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Introduction: Securing Human Rights through Legislation

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1.1 THESES AND COUNTER-THESES

The legislature is well placed to secure and promote human rights. That is this book's central thesis. It may seem an obvious proposition, but its truth and importance have been obscured in modern, court-centred modes of human rights discourse. The Universal Declaration of Human Rights, the European Convention on Human Rights, and similar instruments outline aspects of human wellbeing in need of respect, protection, and promotion, but they neither exhaust nor perfectly express the content of human rights. We argue that the legislature is under an obligation to give the broad, goal-oriented standards included in these instruments a specified, relatively precise legal form. That obligation is often fulfilled through legislation, and we explore how and why legislatures are able to secure human rights through modes of protection that courts cannot provide by way of judicial review. This book contends that legislatures should be, and in well-functioning democracies commonly are, at the centre of human rights practice. One of our purposes is to illuminate the moral value of positive law and our title, *Legislated Rights*, refers specifically to the value of law as enacted by legislatures – statutory law – which in its central case is made for the common good and exhibits the virtues of generality, clarity, and other desiderata of the Rule of Law.

This approach to human rights is new in comparison to prevailing approaches that focus on the role of courts, but it is not novel. Many figures in the tradition of Western legal and political thought – figures as various as Aristotle and Blackstone, Aquinas and Bentham – have emphasised the central, strategic responsibility of legislative assemblies. That responsibility includes securing the rights of persons, a responsibility that is prior to and reaffirmed in human rights instruments like the Universal Declaration and the European Convention. It is sometimes claimed that the decades leading up to and including World War II shattered confidence

in democratically elected legislatures, specifically in their willingness and ability to respect the rights of persons. And yet, at the post-war beginnings of the modern human rights project, the legislature's role continued to be recognised as central. The Universal Declaration, drafted as a non-legal, non-justiciable document setting common standards for all nations and all governing institutions to achieve, includes calls for legislation to be enacted across a range of human rights, needs, and goods. Many of the broad aims of the Declaration can be realised only through a detailed legislative programme.

This vital legislative role has been obscured by developments in theory and judicial practice regarding rights. It is telling, for example, that the UK Supreme Court's President, Lord Neuberger, has said that before the United Kingdom ratified the European Convention in 1951, 'the UK simply did not recognise human rights other than through the common law'.[1] Absent from his account is any mention of pre-1951 legislation that protects and promotes rights later identified in the European Convention, such as the Representation Acts, the Habeas Corpus Acts, the Education Acts, industrial labour legislation, and the National Health Service Act 1946, to name but a few examples. One implication of Lord Neuberger's claim is that the UK did not recognise the right against slavery until the adoption of the Convention's Article 4, notwithstanding the Slavery Abolition Act 1833. This implication is reaffirmed in his invitation to contrast the pre-1951 'dark ages' with the 'age of enlightenment' brought about by the Human Rights Act 1998, which gave the Convention effect in domestic British law. One can avoid such a truncation of vision by recognising legislatures as part of the human rights story.

In modern human rights discourse, however, it has become axiomatic that the legislature is to be expected to act contrary to human rights and that only a judicially enforced bill of rights will secure a commitment to rights. That axiom animates human rights in legal practice and the theoretical scholarship engaging with that practice.[2] The general view that the legislature is a chief threat to rights and courts the main or the only forum where human rights are vindicated, typically by correcting the abuses of the legislature, has taken hold in much theory and judicial practice regarding rights. That theory and practice are settled in the view that a bill of rights guarantees human rights and legislation is a standing threat to that guarantee. This discourse is grounded on a number of distinctive theses about the nature of legislatures, courts, rights, and the common good. Too often these theses are simply assumed or implied

[1] Lord Neuberger, 'The role of judges in human rights jurisprudence: a comparison of the Australian and UK experience' (Address at the Supreme Court of Victoria, Melbourne, Australia, 8 August 2014) para 1, www.supremecourt.uk/docs/speech-140808.pdf, accessed 23 May 2017.

[2] Although the main legal instruments and treaties we engage with – the Universal Declaration of Human Rights, the European Convention on Human Rights, the UK Human Rights Act – all appeal, as we do, to the expression 'human rights', we could employ the expressions 'fundamental rights' and, where fitting, 'constitutional rights', which are used more or less synonymously in much constitutional theory and human rights law.

in human rights discourse, without analysis or defence. This book spells out these theses, criticises them, and proposes counter-theses to replace them.

In developing our critique, we identify a *central case of the legislature and legislation*.[3] The idea of a 'central case' is appealed to by a range of legal philosophers,[4] not to deny the reality of non-central cases of legal order, legislation, legislatures, constitutions, etc., but rather to give explanatory priority in philosophical argument to those cases that are fully responsive to the reasons that favour introducing legal order, legislation, legislatures, constitutions, etc. What are the reasons that would lead one to favour introducing the legislature and legislation in the governance of a political community? Doubtless they include the reasons referred to by constitutional drafters when they confer authority on legislatures 'to make laws for the peace, order, and good government of the Commonwealth'.[5] More generally, we say the legislature is 'established to act deliberately in response to reasons to change the law'.[6] It is the business of the legislature to understand a need for the law to be changed in some way, to form and revise reasoned proposals to change it, to debate, and then to choose a proposal to bring about a change to the law through the act of legislation. A sound understanding of those reasons awards the legislature with authority to secure human rights as an integral part of promoting the common good of the political community in all of its complexity. The common good of the community is that set of conditions that enable each and every member of the community to realise his or her development and wellbeing. Those conditions need to be secured through collaborative efforts, which include law-making and the coordination of action through legal order. The common good is the proper end of legislation and human rights are integral to the community's common good.

Our central case account is about the relative *practical capacities* of legislatures and the special suitability and responsibility of legislation in securing human rights.

[3] Our conception of the legislature and legislation is influenced by Jeremy Waldron's scholarship: see esp. *Law and Disagreement* (Oxford, Oxford University Press 1999) and *The Dignity of Legislation* (Cambridge, Cambridge University Press 1999). Our grounding for legislative authority includes, but extends beyond, Waldron's appeal to democracy and reasonable disagreement.

[4] See HLA Hart, *The Concept of Law* (3rd edn, Oxford, Oxford University Press 2012) 123, 81; Joseph Raz, 'About Morality and the Nature of Law' (2003) 48 *American Journal of Jurisprudence* 1, 5; John Gardner, 'Nearly Natural Law' (2007) 52 *American Journal of Jurisprudence* 1, 3; John Gardner, 'Hart on Legality, Justice, and Morality' in *Law as a Leap of Faith* (Oxford, Oxford University Press 2012) 228; NW Barber, *The Constitutional State* (Oxford, Oxford University Press 2010) c 1; John Tasioulas, 'On the Nature of Human Rights' in H Ernst and JC Heilinger (eds.), *The Philosophy of Human Rights* (Berlin, Walter de Gruyter 2012) 17; and, with qualification, Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346. The central case method is interrogated most patiently by John Finnis: see, inter alia, *Natural Law and Natural Rights* (2nd edn, Oxford, Oxford University Press 2011) ch 1, *Aquinas: Moral, Political, and Legal Theory* (Oxford, Oxford University Press 1998) ch II, and 'Law and What I Truly Should Decide' (2003) 48 *American Journal of Jurisprudence* 107.

[5] See e.g. Commonwealth of Australia Constitution Act, s 51; Constitution Act, 1867 (Canada), s 91.

[6] Richard Ekins, *The Nature of Legislative Intent* (Oxford, Oxford University Press 2012) 127.

Due to its important focus on *institutions* and their capacities, constitutional theory occupies a methodological middle ground between philosophy and empirical analysis. Our appeal to central case analysis navigates this middle ground. It is informed by the fact that many legislatures in different times and places have failed to be fully responsive to the reasons that favour introducing a legislature and legislation in a constitutional system, reasons that situate responsibility for human rights and common good at the centre of legislative responsibility. The appeal to those reasons, however, allows the central case analysis of the legislature to show *how* legislatures in different times and places have failed to be what they *ought* to be. No amount of comparative empirical analysis can provide this philosophical argument, which is informed by and not blind to empirical realities. Thus, our central case account of the legislature and legislation is not 'about ideal cases, still less about ideal worlds untroubled by wrongdoing, scarcity, misunderstanding, and fear'.[7] It is important to emphasise, in turn, that claims about the central case are not claims about what is normal or usual in the sense of empirically regular or statistically likely. The study of central cases in legal theory does not deny the existence of defective instances of law or legal institutions. Rather, it is precisely by understanding central cases that we understand what is flawed or lacking in such deviant (and so non-central) cases. The study of medicine proceeds on the basis of ideas about the healthy functioning of the body, and that is what enables doctors and researchers to identify pathologies. So it should be in the philosophy of law and human affairs. But as we will see in the theses below, influential theorists have characterised as paradigmatic what ought to be understood as legislative pathologies. This contributes to lowering expectations about what legislatures can achieve.

One thesis inhibiting an understanding of the legislative role is the claim that the legislature's main function is to promote the general welfare by aggregating preferences or maximising overall utility (Thesis 1). Scepticism about the legislature's capacity to protect human rights sometimes focuses on the legislature's susceptibility to demagoguery, temporary passions, and corruption, but there are other kinds of scepticism that run deeper.[8] Some theorists hold that even when the legislature is free of such contingent faults, its role does not embrace reasoned deliberation about human rights or the moral principles that inform them. Rather, the legislature is conceived as promoting social welfare in an aggregative sense, and this is said to be

[7] Finnis, *Aquinas* 47.

[8] Ronald Den Otter, for example, states that 'the most honest rationale for the practice of judicial review is rooted in pessimism about the likelihood that ordinary citizens or their elected representatives could decide important constitutional cases competently'. *Judicial Review in an Age of Moral Pluralism* (Cambridge, Cambridge University Press 2009) 19. See also WJ Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge, Cambridge University Press 2007) 265 ('[L]egislators are often prepared not only to compromise or deny constitutionally protected rights for the sake of placating a potentially resistant or even hostile electorate; they may opt not even to address the relevant issues of constitutional right').

its essential function.[9] Dworkin goes so far as to call the political process a 'machine' or 'computer' that counts and registers all preferences in society in order to 'translate' them into law.[10] This conception of legislating leads some theorists to accept or treat utilitarianism as the principle upon which legislative institutions are expected to deliberate, even if the utilitarian calculus is not the final measure of political justification.[11] The aggregation of preferences becomes a substitute for reasoned deliberation. Other theorists, while accepting that individual legislators may and should engage in reasoned deliberation, contend that those legislators together – and so the legislature – cannot be understood to be collectively engaging in the type of reasoning that characterises human agency.[12] Representatives within legislatures, on this account, engage in debates, and the legislative processes can in some machine-like fashion produce authoritative texts, but those texts are not the product of reasoned deliberation; the legislature is institutionally incapable of reasoning as an agent.

From this viewpoint, it is hard to ground an account of legislation as central to the protection and promotion of human rights. Those influential voices whose views are captured by Thesis 1 do not purport to formulate either (a) a sheer normative claim – e.g., the legislature *ought* to maximise utility, and it would be *good* all things considered if it did – or (b) a mere empirical observation – e.g., the legislature *always* and *everywhere* does maximise utility. Rather, they express a view about what the legislature is especially *suited* to do, distinctly *capable* of doing, given the kind of institution it is. A legislature, on this view, is better than any other government institution at aggregating preferences or maximising utility. Correspondingly and importantly, it is *worse* than other government institutions (most notably worse than courts) at taking responsibility for rights. It is worse because it is not fit for that purpose. And because it is worse, not fit for purpose, it matters little whether the legislature endeavours to protect rights. The legislature can legitimately limit itself primarily to that which it is able to do – aggregate preferences – within the framework of a constitutional system that duly reins in legislative power by subordinating it where needed to the courts as

[9] See for instance: William H Riker, *Liberalism Against Populism* (Prospect Heights, IL, Waveland Press 1982); *Axa General Insurance Limited* v. *The Lord Advocate* [2011] UKSC 46 [49] (Lord Hope); Johan Steyn, *Democracy through Law* (Aldershot, Ashgate 2004); Christopher Eisgruber, *Constitutional Self-Government* (Cambridge, MA, Harvard University Press 2001); Owen Fiss, 'Between Supremacy and Exclusivity' in Richard W Bauman and Tsvi Kahana (eds.), *The Least Examined Branch* (Cambridge, Cambridge University Press 2006).

[10] Ronald Dworkin, 'Social Sciences and Constitutional Rights – the Consequences of Uncertainty' (1977) 6 *Journal of Law and Education* 1, 10; *A Matter of Principle* (Cambridge, MA, Harvard University Press 1985) 366.

[11] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA, Harvard University Press 1977) 22, 90. For critical discussion, see Paul Yowell, 'A Critical Examination of Dworkin's Theory of Rights' (2007) 52 *American Journal of Jurisprudence* 93.

[12] See John Gardner, 'Some Types of Law' in Douglas E Edlin (ed.), *Common Law Theory* (Cambridge, Cambridge University Press 2007) 59; Joseph Raz, *Between Authority and Interpretation* (Oxford, Oxford University Press 2009) ch 11; Waldron, *Law and Disagreement* ch 6. For critical discussion, see Ekins, *The Nature of Legislative Intent* ch 4.

chief guarantors of moral correction and respect for rights. As a view about the legislature's *relative capacity*, Thesis 1 thus combines normative and empirical elements. Once this view is properly unpacked, we contend that it does not withstand scrutiny and deserves to be abandoned in favour of a very different and more positive view about a legislature's *relative capacity* to protect rights.

Thus, in opposition to Thesis 1, we argue that the legislature is capable of principled, reasoned deliberation, and the central case of legislative action consists in reasoned deliberation to promote the common good, which has as its concern the wellbeing and rights of all persons in community (Counter-thesis 1). The lists of rights and principles in human rights instruments sketch an outline of the common good across a range of human values, goods, and needs, including: life, liberty, security, equality, privacy, family life, property, religion, expression, association, and assembly. In legislating for the common good, the legislature should not be willing to ignore the interests of some persons or to sacrifice their vital needs and goods. The common good is that set of conditions that enable each and every member of the community to realise his or her wellbeing, both individually and cooperatively with others. Such an understanding rejects aggregative conceptions of the 'greater good', whereby the rights, needs, or goods of some persons can be outweighed by the interests of the rights, needs, or goods of some greater number of persons. Theories – like classical utilitarianism – that adopt an aggregative conception of the general welfare and that downplay or ignore the importance of rights should be rejected even as a provisional guide for legislative deliberation.

The legislature is capable of genuine, principled reasoning and its deliberations can and should be grounded in the most fundamental principles of practical reasoning. Counter-thesis 1 articulates a claim about legislative capacity, which methodologically is related to legislative *action*, all with a view to formulating the *nature* of the legislature, a nature articulated by reference to the *reasons favouring* legislatures in constitutional systems. We defend the claim that legislators are capable of joint, reasoned action. The rules that govern the law-making process are not designed to aggregate preferences, but to enable the legislature to deliberate and change the law for reasons. Theoretical accounts of the legislature and its role in relation to human rights misfire in assuming the sceptical thesis expressed in Thesis 1 rather than attending to the reasons for legislative action. Without holding in view an understanding of the legislature as capable of securing human rights, whole lines of constitutional inquiry are closed off from pursuit. Thesis 1 denies that the legislature can defend human rights. If, however, both courts and legislatures are in principle tasked with promoting rights, and in principle both have the institutional capacity to do so, then new philosophical questions take centre stage and new empirical studies present themselves. That is what we aim to establish in proposing and defending Counter-thesis 1.

A second thesis holds that the legislature, unlike the court, is institutionally biased towards majority interests and against minorities and is thus unfit to engage

in principled decision-making about human rights (Thesis 2). According to this thesis, the legislature functions well with regard to aggregating preferences (the task assigned to it by Thesis 1) and thus can be entrusted with certain decisions about expenditures, taxation, allocation of resources, and other broad matters of public policy. Basic features of its institutional structure, however, make the legislature systematically biased against minorities. Majority voting within the legislature, together with majority or plurality voting to elect representatives to the legislative chamber, condition law-making to attend to the interests of the majority of the electorate. Legislation can be presumptively justified on the grounds that it is an act of the majority; consequently, a judicially enforced bill of rights is needed to protect the rights and interests of minorities against legislative majorities that are actively prejudiced against them or that neglect their rights or interests because of a predisposition towards majority concerns.[13] Courts are well placed to protect minorities and their rights, in part because of their independence and counter-majoritarian role and in part because of the standing of even a single litigant to challenge decisions made by or with the approval of the majority. One strand of this approach locates the fundamental problem not in the legislature itself but in the democratic process that elects it and the public this empowers; for Den Otter, to take an example, judicial review is justified because we live in a world 'where the vast majority of citizens are either incapable of making informed, reflective decisions on basic questions of public morality or unwilling to make the effort to do so'.[14]

The most concentrated and influential expression of this theoretical approach is Dworkin's *dual-forum thesis* and his theory of rights as trump cards against the general welfare. In Dworkin's account, Thesis 2 (the legislature is biased towards majorities) is a necessary consequence of his stark version of Thesis 1 (the legislature aggregates individual preferences). The combination of these two theses requires that principled reasoning takes place in an institution outside the legislature. The division of labour between the two forums (court and legislature) corresponds to a distinction between the reasons and justification employed by each institution. Rights are a matter of principle – 'a requirement of justice or fairness or some other dimension of morality'[15] – and the special responsibility of courts; policies are goals to be reached – 'generally an improvement in some economic, political, or social feature of the community'[16] – and are the responsibility of the legislature. The legislative pursuit of policies is presumptively justified, subject to the power of courts to

[13] David Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (New York, NY: Oxford University Press, 2008) 175 captures this 'classical' thought this way: 'Legislatures, of course, are the quintessential voice of the majority and thus, speaking classically, it is their tyranny that the Bill of Rights was intended to block.'

[14] R Den Otter, *Judicial Review in an Age of Moral Pluralism* (Cambridge, Cambridge University Press 2012) 19.

[15] Dworkin, *Taking Rights Seriously* 22.

[16] Ibid.

trump such pursuits with the rights of individuals. Rights, on this view, are vindicated when courts uphold a claim of right against legislation pursuing the general welfare.

We reject this majoritarian conception of the legislature and argue that the legislature is not inherently biased against minorities and is fit to engage in principled decision-making about human rights (Counter-thesis 2). In any given vote, the majority of ayes or nays will win, but it is a conceptual mistake to think that this entails the existence of a 'majority' as a stable, unified, collective group that acts through time and transmits its preferences through the political process.[17] The mistake arises in part from misunderstanding the dynamics of a series of votes[18] and in part from overlooking the complexity of the voting public and the reasons for voting.[19] More fundamentally, however, this mode of analysis is not well suited to explain the way in which the legislature acts. That action is best understood by attending to the reasons of those who act, as they conceive them. From this internal point of view,[20] focusing on 'the majority' is a distraction. Legislators do not cast their votes because they count the 'majority's moral convictions about how others should live' as the ground for political decision.[21] The individual legislators whose votes, taken together, constitute the majority in favour of a legislative proposal support it because they reason that some matter requires legislative action. Reliance on majority voting procedures does not entail, as Dworkin suggests in his account of 'statistical democracy', 'that anything a majority or plurality wants is legitimate for that reason'.[22] Still less does it entail that each one of the members whose votes constitute the majority considers the fact that being in a majority is itself a legitimate, or even a relevant, reason for casting a vote to approve the proposed legislative measure. Understood from the point of view of legislators and their reasons for supporting or opposing a proposal, 'the majority' is not an unprincipled, unreasoning collective

[17] See John Finnis 'Human Rights and Their Enforcement' in *Human Rights and Common Good: Collected Essays, volume III* (Oxford, Oxford University Press 2011) 24–26. See also Jeremy Waldron's helpful distinction between the 'decisional' majority and minority (the ayes and nays) and the 'topical' majority and minority ('the majority and minority groups whose rights are at stake in the decision'): 'The Core of the Case Against Judicial Review' 1397.

[18] See GEM Anscombe, 'On Frustration of the Majority by Fulfilment of the Majority's Will' (1976) 36 *Analysis* 161.

[19] As Richard Bellamy observes, 'most legislation is not the product of a homogeneous majority imposing its will upon a constituent minority, but of a series of compromises brokered by winning coalitions of different minorities': *Political Constitutionalism* (Cambridge, Cambridge University Press 2007) 241.

[20] In *The Concept of Law*, HLA Hart showed that a full understanding of a legal system requires a theorist to give a central place to the internal point of view, this is, to the point of view of the person who sees law as a reason for action – not simply a brute command issued by an authority powerful enough to sanction noncompliance. Hart extended this internal focus in his notion of the 'conscientious legislator', who deliberates on the basis of his 'beliefs and values' and a 'sense of what is best' in law-making decisions. See *The Concept of Law* 273, 275.

[21] As is argued by Dworkin, *A Matter of Principle* 68.

[22] Dworkin, *Freedom's Law* (Cambridge, MA, Harvard University Press 1977) 364. See also Den Otter, *Judicial Review* 252.

and the fact that 'the majority' (of electors or of legislators) wants something is, we argue, itself no reason to favour it.

It is true and important that democratically elected legislative majorities sometimes fail to protect the rights of minorities and sometimes oppress them. It is also true and important that certain minorities (whether tribe, caste, aristocracy, oligarchy, prince, or other) have sometimes oppressed majorities or other minorities. Nothing in our argument denies that those with power will sometimes yield to the temptation to abuse it. Nor does anything in our argument require heroic assumptions that legislators always form their own view of the merits of a legislative proposal, and never favour a proposal for partisan advantage rather than for the common good. There are a number of ways in which legislatures and individual legislators can deviate from the central case and a great number of examples when they have done so. Lacking in historical support, however, is the broad claim that democratic legislatures are intrinsically biased against minorities. That claim, sometimes expressed, other times assumed, has been taken to justify an expansive supervisory role for courts. Debate over the institutional roles of legislatures and courts requires a sound understanding of the practices of both, with such understanding informed but not exhausted by a careful account of history. Such an account includes attention to how legislatures, governed by majority voting procedures, extend the positive law to protect the human rights of minority groups. Among some of the better-known examples are the abolition of first of the slave trade and later of slavery by the Westminster Parliament,[23] the prohibition of racial discrimination in employment in the US Civil Rights Act 1964 and the later extension of this to other groups (for example, with the US Americans with Disabilities Act 1991), and the US Voting Rights Act 1965.[24] Chapter 5 provides a detailed account of legislative and judicial involvement in the long campaign for racial equality. More fundamentally, the claim that democratic legislatures are inherently biased against minority interests mistakes an aberration for the central case, failing to understand that when the legislature commits injustice and violates human rights, it is departing from, *not fulfilling*, its responsibility to legislate for the common good. We do not deny the reality of past instances of legislation violating human rights, or of legislatures past and present whose members act not for sound reasons but as tools of a state or party politburo. But we deny that such legislation was or is a central case of legislative action. Misunderstandings of the legislature that begin with the sceptical views of Theses 1 and 2 culminate in Theses 3 and 4, which have, as we will see, the surprising upshot of conceiving of the legislature as an institution that fulfils its proper function precisely by *infringing* human rights.

[23] Slave Trade Act 1807 and Slavery Abolition Act 1833.

[24] For elaboration on this theme, see JD Heydon, 'Are Bills of Rights Necessary in Common Law Systems?' (2014) 130 *Law Quarterly Review* 392, esp 394–5.

The third thesis holds that the legislature regularly and permissibly acts in opposition to human rights, since it must infringe rights to achieve other aims for the sake of the public interest (Thesis 3). This thesis has taken hold in the jurisprudence of the European Court of Human Rights and the jurisprudence of many other European and Commonwealth courts.[25] It is a widely held assumption that human rights instruments not only set out to guarantee rights, but also authorise their infringement, subject to conditions. When confronted with a rights claim, the European Court typically begins its judgment by first determining whether a legislative measure has infringed a human right. If so, the Court proceeds to determine, at a second stage, whether there is a justification for the infringement. The second stage consists in the application of a proportionality analysis, which weighs the value of the aim and effects of the legislative measure against the burdens imposed on the rights claimant in order to evaluate whether the infringement is justified. The point of this exercise, with few exceptions, is not to interpret and to vindicate the priority of the right, or even to set defined limits, applicable in future cases, to how far the right can be infringed. Rather, the point of the exercise is to decide whether, in the immediate case, the public interest in the legislative measure outweighs the burden imposed on individual interests. European and Commonwealth jurisprudence regularly concludes that the public interest outweighs individual interests and therefore prevails over declared rights, with the consequence that the legally justified infringement of legally guaranteed rights is common. The presupposition of this judicial reasoning is that the legislature, perhaps very often, has a duty to infringe rights because not to infringe a right would be without justification: such infringement is 'necessary in a democratic community'.[26]

We reject the claim that the scope of the legislature's authority involves or extends to acting in opposition to human rights and argue to the contrary that sound legislation does not oppose human rights, but rather affirms the requirements of human rights, including by specifying the broad, goal-oriented standards included in human rights instruments into relatively precise legal form (Counter-thesis 3). The reasonable legislature does not set out to secure some public benefit either by deliberately infringing human rights or even by accepting such infringements as a side-effect. Legislation, in its central case, does not oppose rights; it is made for the community's

[25] For an overview of the case law approach of the European Court of Human Rights, see Grégoire Webber, *The Negotiable Constitution: On the limitation of rights* (Cambridge, Cambridge University Press 2009) ch 2 and Kai Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press 2012); for an overview of the case law approach of the Supreme Court of Canada, see Bradley W Miller, 'Justification and rights limitations' in Grant Huscroft (ed.), *Expounding the Constitution* (Cambridge, Cambridge University Press 2008). More generally, see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press 2012).

[26] This is the expression employed in the 'limitation clauses' of the European Convention, arts 8(2), 9(2), 10(2), 11(2). Similar expressions are to be found in other limitation clauses. See Webber, *Negotiable Constitution* 59–65.