in trust in patient-doctor relationships), or within our communities and broader society (the loss of higher purpose, and a self-absorption that makes people less concerned with others or society).

²⁶ Available at: www.jrf.org.uk/media-centre/consultation-todays-social-evils-reveals-deep-unease-about-greed-individualism-and-decl-741.

²⁷ U. Beck, E. Beck-Gernsheim, *Individualization*, SAGE Publications Ltd, p. 22.

²⁸ Ibid.

Cambridge University Press

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Excerpt

[More information](#)

Even if some of these concerns lack a factual basis, and if we sometimes tend to overstate the existence and prevalence of individualistic behaviour in Western societies – we are all certainly able to provide examples of caring, compassionate, and altruistic behaviour experienced in everyday life – it seems evident that there are cultural, economic, and social forces at play that not only promote the ethic of self-fulfilment but also support and foster its self-indulgent forms that compel us ‘to go for more and more’, sometimes at the cost of mutual responsibility, cooperation, and care towards others.

The nexus

There are certainly many different, interrelated reasons for various forms of individualism to flourish in contemporary Western society. However, I want to concentrate on one of them, and thereby make a bridge between the power of the language of human rights, discussed earlier, and the social fabric now dominant in Europe. Hence, the book starts with the premise that there is a possible correlation between the way human rights are constructed and the way people relate to each other. In other words, there may be a link between human rights and the ‘age of individualism’. Although I do not doubt that human rights are important, and that over the past decades they have significantly contributed to the improvement of the lives of women and of sexual and ethnic minorities, human rights – according to a number of critics – also provide the context in which the individual, set apart from and threatened by others, creates social relations characterised by selfishness, personal gain, and private interests.²⁹

Several critics are concerned that although human rights discourse makes worthy claims for the pursuit of human dignity and freedom, it also promotes and encourages the creation of a community whose members think of their needs and problems in narrow, self-interested terms. ‘Rights-centred society’, argues Allan Hutchinson, ‘becomes little more than an aggregate of self-interested individuals who band together to facilitate the pursuit of their own uncoordinated and independent life-projects – a relations of strategic convenience and opportunism rather than mutual commitment and support.’³⁰ Crucially, the charge is that

²⁹ M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press, 1991); M.J. Sandel, *Liberalism and the Limits of Justice*, 2nd ed (Cambridge University Press, 1998); R. Dagger, *Civic Virtues: Rights, Citizenship and Republican Liberalism* (Oxford University Press, 1997).

³⁰ Hutchinson, *Waiting for C.O.R.A.F.*, 90.

Cambridge University Press

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Excerpt

[More information](#)

‘the insistence on rights has not resulted in a warmer and more caring society’.³¹ The ‘rights talk’ is devoted to individualism and freedom, often at the cost of nourishing mutual responsibilities and concern towards others.³²

In his critique against the practice of European institutions, Joseph Weiler contends that while ‘we brandish human rights, with considerable justification, as one of the important achievements of our civilization’,³³ the result is, paradoxically, ‘the matrix of personal materialism, self-centredness, Sartre style ennui and narcissism in a society which genuinely and laudably values liberty and human rights’.³⁴ Following Weiler, human rights vocabulary seems now to be frequently ‘lost-in-translation’.³⁵ The inviolability of human dignity has become ‘the inviolability of the “I”, of the ego’.³⁶ Since the language of rights, Weiler argues, ‘is not conducive to the virtues and sensibility necessary for real community and solidarity’ and ‘it undermines somewhat the counterculture of responsibility and duty’, the culture of human rights ‘may produce unintended consequences on that very deep ideal that places [the] individual at the centre and calls for redefinition of human relations’.³⁷ Hence, although, the purpose of human rights might have been noble – to put the individual at the centre of political and social life – unfortunately, the result is an excessive individualism and a society of self-centred individuals.³⁸

Similarly, Marta Cartabia, in her criticism of the enlarging number and scope of new privacy rights that are now blooming in European courts, raises concerns that liberal individual rights not only offer an impoverished image of the human subject, but also affect our human agency, our social behaviour: ‘Rights require not hurting others, but they do not prompt a positive move towards others: they fall short of encouraging care and concern about others’.³⁹ Instead, the multiplication of rights may make human relationships more confrontational; people become more litigious in their personal interactions. Because of these shortcomings and because of their potentially detrimental effect on social cohesion, the use and usefulness of rights, Cartabia insists, should be limited.

³¹ Cartabia, ‘The Age of “New Rights”’, Straus Working Paper 03/10, available at <http://nyustra.us.org/index.html>, 15 and 31; Weiler, ‘Europe’.

³² Glendon, *Rights Talk*, 76–108. ³³ Weiler, ‘Europe’, 27. ³⁴ *Ibid.*, 32.

³⁵ *Ibid.* ³⁶ *Ibid.* ³⁷ *Ibid.*, 31.

³⁸ J.H.H. Weiler, ‘The Political and Legal Culture of European Integration: An Exploratory Essay’, (2011) 9(3–4) *International Journal of Constitutional Law* 678–94, at 693.

³⁹ Cartabia, ‘The Age of “New Rights”’, 31.

At the same time, then, when insistence on the protection of rights has been vigorous (in Europe, at least),⁴⁰ when individuals and groups have gotten used to stating almost every interest they have in terms of rights,⁴¹ when rights language has been adopted to organise an increasing array of human interaction,⁴² and when courts are facing rights claims they have never seen before,⁴³ many scholars have begun to question whether the expansion and the widespread assertion of human rights is actually desirable.⁴⁴ These criticisms and observations point to exploring the possible ‘detrimental effects’ and ‘unintended consequences’ of rights discourse. Do human rights always generate desirable and positive effects in the societies in which they are so highly valued? Are certain rights always appropriate in certain contexts? From a different angle, commentators’ observations also raise questions about the importance of the vocabulary of human rights language and how it shapes our relationships and the society we live in. Does the language of human rights sometimes cause ‘unintended consequences’ in terms of the behaviour of individuals, thereby making it problematic for a harmonious and caring social co-existence?

By bringing together these three themes – the expressive capacity of human rights law, the concern for the quality of human relationships, and the possible link between the language of human rights and the excessive individualism now prevailing in Western societies – in this book, I examine the meaning of autonomy and the potential impact that the practice of the European Court of Human Rights, expressed

⁴⁰ The supervisory organ of the European Convention on Human Rights – the European Court of Human Rights – has been even declared to be a ‘victim of its own success’. See R. Ryssdal, ‘The Coming of Age of the European Convention on Human Rights’, (1996) 1 *European Human Rights Law Review* 18–29, 26; Helfer, ‘Redesigning the European Court of Human Rights’, 125. According to the European Court of Human Rights website, as to 31.12.2013 99 900 cases were pending before the ECtHR. Available at www.echr.coe.int/Documents/Stats_month_2014_ENG.pdf (18.08.2014).

⁴¹ Access to internet, for example, has been put forward as a human right. A. Wagner, ‘Is Internet Access a Human Right?’, *The Guardian*, Wednesday, 11 January 2012.

⁴² An idea that rights should regulate relationships between friends has been proposed by E.J. Leib, *Friend v Friend* (Oxford University Press, 2011).

⁴³ See e.g. Case of *Hatton and others v the United Kingdom* (App.36022/97), Judgment of 8 July 2003. The applicants in *Hatton* submitted that the sleep disturbance, distress, and ill health caused by night flights at London Heathrow Airport was a violation of their right to private life under Article 8 of the European Convention on Human Rights.

⁴⁴ For a general overview on the criticisms of rights, see C.R. Sunstein, ‘Rights and Their Critics’, (1995) 70 *Notre Dame Law Review* 727–68; see also Cartabia, ‘The Age of “New Rights”’.