1

Historical and Conceptual Background

1.1 Introduction

As indicated in the Preface, this book seeks to describe, explain, compare and contrast institutions, procedures, norms and policies for the protection of human rights in the CE and the EU, and to discuss core achievements, trends and challenges. The primary purpose of this chapter is to provide a brief historical overview of origins and principal milestones and to identify key conceptual frameworks to be explored in greater depth later.

But first we briefly need to consider what 'human rights' are, how, if at all, they might be distinguished from 'fundamental rights' and from other kinds of right, and what all this might imply for our purposes. Arguably the most basic distinction is between 'fundamental' rights, on the one hand, and all other 'less-fundamental' rights or 'non-fundamental' rights, on the other. But how the two categories can be demarcated, except by resorting to the circular criterion that the former is 'more fundamental' than the other, is not clear. One possibility would be to regard the category of 'fundamental rights' as an umbrella term embracing both individual human rights and some other kinds of fundamental right. However, finding a definition for these other fundamental rights which adequately identifies their key characteristics, source and rationale is not easy. By contrast, the concept of 'human rights' can be framed with greater precision. It expresses the notion that everyone possesses a set of individual entitlements, linked to the most fundamental aspects of our well-being, which recognise and give substance to our equal intrinsic worth, and which we possess independently of any other badge of difference, be it gender, race, nationality, religious or other belief, sexual orientation, ability/disability, etc.

These reflections have several implications for this study. First, if human rights are to be taken seriously, it follows that all legitimate legal and political systems, institutions and activities in the contemporary

world should embody a commitment to them in some shape or form. However, because human rights are universal does not mean they apply in all contexts in precisely the same ways or without restriction or exception. Being sentenced to imprisonment for an imprisonable offence on the basis of factual and legal guilt following conviction in a fair trial is, for example, a legitimate exception to the right to liberty, not a violation. And deriving every institutionally protected right or entitlement in a contemporary liberal democracy from a human right does not make it a human right itself. So, for example, rights arising from detailed rules of civil and criminal procedure are not strictly human rights themselves but, where properly conceived, can be traced to the human right to a fair trial.

It also follows that any right which derives from a specific feature of our identity in addition to our common humanity – for example, from gender, race, ethnicity, nationality etc – cannot, by definition, itself be a 'human' right. Strictly speaking there is, therefore, no such thing as 'women's human rights' or 'gay people's human rights', or 'disabled people's human rights' in the sense of special categories of human rights only applicable to people with these characteristics. However, while women, gay people, disabled people and minorities of various kinds have the same human rights as everyone else, disadvantaged groups may require additional rights to enable them to exercise their human rights as effectively as others. But these rights are 'facilitative rights', 'rights about', or 'rights deriving from' human rights and not, strictly speaking, human rights themselves.

Since human rights are, by definition, individual rights possessed by real flesh-and-blood human beings, the collective entitlements not equally and simultaneously capable of being held by individuals cannot be genuine *human* rights either. So, for example, a faith group may appropriately be regarded as a repository of the individual human right to freedom of thought, conscience and religion also simultaneously held by each of its members. However, interests such as national self-determination or national economic development, which can only be held collectively, may more accurately be regarded as fundamental group rights, but not human rights as such. Alternatively, they can be seen as preconditions for a flourishing system of individual civil, political, social, economic and cultural human rights.

As we shall see throughout this study, the analytical distinctions between 'human rights', 'fundamental rights' and 'rights about human rights' are not clearly drawn in the law and politics of the CE or EU. Indeed, the issue is further complicated by the fact that a third term,

'fundamental freedoms', is also employed in both contexts but means something different in each. For example, debates about the ECHR have been conducted almost entirely in the language of human rights, in spite of the fact that 'fundamental freedoms' feature in its full formal title – the Convention for the Protection of Human Rights and Fundamental Freedoms – suggesting that the distinction between the two terms might be more rhetorical than substantive. By contrast, until comparatively recently, the normative language of the EU was dominated by the four 'fundamental freedoms' integral to the effective functioning of the common market – free movement of capital, goods, services and people. The increasing interest the EU has shown in human rights in the past decade or so has, therefore, raised significant questions about how these concepts can be distinguished, not only for analytical, but also for dispute resolution and policy purposes.

1.2 Chronology

For three conflicting reasons Europe occupies a central and unique place in the history of the international protection of human rights. First, it was, together with the United States, the birthplace of the now-global processes of political, social, legal and economic modernisation which embody, amongst other things, liberalisation, democratisation, marketisation and internationalisation. Second, and paradoxically, it was also the site of the Holocaust and a crucial theatre for the twentieth century's two world wars, which together constituted, or precipitated, the most systematic and serious violations of human rights the world has ever seen. Third, it was also the crucible of the Cold War at the heart of which lay a bitter ideological conflict over the profile of individual rights in social, political and economic systems. In the second half of the twentieth century, this heritage not only inspired and laid the foundations for international human rights law itself, it also led to increasing convergence in European political, constitutional, legal and economic systems around a 'common institutional model' formally defined by the values of democracy, human rights, the rule of law and the democratically regulated market. These processes now operate on three principal and overlapping dimensions: individual European states, the CE and the EU.

However, several other international institutions with a human rights brief, including the United Nations (UN), are also active across the continent. One of the most prominent is the fifty-seven-member

Organisation for Security and Cooperation in Europe (OSCE),[1] the largest regional security organisation in the world, with participating states from Europe, Central Asia and North America, which takes politically, but not legally, binding decisions on a consensual basis. The OSCE was established in December 1994 as a more permanent post–Cold War version of the Conference on Security and Cooperation in Europe (CSCE), created in the early 1970s as an ad hoc multilateral forum for dialogue and negotiation between East and West during the thaw in the Cold War known as détente. Its main achievements were the Helsinki Final Act, signed on 1 August 1975 – which contained several key commitments on political, military, economic, environmental and human rights issues, central to the so-called Helsinki process – and the Decalogue, ten fundamental rights principles governing the behaviour of states towards each other and their own citizens.

At its inception the OSCE was intended to assist in the management of the post–Cold War transition in Europe. But today its main functions cover the three core 'dimensions' of security: the politico-military; the economic and environmental; and the human. Within these fields the OSCE's activities range across traditional security issues such as conflict prevention and arms control, to fostering economic development, ensuring the sustainable use of natural resources and promoting full respect for human rights and fundamental freedoms, particularly in the fields of freedom of assembly and association, the right to liberty and fair trial and the death penalty. Its four specialist human rights–related agencies are the Office for Democratic Institutions and Human rights (ODIHR), active in election observation, democratic development and the promotion of human rights, tolerance, non-discrimination and the rule of law; the Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, which supports the development and implementation of anti-trafficking policies; the OSCE Representative on Freedom of the Media, who provides early warning on violations of freedom of expression and promotes full compliance with OSCE press freedom commitments; and the High Commissioner on National Minorities, who seeks to identify and to resolve ethnic tensions which might endanger peace, stability, or friendly relations between participating states.

[1] D. Galbreath, *The Organization for Security and Co-Operation in Europe* (London: Routledge, 2007).

However, only the CE and EU have trans-national legislative and/or judicial functions, without which the dynamic development of a distinctive European human rights law is not possible. Three broad, and to a certain extent overlapping phases can be distinguished in their partly separate, partly shared, histories: origins, institutionalisation and consolidation, 1945–mid-1970s; development and enlargement, mid-1970s–late 1990s; and crisis management, 2000–16. These are considered in turn.

Origins and Institutionalisation: 1945–Mid-1970s

When the Second World War ended in 1945, one question reverberated around the globe: how could such a catastrophe be prevented from recurring? It was clear that the constitutional, political and legal systems of some European countries had not effectively curbed the ambitions of political movements offering authoritarian answers to economic and political questions and military solutions to territorial disputes. The way forward for many western democrats, therefore, seemed to lie in the firmer national entrenchment of constitutional democracy, human rights and the rule of law, including their protection in much more effective international institutions than had yet been seen. There was, however, little enthusiasm for a return to the system for the protection of national minorities in Europe in the inter-war years which had involved collective complaints to the League of Nations. It had, after all, been a double failure. Not only had it proved ineffective for minorities, it had exacerbated the drift to war by intensifying the territorial squabbles between 'kin-states' and the host-states in which national minorities found themselves.[2] And the displacement of millions during the Second World War complicated these issues even further. The protection of individual rights, therefore, appeared to offer a more attractive solution.

However, the attempt to institutionalise human rights at the global level proved frustratingly slow. Indeed, it was only as a result of successful lobbying by NGOs attending the San Francisco conference which established the UN in the summer of 1945, that the UN Charter contained so many references to human rights. Three years later the UN approved the Universal Declaration of Human Rights, the significance of which has divided commentators. Some regard it as a watershed because, for the first time, representatives of western and some

[2] J. Jackson Preece, *National Minorities and the European Nation-States System* (Oxford: Clarendon Press, 1998), ch. 5.

non-western civilizations together produced a list of fundamental civil, political, social, economic and cultural rights going far beyond those the social contract and Enlightenment thinkers had regarded as natural.[3] However, for others, the Declaration's aspirational character, and its lack of enforcement machinery, made it virtually worthless.[4] Debate about two further UN human rights treaties – one on civil and political rights and the other on economic, social and cultural rights – was to last for another two decades and a further ten years would elapse before either came into force. This slow rate of progress added momentum to the campaign for a pan-European human rights regime.[5] European states were not, however, to be the sole masters of their own destiny. The defeated powers were obviously in no position to argue. But even the victors were constrained by the conflicting interests of the USA and the USSR. By 1948 it had become clear that Germany would be partitioned, that the USSR would dominate eastern and central Europe, and that the USA regarded an integrated western Europe as a constraint upon the spread of communism, the territorial expansion of the Soviet Union, and resurgent German nationalism.[6]

However, there were differing views about what kind of new arrangements western Europe should have. In a celebrated speech at the University of Zurich in September 1946 former British Prime Minister Winston Churchill advocated a 'United States of Europe', a view greatly welcomed by 'federalists' who wanted full economic integration, regulated by supranational institutions, resulting in the pooling of state sovereignty. Others, the 'intergovernmentalists', favoured a looser set of intergovernmental institutions devoted to cooperation over issues arising in the spheres of politics, defence, the rule of law, human rights and democracy, which

[3] M. A. Glendon, 'Knowing the Universal Declaration of Human Rights', *Notre Dame Law Review*, 73 (1998), 1153–90, 1176.

[4] A. W. B. Simpson, 'Hersch Lauterpacht and the Genesis of the Age of Human Rights', *Law Quarterly Review*, 120 (2004), 49–80, 74, 56, 62, 68, 72, 79.

[5] According to Simpson the idea of a regional human rights treaty first appeared in a British Foreign Office minute of June 1948, A. W. B. Simpson, 'Britain and the European Convention', *Cornell International Law Journal*, 34 (2001), 523–54, 540.

[6] See K. Sikkink, 'The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe' in J. Goldstein and R. O. Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (New York: Cornell University Press, 1993), pp. 139–70; A. H. Robertson, *The Council of Europe: Its Structure, Functions and Achievements* (London: Stevens & Sons, 2nd edn., 1961), p. 6; G. Lundestad, *'Empire' by Integration: The United States and European Integration, 1945–1997* (Oxford University Press, 1998), p. 13.

would preserve the traditional conception of independent nation states. The government of the United Kingdom, the only state capable of exercising significant leadership in Europe in the immediate post-war years, preferred the latter: intergovernmental arrangements based on an anti-Soviet western military alliance plus a western European organisation with largely ideological and symbolic functions. In a key speech to the House of Commons, on 22 January 1948, the British Foreign Secretary, Ernest Bevin, stated that a western European 'spiritual union', founded on respect for human rights, had become the prime aim of British foreign policy.[7] This vision, though vague on details, was to be implemented in three stages. First, in March 1948, the United Kingdom, France and the Benelux countries signed the Brussels Treaty for Economic, Social and Cultural Collaboration and Collective Self-Defence, laying the foundations for what later became the Western European Union. A Consultative Council was included and, although primarily a pact for economic, social, cultural and defence cooperation, respect for human rights became a condition of membership. Second, a wider military alliance including the United States and Canada – the North Atlantic Treaty Organisation 1949 ('NATO') – provided firmer military guarantees. Third, it was envisaged that other European countries, including West Germany, would eventually sign the Brussels Treaty when they were in a position to comply with the membership requirements, particularly respect for human rights.

However other ideas were in the air.[8] In May 1948 a Congress of Europe, sponsored by the right-of-centre international Committee of the Movements for European Unity, and attended by some 660 delegates including twenty prime ministers and former prime ministers, met in the Hague. In a keynote speech elaborating on what he had said in Zurich two years earlier, the Honorary President Winston Churchill, argued that a European Charter of Human Rights should be at the

[7] A. W. B. Simpson, *Human Rights and the End of Empire – Britain and the Genesis of the European Convention* (Oxford University Press, 2001), pp. 574–9. These ideas had already been discussed with the US Secretary of State, George Marshall, and the French Foreign Minister, George Bidault, at secret meetings in the Foreign Office on 17–18 December, K. Morgan, *Labour in Power* (Oxford: Clarendon Press, 1984), pp. 273, 274.

[8] For a fuller account of the debate in the 1940s see E. Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010), ch. 3; J. Petaux, *Democracy and Human Rights for Europe: The Council of Europe's Contribution* (Strasbourg; Council of Europe Publications, 2009), pp. 31–63.

centre of a new programme of European unification.[9] Delegates also proposed a European Parliamentary Assembly and an individual petition process for the judicial enforcement of the Charter. The British Labour government, which had not sent a delegation, opposed both ideas on the grounds that such an assembly would provide an unwelcome platform for communists, while a court of human rights would create an equally unwelcome judicial authority superior to any British tribunal.[10] In October 1948, the various strands of European integrationism were woven into the European Movement, which continued to develop proposals including for a European Assembly selected by national parliaments which could discuss a wide range of issues, including human rights.[11]

The Council of Europe

As 1948 drew to a close, the governments of the United Kingdom, France and Belgium agreed to create a Council of Europe on an intergovernmental rather than integrationist model and invited Ireland, Italy, Denmark, Norway and Sweden to participate in the negotiations. Luxembourg and the Netherlands also became founding members. In 1949 Greece joined, followed, in the 1950s, by four other states – Turkey (1950), Germany (1950), Iceland (1950) and Austria (1956) – and a further three in the 1960s – Cyprus (1961), Switzerland (1963) and Malta (1965). Established by the Treaty of London on 5 May 1949, the CE had four principal objectives: to contribute to the prevention of another war between western European states, to provide a statement of common values contrasting sharply with Soviet-style communism (as expressed by the mostly civil and political rights subsequently contained in the ECHR), to re-enforce a sense of common identity and purpose should the Cold War degenerate into active armed conflict and to establish an early warning device by which a drift towards authoritarianism, including communism, in any member state could be detected and addressed by complaints from states against each other to an independent transnational judicial tribunal in Strasbourg. And even this 'early warning' function was also inextricably linked to the prevention of war because the slide towards the Second World War indicated that the rise of

[9] Simpson, 'Britain and European Convention', 543, claims that it is unlikely that Churchill ever envisaged a federation which would have included the United Kingdom.
[10] Simpson, *Human Rights and the End of Empire*, pp. 619, 612.
[11] *Ibid.*, p. 629.

authoritarian regimes in Europe made the peace and security of the continent more precarious.[12]

Drafted largely by the British Foreign Office, six core principles are found in the CE's Statute. Certain unspecified 'spiritual and moral values' – 'the cumulative influence of Greek philosophy, Roman law, the Western Christian Church, the humanism of the Renaissance and the French Revolution'[13] – are said to constitute the 'common heritage' of the signatory states (the 'common heritage' principle) and to be the true source of 'individual freedom, political liberty and the rule of law' (the 'human rights' and 'rule of law' principles). These form the 'basis of all genuine democracy' (the 'democracy' principle). The promotion of these principles, and the interests of 'economic and social progress' (the principle of 'economic and social progress'), is said to require closer unity between like-minded European countries (the 'closer unity' principle). Similar ideas can be found in the Brussels and NATO Treaties.[14] And while the CE was not the only western European organisation to make adherence to the principles of human rights and the rule of law conditions of membership,[15] at the time it was unique in seeking to identify the human rights in question in a further treaty (the ECHR), in providing means for their enforcement and in promoting 'closer unity' amongst its members.

The exclusion of defence issues from the CE's remit is deliberate and understandable since these objectives were already well covered by the Brussels and NATO treaties.[16] However, curiously, Article 1 of the Statute of the CE says nothing specific about 'political' questions, possibly on the assumption that these are already entailed by the reference to social and economic issues.[17] Other provisions of the Statute deal with the establishment of the Council's principal organs – the Committee of Ministers (CM, the foreign ministers of member states), the Secretariat (the administration) and the Consultative, later Parliamentary, Assembly (a non-legislative body appointed by the legislatures of member states) – the official languages (French and English), membership (by invitation of the CM), the location (Strasbourg), financial matters, privileges and immunities (including those of representatives of member states) and arrangements for amendment, ratification and other formalities.

[12] S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, 2006), ch. 1.
[13] Robertson, *Council of Europe*, p. 2.
[14] *Ibid.*, p. 13.
[15] Art. 3, Statute of the Council of Europe.
[16] Art. 1 (d).
[17] Robertson, *Council of Europe*, p. 16.

By the end of the 1950s the CE had also entered into mostly informal relations with the UN and other international organisations, including the European Communities, which largely sought to affirm shared goals and values and to exchange information and expertise.[18] In addition to an expanded membership, by the end of the 1960s, seventy-five treaties and protocols, on topics as diverse as social security schemes and the payment of scholarships to students studying abroad, had been concluded. Apart from the ECHR, the most significant in the human rights field was the European Social Charter 1961 (considered more fully in Chapter 2), which provides a range of social and economic rights to such things as housing, health, education and work, but, unlike the ECHR, has no judicial or individual applications processes.

The European Convention on Human Rights

Simpson maintains that the ECHR was the product of 'conflicts, compromise and happenstance' and there are no simple explanations, either for what it is or why it came into being.[19] The discussions out of which it emerged were inevitably influenced by the intellectual and political debates in the West about rights which had been in progress since the early modern period. But they were also overwhelmingly driven by the need to find workable institutions and procedures which all parties could accept. By October 1949 the British government had concluded that a European human rights convention was urgently required – partly to remedy the lack of progress at the UN – and also because the United Kingdom was now convinced that the CE had become 'one of the major weapons of the cold war'.[20] Having embarked on this course of action, the political pressure to avoid failure was enormous since it was unlikely the CE would survive the acrimonious collapse of its first substantial project.[21]

[18] S. Schmahl, 'The Council of Europe within the System of International Organizations' in S. Schmahl and M. Breuer (eds.), *The Council of Europe: Its Law and Policies* (Oxford University Press, 2017), pp. 874–945.

[19] Simpson, *Human Rights*, p. ix. Other literature on the background to the Convention includes, G. Marston, 'The United Kingdom's Part in the Preparation of the European Convention on Human Rights 1950', *International and Comparative Law Quarterly*, 42 (1993), 796–826; Simpson, 'Britain and European Convention'; E. Wicks, 'The United Kingdom Government's Perceptions of the European Convention on Human Rights at the Time of Entry', *Public Law,* [2000], 438–55; D. Nicol, 'Original Intent and the European Convention on Human Rights', *Public Law*, [2005], 152–72.

[20] Simpson, *Human Rights*, p. 684.

[21] Marston, 'UK's Part in ECHR'; Simpson, *Human Rights*, 686; Wicks, 'UK's Perceptions of ECHR'.