Human rights fundamentalism according to Nigel Biggar

El fundamentalismo de los derechos humanos según Nigel Biggar

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Recibido: 27/06/2025 | Aceptado: 22/10/2025 | Publicado: 27/10/2025

Abstract. A provocative book by Nigel Biggar has recently called into question conventional wisdom about human rights in general. According to Biggar, this conventional wisdom is an expression of what he calls "human rights fundamentalism", namely, the belief that all of the items included in international human rights treaties are equally important, feasible, and non-context-dependent. In this paper, I expose Biggar's criticism of conventional human rights theories and adjudication, I show how some of the retorts made by critics of his views are unsatisfactory, and I will show how a recent decision of the European Court of Human Rights exemplifies human rights fundamentalism as denounced by Biggar, thus giving further empirical confirmation to his thesis.

Keywords. Nigel Biggar; human rights; human rights fundamentalism; judicial activism

Resumen. Un provocador libro de Nigel Biggar ha puesto recientemente en tela de juicio la sabiduría convencional sobre los derechos humanos en general. Según Biggar, esta sabiduría convencional es una expresión de lo que él denomina "fundamentalismo de los derechos humanos", a saber, la creencia de que todos los items incluidos en los tratados internacionales de derechos humanos son igualmente importantes, realizables y no dependientes del contexto. En este artículo, expongo la crítica de Biggar a las teorías convencionales y a la adjudicación de los derechos humanos, muestro cómo algunas de las réplicas hechas por los críticos de sus puntos de vista son insatisfactorias, y mostraré cómo una decisión reciente del Tribunal Europeo de Derechos Humanos ejemplifica

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el fundamentalismo de los derechos humanos denunciado por Biggar, dando así una confirmación empírica adicional a su tesis.

Palabras clave. Nigel Biggar; derechos humanos; fundamentalismo de los derechos humanos; activismo judicial

1. Introduction

Human rights are widely considered the most important normative standard in current political and legal practice. Despite this, there have been many philosophical critiques both of the very concept of rights[1] and of the abuse of rights language[2]. The latter criticism does not necessarily deny the existence of rights, but only questions the usefulness of rights talk. An example thereof is the criticism of the so-called "proliferation" of rights. Moreover, an excellent book by Eric Posner (2014) has called into question, from an empirical point of view, the very usefulness of signing human rights treaties for ameliorating life conditions in general. Posner's provocative conclusion is that, whatever their normative cogency, formal recognition of human rights by states does not cause any of the purported improvements in living conditions that this recognition was supposed to cause. Economic growth, on the other hand, does. Therefore, Posner's skepticism concerns not the rationality of the concept of human rights, but their causal power in improving human well-being.

A interesting and timely book by Nigel Biggar (2020) has recently appeared in this philosophical genre[3]. At first sight, it is difficult to classify in any of the former groups, since, at times, it does not seem clear what exactly Biggar is criticizing –whether human rights themselves, the abuse of their language, or the use that they have been put to[4]. In

[1] For instance, Villey (2014), and his followers like John Milbank (2012). The first one was probably that of Bentham (2001). Contrary to much misperception, Burke's criticism, on the other hand, was directed mainly against the political philosophy underlying the French Declaration of Rights of Man and of the Citizen, and not against the idea of natural rights themselves.

[2] A classic one is Glendon (1991).

[3] I have more briefly expounded Biggar's criticism of rights/rights talk in Isler Soto (2022, pp. 156-165) while discussing contemporary Anglican thought about human rights. This paper is a much more extended discussion of Biggar's position.

[4] A fact expressed by John Witte in his critical review of the book: "It's also not clear to me what rights ultimately concern Biggar. His criticisms of 'universal', 'natural', and 'absolute' rights claims sometimes spills over into criticisms of public, private, penal, and procedural rights altogether" (Witte, 2021).

Indeed, Biggar's book can be understood also as a criticism of belief in natural rights themselves, and in this aspect, it seems much less convincing, as will be said in the conclusion. John Milbank has aptly expressed this impression when he says that "Biggar denies that any rights can be natural, on the double ground that none of them are without exception and that they are not always enforceable" (Milbank, 2021). A further reason for Biggar's disbelief in natural rights is that he considers that a right has to be something stable and secure, and his paradigm of rights is therefore a legal right. He is consequently suspicious of the whole category of moral rights, even though he is firmly committed to moral realism. He summarizes his overall position thus: "I am unequivocal in affirming that God-given, created natural morality, which

this sense, it must be acknowledged that Biggar's book is at times confusing and invites some of the criticisms subsequently made thereof. However, after a careful reading, one can see that what Biggar mainly opposes and fiercely criticizes is "human rights fundamentalism" as espoused by some activists, judges, NGOs, and lawyers. So, even though he says that "in many respects I am a rights-sceptic" (Biggar, 2020, p. 313), he does not deny the very validity of the category of subjective rights, as Michel Villey had done, nor does he claim that this category is inextricably linked with egoism or individualism. Consequently, he can also say that "There is much that is right with rights" (Biggar, 2020, p. 324). Human rights fundamentalism, the main target of the book, is the belief that all the rights currently enshrined in international treaties are equally universal, non-forfeitable, non-dependent on political, social or economic contingencies, and that they should be applied whatever the consequences for the real world. This conception of human rights is the one espoused by many recent decisions of national and international courts that, moreover, have dared to create new rights, without any textual basis in the texts they are interpreting. The courts justify this procedure by arguing that the new rights are somehow "implied" by others. This has affected very important political goods like the separation of powers (*the* key element of the Rule of Law), democracy, or national security. This book can therefore also be seen as a subsequent criticism of judicial activism. Judicial activism is a phenomenon analytically distinct from human rights fundamentalism, since judges can exceed their constitutional limits and impose their political agenda not only in the name of human rights, but also in the name of any other normative concept (Common law, *ius cogens,* or whatever), but it is quite clear that *contemporary* judicial activism has been made mainly in the name of human rights.

In this paper, I will expound Biggar's criticism of human rights fundamentalism, understood especially as a cultural criticism of the rhetoric of human rights as found in international treaties (I) and of their adjudication by courts (II). In section III, I will briefly review some responses to Biggar's criticism, I will show how these responses miss Biggar's main arguments, and are sometimes themselves an expression of the human rights fundamentalism denounced by Biggar. In section IV, I will show how the vices exposed by Biggar can be found in a recent decision of the European Court of Human

trascends human cultures, asserts universal human dignity, makes certain kinds of action always and everywhere immoral, and provides the framework for determining what is just. It even obliges the granting of some legal rights always and everywhere, and it justifies the granting of others as circumstances permit. But what it should be thought to do, in my view, is generate natural rights" (Biggar, 2021a, 430).

I will focus in this paper on his criticism of human rights fundamentalism, which I do not conflate with belief in natural rights themselves, if properly understood, as will be stated in the final remarks. As Stewart Claim expresses, "*What's Wrong with Rights?* contains far more complex ideas and arguments than can be adequately addressed in a brief analysis. It will be more fruitful, I think, to engage one idea deeply than to engage several ideas in a cursory fashion" (Clem, 2021, p. 409). In this paper, therefore, it is only expounded his thesis that there is a human rights fundamentalism, and it is shown that a recent decision of the European Court of Human Rights gives good evidence for that thesis.

Rights, giving thus credibility to his thesis that there is a human rights fundamentalism. I finish this paper with some personal reflections on the issue.

Before proceeding to the expounding of Biggar's criticism of human rights fundamentalism, it is important to make some clarifications: First, a feature of Biggar's book that makes it difficult to summarize his overall argument is that it takes mainly the form of a historical exposition of natural or human rights theories and of their criticisms, followed by his own comments on the topic. So, he discusses the work of classical and contemporary defenders of the idea of human rights, like John Finnis, John Tasioulas, Nicholas Wolstertorff, and James Griffin, among others, all of whose arguments regarding the existence of universal non-tautological rights he finds unconvincing. For the sake of brevity and clarity, I will concentrate only on his analysis of rights talk as expressed in international treaties, organizations, and courts. His criticism of contemporary philosophy of human rights will be discussed tangentially, and only when important for the aforementioned discussion.

Secondly, If I were to summarize Biggar's view on rights, I would say that his starting normative point is an idea expounded by David Ritchie, a philosopher whose work has been rescued from oblivion by Biggar himself. When critically commenting on natural rights theories, Ritchie had asserted, in a passage that Biggar quotes more extensively, that "whoever appeals to an abstract justice that is incompatible with the continuance of orderly social organisation is... talking nonsense –and mischievous, too" (Ritchie, 1903, p. 106). It seems to me that this idea –namely, that if the application of any normative standard would render social life impossible, then that standard must be simply discarded– is what underlies much of Biggar's criticisms of the current use of rights and rights language.

Once we have made the previous clarifications, it is possible to expose his criticism of human rights, at least as they are expressed by modern declarations and treaties and talked of in political and legal discourse.

2. Biggar's criticism of human rights fundamentalism

Biggar's general opinion about the items included in current human rights treaties is the following: "Some of these purported rights are too indefinite or too absolute to be plausible or useful; others are too specific to be natural (in the sense of universal or absolute, applying always and everywhere); and yet others are truistic or merely aspirational" (Biggar, 2020, p. 71).

Let us begin with this last group of putative human rights: some are "merely aspirational." What is meant here, of course, are the so-called "welfare," "economic," or "social" rights. To justify their inclusion in modern catalogs, it is normally adduced that they satisfy human "needs." After all, who would deny that one needs, and may badly need, food or

shelter? But Biggar says that it is illicit to deduce rights from needs[5]. One must take into consideration not only available resources but also whether there is a determinate bearer of the corresponding obligation. And this determinate bearer in the case of social rights simply does not exist. Consider the purported right "of everyone to be free from hunger" (International Covenant on Economic, Social and Cultural Rights [hereater, "ICESCR"], art. 11.2). Biggar rightly points out that "This makes sense only on the assumption either that every state has the resources to preserve its people from hunger or that other states or non-governmental bodies have the resources, together with the obligation, to do so instead" (Biggar, 2020, p. 70). Even supposing that every state had such resources, each state also has other obligations. "No state is subject to a single, overriding obligation in all circumstances" (ibid). It is true that sometimes these very same treaties give the impression that these purported rights are merely "aspirational," but even so, it may be legitimately doubted whether these aspirations are feasible at all. Consider, for instance, the right to work as declared in the ICESCR, which includes "technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual" (ICESCR, 6.2), or the right to "the enjoyment of the highest attainable standard of physical and mental health" (ICESCR, 12.1). Biggar sharply comments, "These are indeed tall orders on the Bank of

[5] Biggar only mentions the idea that the satisfaction of some needs may be empirically impossible. His main objection is that these pretended universal rights demand an impossible state of affairs. However, a much stronger objection against them can be made: that it is *logically* illicit to deduce rights from needs, since there is more in the concept of "right" than in that of "need". This point was made by MacIntyre, when criticizing Alan Gewirth's justification of human rights claims in general: "the claim that I have a right to do or have something is a quite different type of claim from the claim that I need or want or will be benefited by something. From the first –if it is the only relevant consideration– it follows that others ought not to interfere with my attempts to do or have whatever it is, whether it is for my own good or not. From the second it does not" (MacIntyre, 1984, p. 67).

The empirical impossibility is also at the basis of Biggar's defense of the classical distinction and preeminence of negative rights over positive rights. Even though he denies the existence of *any* absolute right, he says that negative rights clearly are better candidates for the title of human rights than positive ones. Criticizing Henry Shue's assertion that the protection of negative rights also requires resources (the right to a fair trial can't be warranted without such resources), Biggar answers that, indeed, there are two essential differences between both types of rights: first, negative duties are "generally feasible, since everyone generally has the power not to act" (Biggar, 2020, p. 97), while positive duties "cannot exist without specifying a competent duty bearer" (Biggar, 2020, p. 97). Secondly, even if is true that full protection of negative rights may demand resources from the state (the state has the duty not only not to kill its subjects –a negative one–, but also to protect them from reciprocal aggression –a positive one–), there is still an essential difference between this last "positive duty" and the ones that are counterparts of the purported positive rights: even if there were a state with no resources, it would be at lest conceptually possible for the state, or whatever actor, to protect the right to life simply appealing to virtue –*thou shall not kill*–, while "no amount of humanitarian virtue can conjure food out of thin air" (Biggar, 2020, p. 99). So, even if full protection of the right not to be tortured requires a state with resources to protect us from torture, in case such a state does not exist or does not have enough resources, "it is still generally possible for the right to claim the dutiful restraint of any person" (Biggar, 2020, p. 99).

It is worth noting that Biggar also calls "rights-fundamentalists" those who claim that "the urgency of the human interest alone is sufficient to generate a right" (Biggar, 2020, p. 101).

Providence" (Biggar, 2020, p. 71). Similarly, there is no universal, moral right of children to education if we conceive education as formal schooling since that purported right "presupposes a functioning state with sufficient resources to perform the duty entailed by this right" (Biggar, 2020, p. 97, n. 15).

Other purported human rights can be dismissed on the grounds that they are not universal, that is, that they fail to obtain always and everywhere, like the purported human right to "periodic holidays with pays" (ICESCR, 7, d).

Even if we consider political rights, Biggar considers some treaties simply "imprudent". From an unobjectionable right "to take part in the government of his country, directly or through freely chosen representatives", the Universal Declaration of Human Rights (hereafter, "UDHR") and the International Covenant on Civil and Political Rights (hereafter, "ICCPR") deduce a much more specific right to universal suffrage whose unconditional recognition always and everywhere would lead to catastrophic consequences, as shown in the cases of Iraq and Afghanistan. This further universal recognition of a Western-style universal right to suffrage is simply "democratic overreach" (Biggar, 2020, p. 69). On the other side, the unobjectionable right to political participation is too abstract to be useful in guiding action.

Furthermore, even if some rights asserted by international covenants may be rendered more plausible by being made conditional, they then cease to be natural, namely, obtaining always and everywhere, and become mere legal rights, obtaining only under certain conditions (see Biggar, 2020, pp. 71-72). For instance, the ICCPR and ICESCR limit the scope of some rights by normative standards like "public safety," "order," "health," "reputation of others," "national security", and so on, and sometimes also demand that this limit may be determined "by law," and even permit states to suspend some rights –with some exceptions– in emergency cases. Rights so conditionally affirmed are doubtful candidates for the title of "natural" or "human rights", though they may be "conditional positive rights justified by natural morality" (Biggar, 2020, p. 72). Or, as he says elsewhere, "At the end of a process of moral deliberation, natural morality might authorise the granting of a legal right in a particular set of political, social, cultural, and economic circumstances. Such a right will be the conclusion, not the premise, of ethical deliberation" (Biggar, 2020, p. 325).

But, one could argue, what about some rights that seem much more universal and seem to exclude any kind of compromise or condition? For instance, the right against torture or cruel, inhuman, or degrading treatment or punishment. This is one of the rights that the ICCPR explicitly says can't be suspended, not even in times of emergency. Biggar claims that there is no intrinsic immorality in an act of deliberate infliction of pain (see Biggar, 2020, p. 170), even if the pain is intended and not a mere side effect. For instance, "I cannot see anything morally wrong *as such* with deliberately causing pain to a mugger by pushing his arm up his back, in order to get him to release a stolen wallet" (Biggar, 2020, p. 181), or with the deliberate infliction of pain that any form of punishment involves. Biggar expounds and discusses in extension attempts by moral philosophers

like Jeremy Waldron, Jean Porter, and Henry Shue to conclude that torture is intrinsically evil and finds all of them unconvincing (see Biggar, 2020, pp. 167-184).

If, then, there is no intrinsic evilness in the imposition of pain, one can only argue against interrogational torture in the case of the so-called ticking time bomb scenario on the basis of efficacy, proportion, ulterior consequences on the character of interrogators and society in general, and so on, but then the conclusions will always be contingent. Biggar claims that all of these reasons may be sufficient to justify a *legal* right against all form of deliberate infliction of pain for the purpose of gaining information (as international treaties proclaim) but, while this legal right should be absolute, "The reason for this second kind of absoluteness, however, is prudential" (Biggar, 2020, p. 188). Therefore, says Biggar, "There is, therefore, at least one absolute legal right" (p. 189), namely, against the deliberate non-consensual infliction of pain, even if this right is absolute only because of prudential reasons. However, since the absoluteness based on prudence is not as strong as one based on intrinsic immorality, an extraordinary case could occur where the deliberate infliction of pain for the purpose of gaining information may be morally justified and, in that case, a public official might be morally right in violating this positive right. Biggar does not take a position regarding the further legal consequences for that official.

Now, to continue speaking about putative absolute rights, what about the right to life? Well, we all know that every state permits killing under certain conditions, for instance, in self-defense. But, argues Biggar, one could construe this right as John Finnis does, namely, as the counterpart of an absolute obligation never to do an action that in itself intends to kill. Self-defense and waging war, according to Finnis, may be explained as legitimate actions since those who engage in self-defense or in a just war do not –or do not necessarily– intend to kill. The death of the attacker, even if foreseen as necessary, may fall outside the intention of the defender, whose intention is directed only to the preservation of his own life. Is the right to life, so construed, absolute, "applying always and everywhere"?

Biggar does not think so. He claims that it is always illicit to intend the death of someone for its own sake, but not necessarily if it is intended for some ulterior end. He claims that, for instance, capital punishment may be licit if it is completely impossible for a state to incarcerate a criminal who continues to pose a lethal threat.

Biggar accepts that there may be some putative rights that can obtain always and everywhere, but they are so abstract that they do not serve to guide action. When commenting on John Finnis's claim that there is a right "to be taken into respectful consideration in any assessment of what the common good requires", Biggar says, "while this absolute natural, moral right is plausible, it is so only because it operates at a very high level of generality, one that is too abstract to be practically illuminating" (Biggar 2020, p. 90). True natural or human rights, namely, rights that have the features that their supporters ascribe to them (universality, inalienability, and so on) should be "non-tautologous, practically illuminating..."

rights, that "transcending variable social circumstances, are absolute, applying always and everywhere" (Biggar, 2020, p. 92). There are no such rights.

Biggar's conclusion regarding theories of natural rights is that

> There is natural right or law or morality, that is, a set of moral principles that are given in and with the nature of reality, specifically the nature of human flourishing. There are also positive legal rights that are, or would be, justified by natural morality. But there are no natural rights. (Biggar, 2020, p. 131)

That means that Biggar acknowledges that natural morality may require the institution of some particular legal right in some circumstances. But this legal right would or should be established only if these circumstances obtained. That is why it cannot be called a "natural" right. Real natural rights, obtaining always and everywhere, are so abstract as to be of no help in guiding action.

He applies this conclusion to human rights as declared by international treaties too. Even if they omit the phrase "natural rights", these treaties proclaim rights which, in substance, are putative natural rights, namely, rights that one purportedly has only because of being a human being. Consequently, the previous criticism applies in full: either these rights are too contingent on particular circumstances, or they are illusory, too abstract to be practically illuminating, or tautologous. But, Biggar acknowledges, there are "morally justified legal" rights (Biggar, 2020, p. 129), a logically and empirically unobjectionable concept. In some countries, for instance, there may be a morally justified legal right to vote. In other countries, the very abstract right to political participation may take the form of another morally justified legal right. Similarly, there may be a morally justified legal right to keep arms under certain conditions. Likewise, there may be morally justified legal rights that hold on most occasions, like the right to free speech, but, again, they never hold always and everywhere. Even if holding most of the time, they are still context-dependent. In brief, "exactly what legal rights, and what degree of security, are morally justified depend upon what is possible and prudent in the prevailing circumstances" (Biggar, 2020, p. 126).

Furthermore, even if we conclude that some rights hold always and everywhere, there is still the further question of whether they should be immediately institutionally recognized. As was seen in the case of political rights, Biggar claims that, here, conditions matter a lot: "When the loss of stability would amount to anarchy, in which nothing human can flourish, a government could be justified in suspending certain destabilising rights or in refusing to assert them in the first place. Sometimes, a trade-off between stability and rights can be morally justified" (Biggar, 2020, p. 203). At times, there is a need to make a "compromise between human rights and political reality" (Biggar, 2020, p. 206). For instance, says Biggar, "The standard rights to due process are maximally safe means of ensuring fairness. But in certain social, economic, and political contexts, the adoption of less safe means may be morally justified" (Biggar, 2020, p. 211). That means, in the end, that, notwithstanding

much rhetoric to the contrary, "post-1945 'human rights' declarations, covenants and conventions... are not universally appropriate" (Biggar, 2020, p. 218).

3. Criticism of human rights adjudication

It was mentioned that many of the rights asserted in international treaties are so abstractly expressed that they are practically non-informative unless more specified. And here comes a key point in Biggar's criticism: Who is doing this work of specification? Courts. Far from being an advantage of human rights treaties or declarations, their "indeterminacy is a problem", because "international treaties and national charters often affirm highly abstract, capacious rights, which give their judicial interpreters ample, and politically dangerous, room for creative elaboration" (Biggar, 2020, p. 111, n. 71).

To this threat, Biggar dedicates chapters 10 and 11 of his book. Chapter 10 examines the judicial activism of the European Court of Human Rights, which has extended, against the intention of the signatory states and the clear text of the Convention itself, the territorial scope of the European Convention on Human Rights to places outside of Europe where European armed forces are engaged in warfare. So, British military forces have been prohibited from keeping suspects of terrorism in detention without judicial order in Afghanistan –something allowed under the Law of Armed Conflict during times of hostility– on the grounds that such detention is incompatible with the right to due process as enshrined in the European Convention. However, rights acknowledged by the European Convention were clearly thought to be for normal, stable countries, where the main threat to life and liberty came from the state. But in Iraq or Afghanistan, such conditions did not obtain, and the main threat was posed not by state actors, but by terrorists and armed groups. Biggar expounds and subjects to devastating criticism the reasoning of the European judges, whom he calls "rights-fundamentalists", in cases such as *Al-Skeini* (2011) and *Al-Jedda* (2011) (Biggar, 2020, pp. 234-267). These decisions erode confidence in international treaties themselves. States will think it twice before signing any treaty whose interpretation will be carried out by judges resolved to adjudicate against the intention of the contracting parties and the clear text of the treaty.

These negative consequences arise when one forgets that, as Biggar reminds us, rights depend on economic, political, and social circumstances. Indeed, if one views rights as universal, holding always and everywhere, as a non-forfeitable property of individuals, then one will conclude that nobody may never be put in detention without judicial order, not even temporarily, even if such detention is urgently needed in times of armed conflicts. But such an approach would simply paralyze any military effort.

In Chapter 11 he examines the decision of Canada's Supreme Court to legalize some kind of assisted suicide in "Carter v. Canada (Attorney General)" (2015). He carefully expounds the court's argumentation and shows its failings. This is not an isolated case, but reflects a whole series of cases where courts take true political decisions in the name of rights. Here,

the danger involved in the declaration of abstract rights becomes operative, namely, that they give an excessively creative role to courts in applying them. For instance, one of the reasons given by the Canadian Supreme Court to legalize some kind of physician-assisted suicide was that the blanket prohibition of it was incompatible, with the right to life! The blanket prohibition of physician-assisted suicide, argued the court, may force an individual to take his life prematurely, before he would not be able to do it. The court's reasoning defies any logic, which makes us question whether the judges were really attempting to interpret and apply the law, or to adjust the rights enumerated in the Canadian Charter of Rights, among them the right to life, to a decision that they had previously taken.

When explaining the causes of this judicial activism, Biggar mentions not only the forgetting of the context-dependency of rights, but he reminds us of another one:

> there is the fact that judges are human, and being human, are sometimes insecure or vain enough to want to be well thought of at a time when the championing of human rights is highly fashionable and widely regarded as 'progressive', even heroic (Biggar, 2020, p. 242)

or, as Richard Ekins and others say

> some judges are eager to be at the vanguard of extending human rights law. There is a transnational conversation among judges, in which the interpretation and development of human rights law is often assumed to be the central part of the judicial role. There is also at times a competition amongst judges and courts –with judges who are seen to be in the vanguard of the development of human rights law enjoying considerable acclaim from other judges, scholars, and the media. (Ekins et al, 2015, p. 49, quoted in Biggar, 2020, p. 242)

This tendency finds its theoretical expression in the so-called "living instrument" doctrine, according to which judges may transform the European Convention on Human Rights to fit new circumstances.

Moreover, the special problem with the adjudication of very abstract rights is that their determination involves moral and political argument, a kind of argument in which judges may not claim any special expertise. Judges may claim expertise in law, but to deduce an unenumerated right from an abstract right involves a kind of reasoning in which they may not claim any special expertise at all. When "deducing" a right to physician-assisted suicide from the rights to life, liberty, and security, judges are not applying the law, but their own philosophical and moral convictions. These may be perfectly true, but one wonders why the moral and political convictions of judges instead of those of elected parliamentarians should be the ones that decide political (as opposed to legal) controversies.

4. Some reactions to Biggar's book

Biggar's book was likely to cause some negative reactions. On one side, one has to acknowledge that the book itself seems at times ambiguous on what the target of Biggar's criticism itself is. As was mentioned in the introduction, sometimes he seems to criticize mere belief in human or natural rights because, as Milbank expressed, "none of them are without exception and that they are not always enforceable" (Milbank, 2021). A criticism of this type would be somewhat weak in the face of conceptions of natural rights such as that of Locke, for example, who, recognizing the existence of natural rights to life, liberty, and property, never assigned them the feature of being non-forfeitable[6].

On the other side, the book can also be read as a criticism of human rights fundamentalism, as defined above. And this way, since the concept of human rights is considered the most precious normative standard in contemporary legal and political discourse, any criticism thereof will cause adverse reactions. It is very interesting to analyze some of them, because they are expressive of today's cultural environment, in which any criticism of conventional wisdom about human rights, or even the bare assertion that there may be such a thing as "rights fundamentalists", is met with immediate hostility and suspicion.

Consider, for instance, John Witte's claim:

[6] Some of the criticisms to Biggar's book react not to his criticism of human rights fundamentalism, but to his criticism of belief in natural or moral rights themselves. Since the topic of this paper is Biggar's criticism of human rights fundamentalism, I will not comment them. See especially, Anderson (2021), for a valuable critical examination of Biggar's rejection of natural rights themselves. Anderson, however, although he defends the existence of natural rights, acknowledges that "one might subject natural rights to parsing and qualifying similar to those that Biggar puts legal rights through, rather than rejecting them altogether because of their putative instability" (Anderson, 2021, p. 404), a judgement with which I agree, as will be mentioned later. See also Tollefsen (2021) for a valuable criticism of Biggar's skepticism regarding natural rights, acknowledging that his criticism of rights fundamentalism is quite sound. See, also, Little (2021), for a very good defense of a Lockean-type natural rights theory that might withstand Biggar's criticism. Unfortunately, Little misunderstands Biggar in that he believes that, for Biggar, mere belief in natural rights amounts to rights fundamentalism. That is not the case: the critique of natural rights theories and of rights fundamentalism are analytically distinct in Biggar's work. Thus, Biggar does not call authors like Locke or Finnis "rights fundamentalists", even though he does not share their belief in natural rights.

Clem (2021) deals with a very different topic: Biggar's denial of the inherently evil character of any act of torture, even though acknowledging the need to establish an absolute legal right against torture. This is a discussion outside the topic of this work.

Let us, finally, add that Biggar is not very clear about what he means by "natural rights", the existence of which he denies. Sometimes, he seems to think that they are those which one would have always and everywhere, as when he says, commenting on the French Declaration of the Rights of Man and of the Citizen, that in it we find a "tendency to confuse natural rights that are absolute, obtaining always and everywhere, with natural rights that exist only sometimes or with the corresponding positive rights that may sometimes be violated" (Biggar, 2020, p. 57).

Sometimes, however, he considers them to be those which one would have in a state of nature. See, for instance, (Biggar 2020, p. 37): "The word 'natural' connotes what is pre-conventional, whereas the institution of private property (for whatever purpose) belongs to our society"; (Biggar, 2020, p. 68): "The rights against arbitrariness and to fairness and impartiality, therefore, presuppose a political context, not a natural one. They are therefore not natural rights in the sense of existing outside of political society and positive law". Not least for this reason, his criticism of natural rights theories is the weakest part of his book.

> Biggar is surely right that a 'liberal society cannot live on rights alone.' But a liberal society cannot long live without them. Rights declarations are useful instruments to achieve just and right order, and guarantees of rights and liberties can and do provide citizens with the means to discharge the duties and practice the virtues that Biggar praises. (Witte, 2021)

One can perfectly agree, and Biggar does, with the first assertion that Witte makes: that a liberal society can't live without rights. But then comes Witte's second assertion, namely, that rights' declarations are useful instruments to achieve just and right order, and so on. Well, regarding their usefulness, some empirical doubts have been raised by the work of Eric Posner. But even leaving this problem aside, the obvious answer to Witte is that it all depends on *what type* of declaration and on *which* rights are therein declared. The problematic nature of contemporary declarations is not the fact that they proclaim rights, but that they proclaim some items as human rights whose fulfillment is impossible to realize, illusory, that are extremely contingent on particular circumstances, and that sometimes are pure nonsense, like the right to peace. These rights, moreover, are competitive among themselves. One dollar spent on the right to education is one dollar less spent on the right to healthcare. Here, Biggar's criticism of rights fundamentalism applies in full.

That is why Witte's reply to Biggar is misleading. He says

> As such, declarations of rights have functioned in the state much as declarations of duties like the Decalogue have functioned in the church. They provide normative totems and ideals for each generation to makes ever more real and concrete. And they are regular reminders to all community members of the minimum duties that we owe to each other, including to those who are in authority or those whom authorities are called to serve. (Witte, 2021)

Pace Witte, that is not true: *contemporary* rights declarations, like the 1966 Covenants, do *not* function like the Decalogue. The Decalogue, leaving aside the first and third commandments, prescribes only *abstentions*, and one can always abstain from lying. States and their representatives can also always abstain from lying or stealing.

Human rights declarations, on the other hand, command someone –it is not clear whom– to provide to everyone healthcare, vocational training, work with a just wage, and so on. Even peace! And some of them give power to judges to review the state's compliance with these obligations.

Moreover, let us remember that contemporary rights fundamentalism is not only the belief that where there is a need, there is a right, and that these rights are all those enshrined in human rights declarations. It is also the belief, as asserted by human rights scholars, NGOs, and tribunals, that *all* of these rights are inalienable, equally important, justiciable, and so on. No commentator on the Decalogue ever asserted that all of its commandments were equally important. Of course, human rights treaties may not be made guilty of all the

nonsense that is spoken about them, but all these doctrines are part of current human rights fundamentalism. And that was the main target of Biggar's book.

Consider, again, the reply of the former president of the Supreme Court of the United Kingdom, Baroness Brenda Hale, to Biggar's book. In a review tellingly entitled "My rights, your wrongs: Nigel Biggar's flawed attack on 'human rights fundamentalism'", she, after agreeing with Biggar's criticism of natural rights, says that his criticism does not apply to human rights since,

> as Biggar recognises, human rights also have some of the characteristics of his paradigmatic legal right, being recognised and enforced in international law. After the Second World War, the international community understood that legal rights were not enough—everything the Nazis had done had been done according to their laws. There had to be some transcendent principles. Biggar could have made more of the fact that human rights are also recognised and enforced in the laws of many nation states—those that have written constitutions in which fundamental rights are given special protection and even, for that matter, in the United Kingdom, where the rights protected by the European Convention of Human Rights are also rights protected in UK law. (Hale, 2021)[7]

That all may be true, but none of this challenges any of the criticisms made by Biggar, namely, that many of these rights are simply illusory, too abstract to guide action, and that precisely their abstract nature allows activist courts to create new ones by-passing legislative action. Being enshrined in a constitution does not make any more feasible a right to housing than in the absence of such state recognition. Being recognised in an international agreement does not make less competitive between themselves in a world of scarce resources, the right to education, and the right to healthcare. The recognition of a universal human right to vote does not make any less destabilizing the immediate

[7] Tellingly enough, Baroness Hale recognizes the truth of some of Biggar's criticisms, for example, regarding judicial activism. For instance, she says, "As a member of the House of Lords appellate committee on each occasion, I am sympathetic to the criticism that Strasbourg's decisions expanded the concept of 'jurisdiction' way beyond what the parties to the Convention had intended and failed to recognise that the obligations in the Convention were not designed to cater for armed conflict outside the territory of the member states. But I see these as examples of Strasbourg getting things wrong, rather than over-zealous rights-fundamentalism or a failure to vary the scope of Convention rights 'according to morally significant facts on the ground.'" (Hale, 2021).

This recognition is perhaps striking because, in a previous conference, she seemed to have asserted the extreme activist doctrine that judges need not to care, when interpreting the European Convention on Human Rights, about the intention of the contracting parties: "What are the natural limits to the growth of the living tree? They are not set by the literal meaning of the words used. They are not set by the intentions of the drafters, whether actual or presumed. They are not even set by what the drafters definitely did not intend" (Hale, 2011, p. 18). I say "seemed to have asserted" since, after reading her conference, it is not clear to me whether she asserts that as a personal opinion, or simply as a description of the practice of the European Court of Human Rights (in that case, it would be an accurate description), a practice that, in this conference, she also criticizes as overreaching.

introduction of democracy everywhere. Therefore, as Biggar rightly pointed out, "in her review, Baroness Hale contradicted not one of my main theses" (Biggar, 2021b).

Or consider, for instance, Mark Hill's reaction to Biggar's book. He says that Biggar's description of the practice of human rights lawyers (a topic not discussed in this paper), or of the use of rights in a legal system is false. Biggar would have distorted the real practice of human rights lawyers and of the human rights system itself:

> In British jurisprudence, it is rare to read of rights divorced from duties. Human rights provide tools to assist decision makers, including judges, to negotiate contested territory in everyday life. Those rights are reflective of the ethical assumptions of the legislator and are amenable to change over time. But they are not a substitute for public morals, nor do they operate in a vacuum. A tiny fraction of disputes reach the domestic courts, and vanishingly few get as far as the European Court of Human Rights. Biggar ignores communitarian and mediated settlements between neighbors and on the shop floor where rights-based claims are resolved without recourse to the fundamentalism that Biggar identifies. The tiny handful of hard cases upon which Biggar draws cannot bear the weight which he seeks to place on them. Hard cases make bad law. And extrapolating from these hard cases is fraught with danger. Biggar's myopic approach dissects the bark of a single branch of a modest sapling, while the expansive forest — rich, verdant, and fruitful — goes completely unnoticed. (Hill, 2021)

Similarly,

> In terms of jurisprudence, human rights are man-made constructs, just like the criminal law or coronavirus regulations. They are passed by the legislature and enforced through the courts, either as overreaching constitutional provision or as mundane domestic law, informed by international norms articulated in instruments such as the Universal Declaration of Human Rights or the European Convention. The rights can be repealed, revised, or amended. But (with very few exceptions) all human rights are qualified. So, to borrow from my field of expertise in religious liberty, freedom to manifest one's religion is subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety; for the protection of public order, health, or morals; or for the protection of the rights and freedoms of others. (Hill, 2021)

And he concludes, triumphantly, "So what's wrong with rights? Nothing." (Hill, 2021).

Well, I agree that there's nothing wrong with rights, nor with human rights. Indeed, Biggar himself had said that he can also say that "There is much that is right with rights" (Biggar, 2020, p. 324). But, I add, there is much that is wrong with human rights *fundamentalism*, namely, the set of beliefs that governs their application by most contemporary courts. Hill says that "A tiny fraction of disputes reach the domestic courts, and vanishingly few get as far as the European Court of Human Rights" (Hill, 2021). That is true. However, this

tiny fraction resolved by International Courts has enormous consequences, equivalent to that of legislation, for the entire population of several countries. It changes the lives of many people. It tells them what can or cannot be done in the future. And when it is done on the basis of the belief that all of the myriad of rights declared in international treaties are inalienable, imprescriptible, non-hierarchical, etc., one can systematically expect debatable decisions.

Hill also said that "In terms of jurisprudence, human rights are man-made constructs, just like the criminal law or coronavirus regulations... The rights can be repealed, revised, or amended" (Hill, 2021).

This view does not represent the conventional wisdom of human rights. No human rights lawyer would say that human rights are man-made constructs, and that they can be repealed as the coronavirus regulations. Instead, human rights international treaties proclaim that such rights are based on human dignity[8]. Conventional wisdom says that *all* of the rights, as enshrined in international treaties, are inalienable, non-hierarchical, interrelated, and so on[9]. One can expect that a jurisprudence based on those beliefs can lead to unpredictable and more or less arbitrary decisions.

Elisabeth Rain Kincaid made a more nuanced criticism of Biggar's thesis. Even though recognising that Biggar has aptly described the phenomenon of rights fundamentalism, she says that Biggar's proposal to overcome it, namely, to drop the human rights claims to absoluteness is too drastic:

> I worry that rejecting any absoluteness of rights would actually defeat much of the good achieved by Biggar's first goal of situating rights within their proper context of human flourishing, linking them to the development of virtue and the adherence

[8] Curiously enough, Hill reminds, approvingly, that some international instruments, like the *Punta del Este Declaration on Human Dignity for Everyone Everywhere* (2018), proclaim that "human dignity for everyone everywhere is valuable as a point of departure for exploring and understanding the meaning of human rights..." (Clause 2). See Hill (2021). I do not see how this assertion can be made compatible with Hill's other assertion that human rights are man-made constructs and can be repealed.

[9] Still doubting that this set of beliefs is the conventional wisdom on human rights? Well, before proceeding to analyze recent statements of the European Court of Human Rights, let us quote what one of the Justices of the Chilean Supreme Court, in representation of the Supreme Court, expounded in front of the Expert Commission entrusted with the task of writing the draft of a new constitution (which was subsequently rejected by the people in a referendum). Then-Justice Ángela Vivanco said that:

> Posteriormente, desde el punto de vista de los derechos fundamentales y derechos humanos en la nueva Constitución.
>
> Estos derechos y garantías comprenden aquellos que son de carácter: individual, civiles, políticos, económicos, sociales y culturales. Reconocer –esto es importante– *las cualidades indiscutidas de estos derechos: originarios, universales, indivisibles, inalienables, imprescriptibles, irrenunciables, personales, complementarios e interdependientes.*
>
> Todas las personas, el Estado y sus órganos, entre ellos los tribunales, están llamados a *respetar, proteger, garantizar, promover, velar y asegurar la vigencia de tales derechos y garantías*; y desde ese punto de vista, no se trata de una obligación subsidiaria del Estado, sino que de una obligación primaria del Estado que se realiza, entre otras vías, a través del Estado juez, es decir, de la actividad del Poder Judicial (Comisión Experta, Proceso Constitucional, Session of March 22, 2023, 9-10, emphasis added).

> to duty. Such an extreme modification of the basic meaning of rights seems to create a zero-sum game between rights, on one side, and duties, virtues, and the common good, on the other. Without rights, our entire moral discourse would be impoverished, in the equal but opposite way from which it is impoverished now. (Kincaid, 2021, p. 417)

She finds that such a non-problematic use of rights was exemplified in Francisco de Vitoria's work.

At times, it seems that some of the discussion has been misled by the vague meaning of some words. In this case, of the word "absolute". Biggar, for instance, recognizes that "any right that is carefully specified is absolute" (Biggar, 2021, p. 167). What he denies, as I understand him, is that any of the abstract rights, as they are proclaimed in international treaties, has that feature. It is one thing to say that you have an absolute right to life, a claim that probably would be difficult to reconcile with the practice of killing in self-defense, and the claim that you have an absolute right to life, unless you are actually committing a crime, or engaging in aggressive warfare, and so on. This second claim, because of being carefully specified, may indeed be absolute, and is compatible with practices like self-defense and the continuance of social order. But it is not this second claim which is usually embedded in international treaties, nor the one that is made in the political and judicial arena. And if we see other purported rights, like the right to healthcare, then the problem gets worse. A universal right to healthcare, as defined in international treaties, simply can´t be "absolute", not least because resources are scarce. The problem is, simply, how to explain the myriad of exceptions that we, at least at a pretheoretical level, agree that rights have. One way, this is Biggar's, is to simply deny that there may be universal absolute rights at all. Another, for instance, Gewirth's, would be to say that rights are indeed universal and absolute, but that they are only *prima facie* (which creates a problem of its own)[10]. I would prefer, as will be mentioned in the conclusion, simply to say that there are a few basic, universal, absolute rights, but that none of them is non-forfeitable (they may be forfeited by a guilty act of the bearer, for instance, the commission of a crime). This was Locke's position. But, again, rights fundamentalism, at least as represented by some NGO's and some judiciaries, simply claims that *all* of the rights enshrined in international treaties are universal, absolute, inalienable, and so on. That seems hardly believable. And that is, it seems to me, rights fundamentalism. See, below, the statements of the European Court of Human Rights cited in the next paragraph as proof thereof.

[10] See Gewirth (1978). Curiously enough, Biggar acknowledges that one of the ways to make moral rights work, would be to conceive them as *prima facie*. See Biggar (2021a, p. 429), when discussing a way to solve the conflict of supposed natural rights. I have expressed my disagreement with this way of solving the problem, and why the idea that natural rights are forfeitable due to a guilty act of their bearer should be preferred in Isler Soto (2023, pp. 180-184).

5. A good and more recent example of the vices of human rights adjudication denounced by Biggar: the case "Verein KlimaSeniorinnen Schweiz and Others v. Switzerland" (2024)

As can be seen, Nigel Biggar feasts on the Universal Declaration of Human Rights (1948) and on both International Covenants of 1966, and also on some assertions made by human rights courts. At the time when the book was written, the European Court of Human Rights had not yet resolved that Switzerland had infringed its obligations regarding the right to family and private life by failing to legislate on climate change. I will show how in this case we may find all the vices of human rights adjudication denounced by Biggar. I have selected this decision not only because of its novelty, but because in its explanatory part we find quotes taken from several leading human rights organizations that exemplify the intellectual vices Biggar denounced. This recent decision can therefore be taken as a good summary of current human rights conventional wisdom among courts and activists. From this decision, "Verein KlimaSeniorinnen Schweiz and Others v. Switzerland" (2024)[11], are taken all of the following doctrines asserted by leading international organizations:

5.1. The right to health implies the right to housing

The UN Committee on Economic, Social and Cultural Rights asserted that:

> 11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels[12]

So, according to the UN Committee on Economic, Social and Cultural Rights, the right to health includes a right to housing. Moreover, it includes a right to *participate* in health-related decision-making. I still don't understand in what way one may recover from or prevent a wound or sickness by participating in health-related decision-making at the international level. Neither do I see that health-related decision-makers are more healthy than non-decision-makers. Before reading this assertion, one may naïvely have thought that one becomes healthy by eating and sleeping well, playing sports, abstaining from

[11] The decision can be consulted here: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-233206%22]} Site visited on February 18th, 2025.

[12] Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000) on the right to the highest attainable standard of health, E/C.12/2000/4, 11 August 2000. Quoted in *Verein KlimaSeniorinnen*, § 182.

smoking, and so on. But thanks to the Committee on Economic, Social and Cultural Rights, we now know that participating in health-related decision-making at the national or international level improves your health, too.

5.2. Universal responsibility

The UN Treaty Bodies (Committee on the Elimination of Discrimination against Women; Committee on Economic, Social and Cultural Rights; Committee on the Protection of the Rights of All Migrant Workers and Members of their Families; Committee on the Rights of the Child; and Committee on the Rights of Persons with Disabilities) have also asserted a universal responsibility, of all world states, regarding all of the human rights proclaimed in international instruments, to all the inhabitants of the planet:

> 10. Under the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Rights of the Child, and the International Convention on the Rights of Persons with Disabilities, States parties have obligations, including extraterritorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable harm to human rights caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations[13].

Similarly, the UN Committee on Economic, Social and Cultural Rights asserted that:

> 5. Under the International Covenant on Economic, Social and Cultural Rights, States parties are required to respect, protect and fulfil all human rights for all. They owe such duties not only to their own populations, but also to populations outside their territories, consistent with articles 55 and 56 of the United Nations Charter[14].

No one would deny that all states of the world must respect the right of every person in the world not to be tortured, but to say that all the states of the world have duties regarding *all* of the rights proclaimed in the International Covenant on Economic, Social and Cultural Rights to every inhabitant of the planet defies imagination. That Singapore –and, ultimately, Singaporean taxpayers– may have a duty to provide (to "fulfill") free higher education to all

[13] OHCHR Joint Statement on human rights and climate change, HRI/2019/1, 16 September 2019. Quoted in *Verein Klimaseniorinnen*, § 186.

[14] OHCHR, Climate change and the International Covenant on Economic, Social and Cultural Rights, Statement of the Committee on Economic, Social and Cultural Rights of 8 October 2018. Quoted in *Verein KlimaSeniorinnen,* § 180.

of the people in, say, Bolivia, cannot be seriously asserted. But this is what the Committee on Economic, Social and Cultural Rights literally affirms.

5.3. Invention of new rights: the right to life implies a right to life with dignity, the right to family life implies a right to well-being

The UN Human Rights Committee has also asserted that the right to life implies a right to life "with dignity".

Article 6

> 8.3 The Committee notes the authors' claim that the events in this case constitute a violation by act and omission of their right to a life with dignity under article 6 of the [International Covenant on Civil and Political Rights], owing to the State party's failure to perform its duty to provide adaptation and mitigation measures to address climate change impacts that adversely affect their lives, including their way of life. With respect to the State party's position that article 6 (1) of the Covenant does not obligate it to prevent foreseeable loss of life from climate change, the Committee recalls that the right to life cannot be properly understood if it is interpreted in a restrictive manner, and that the protection of that right requires States parties to adopt positive measures to protect the right to life. The Committee also recalls its general comment No. 36 (2018) on the right to life, in which it established that the right to life also includes the right of individuals to enjoy a life with dignity and to be free from acts or omissions that would cause their unnatural or premature death... (para. 3)
>
> 8.4 The Committee takes note of the State party's position that the extension of article 6 (1) of the Covenant to a right to life with dignity through general comment No. 36 is unsupported by the rules of treaty interpretation, with reference to article 31 of the 1969 Vienna Convention on the Law of Treaties. However, the Committee is of the view that the language at issue is compatible with the latter provision, which requires that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. In this regard, the Committee notes that under article 31 of the Convention, the context for interpretation of a treaty includes in the first place the text of the treaty, including its preamble and annexes. The preamble of the Covenant initially recognizes that the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and further recognizes that those rights derive from the inherent dignity of the human person[15].

[15] HRC, Communication No. 3624/2019 (Daniel Billy et al. v. Australia; "Torres Strait Islanders case"). Quoted in "Verein KlimaSeniorinnen", § 176.

The reasoning of the Committee is clearly fallacious. The state, rightly, points out that Article 6 of the International Covenant on Civil and Political Rights speaks only of a right to life, not of a right to life *with dignity.* On any plain reading, this article imposes on states only an obligation to abstain from certain actions, namely, killing.

How, then, does the Committee justify its conclusion that it also imposes an obligation to assure a "life with dignity"? Stating that the preamble of the Covenant asserts that the foundation of rights is human dignity.

The preamble says

> The States Parties to the present Covenant,
> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
> Recognizing that these rights derive from the inherent dignity of the human person...

The fallacious reasoning of the Human Rights Committee is that if you find the word "dignity" in the preamble, you may attach it as an adjective to whatever right you may find listed in the declaration. This way, from the assertion that human dignity is the foundation of rights, you conclude that you have a right to life "with dignity".

It is quite clear, however, that in the preamble, the word "dignity" means a moral status that *grounds* the rights that are mentioned thereafter. This moral status can't be lost. When, on the other hand, it is asserted that you have a right to "life with dignity", the word "dignity" now means something completely different: a certain minimum condition of wellbeing, a contingent situation that can be lost. This is evidently something quite different from the status mentioned in the preamble[16]. When the Committee "deduces" a right to life with dignity from the assertion that recognition of human dignity is the foundation of justice, it changes the meaning of the word "dignity". Its reasoning is logically fallacious.

Moreover, with the fallacious reasoning of the Committee you could also have concluded that you have a right, not only to a "life with dignity", but also to "hold opinions without interference" (article 19) "with dignity"; to "peaceful assembly" (article 21) "with dignity"; to "freedom of association with others" (article 22) "with dignity"; to "be elected at genuine

[16] On this, see, for instance, Horn (2011), where the different meanings of the word "dignity" ("*Würde*" in German) are conceptually clarified, and where it is clearly shown that "dignity" can mean, among other things, two quite different ideas: an unforfeitable moral status (*die unverletzbare Menschenwürde*), and another one as a forfeitable normative state (*die verlierbare Menschenwürde*). According to the second meaning, it makes sense to say that someone hurt someone else's dignity by, for instance, insulting him or that we should treat others with dignity. According to the first meaning, it makes no sense to say that because this moral status is non-forfeitable. According to Horn, it is "dignity" in the first, Kantian sense, that can be thought of as the grounding of human rights. He also points out that the German Basic Law uses the word "dignity" with these two different meanings in its famous first Article: "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt" (art 1.1 Grundgesetz).

periodic elections" (25, b), "with dignity"; that every child has a right to "acquire a nationality" (article 24, 3), "with dignity".

Furthermore, if the right to life, as asserted in Article 6, really meant a right to "life with dignity", one wonders why the contracting parties enumerated all the other rights, like the right to free speech, peaceful assembly, association, and so on. Being all of them included in the concept of "life with dignity", it would have been completely redundant to name them.

The European Court of Human Rights, for its part, in the case "Verein KlimaSeniorinnen", has, similarly, "deduced" from the right to family and private life –which, on any plain reading, imposes only obligations to refrain–, a right to health, well-being, and quality of life:

> 519. Drawing on the above considerations, and having regard to the causal relationship between State actions and/or omissions relating to climate change and the harm, or risk of harm, affecting individuals (see paragraphs 435, 436 and 478 above), Article 8 must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life. ("Verein KlimaSeniorinnen", § 519)

Article 8 of the European Convention, however, reads as follows:

> Right to respect for private and family life
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This article only imposes obligations to abstain from intruding into certain domains. This is clearly expressed by the plain tenor of the phrase "private and family life". It is also shown by the mention of the inviolability of home and correspondence, and by the prohibition to authorities to "interfere" with this right except for in some cases. But the European Court of Human Rights thought otherwise: this right implies a right to "quality of life".

5.4. Rights proliferation

As regards the proliferation of rights, consider, again only as an example, what the UN Special Rapporteur on the promotion and protection of human rights in the context of climate change said regarding the content of the right to clean air, one of the elements of the right to a healthy environment. This right to clean air implies, according to the Special Rapporteur, procedural, substantive, and special obligations (and therefore, one could say, implies procedural, substantive, and special rights related to clean air). Well, regarding the procedural obligations, the Special Rapporteur said

> 59. The procedural obligations of States in relation to the right to breathe clean air include duties related to promoting education and public awareness; providing access to information; ensuring freedom of expression, association, and assembly; facilitating public participation in the assessment of proposed projects, policies, and environmental decisions; and ensuring affordable, timely access to remedies[17].

That means that, from the right to a healthy environment, you have a right to *public education* on the issue or on the importance of clean air. One may naïvely have thought that the right to clean air means, well, a right to clean air. But not so: it also includes a right to be *educated* on clean air. If one, furthermore, considers that the pretended right to a healthy environment may include a substantial amount of similar sub-rights –to clean water, to noise suppression, to healthy food, to a beautiful landscape, or whatever else– and that, consequently, all of these rights have to include a corresponding procedural right to be *educated* on the corresponding matter, one begins to wonder when children would have time to learn mathematics, literature, or history, supposing all of these –inalienable, interconnected, equally important– secondary rights were effectively implemented.

5.5. Open acknowledgment of judicial activism

The European Court of Human Rights, in the same case "Verein KlimaSeniorinnen", stated that

> The Court has consistently held that the Convention should be interpreted, as far as possible, in harmony with other rules of international law (ibid.). Moreover, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement. (§ 455)

In other words: if the Court does not take an evolutive approach, then the European Covenant won't be improved or reformed. The judges seem not to have considered the possibility that the reform and improvement of the Covenant is a faculty of the contracting parties, for which a special procedure is already established.

When reading such assertions made by judges of the highest European Court, it is indeed difficult not to agree with Biggar when he says, "Certainly, there is evidence that some judges view themselves, not simply as interpreters of the law, but as developers of it, responsible for keeping it abreast of 'modern' social mores" (Biggar, 2020, p. 307).

Someone may retort that the doctrines above are fringe, that we are constructing a straw man to give credibility to Biggar's thesis that there is such a thing as human rights fundamentalism, or that these doctrines do not represent conventional wisdom on the issue of human rights. To answer this objection, consider that all the statements above come

[17] 2019 report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change to the Human Rights Council of 8 January 2019 (A/HRC/40/55), quoted in "Verein KlimaSeniorinnen", § 163.

from so-called "specialists" on human rights, including UN specialists, and are quoted by the European Court of Human Rights. They are not taken from fringe books. They are taken from a recent decision of the most important European court on human rights.

We have read, then, some clear examples by leading international organizations of the rights fundamentalism denounced by Biggar. The reader may, however, be puzzled about the reasons these assertions are quoted as illustration of the dominant doctrine on human rights. After all, are there not sophisticated philosophical defenders of human rights, none of them making any of such questionable assertions?

Well, of course, if one considers the work of the philosophical defenders of human rights, like Alan Gewirth, John Finnis, John Tasioulas, and others, then one may indeed find more cogent and coherent conceptions of them. But the problem is that, notwithstanding all the caveats made by philosophers, it is not their conceptions that provide the material for legal and political discourse. It is, on the contrary, the one exemplified by the organizations quoted above. It is not the normally more modest list of rights that philosophers defend those that courts adjudicate; it is the expansive list of abstract rights included in treaties, a list whose items are each described as "inalienable, universal, interdependent and indivisible". No wonder that, with such a list and such features, much room is left for judicial creativity, as Biggar shows. Or, better, judicial activism.

Judicial activism, in its turn, has been exposed, denounced, and criticized well before Biggar, with little, if any, effect on the conduct of judges[18]. Many strong criticisms have been made against judicial activism. The most important concern, in my opinion, is that it is simply the most dangerous threat to the Rule of Law, because of being the most covert. There is much fashionable talk now of the real or supposed threat to the Rule of Law by populist movements, social media, big tech, and so on, but comparatively little on the most covert threat, namely, the one sometimes posed by those who are supposed to protect the Rule of Law. And, as Biggar (among many others) rightly points out, the driving ideological force behind this most covert threat to the Rule of Law is rights fundamentalism.

[18] For criticisms of judicial activism in general, see the classical Bork (2003). Regarding the German case, see Rüthers (2016); regarding the European Court of Human Rights, see Finnis (2016); regarding the Chilean case, see García and Verdugo (2013) and Silva Irarrázaval (2023a and 2023b). Judicial activism is monitored and denounced in Chile by the think tank Observatorio Judicial: https://observatoriojudicial.org

Activist decisions of the Brazilian Supreme Federal Court have been denounced in Pereira Júnior and Vasconcelos Barbosa (2020) and Sales Pinheiro (2022), and the judicial behaviour of its Justice Alexandre de Moraes has been denounced, among others, in Viterbo Martins (2024). This court has dared not only to block political nominations of the President of Brazil (like that of Ministers), but even –believe it or not– to create, by judicial fiat, new criminal offenses.

Regarding the the Inter-American Court of Human Rights, which has even dared to command states (Chile and México) to amend their constitutions, see Silva Abbott (2024).

There is a good description and criticism of the psychology of the activist judge in Gava (2001), which in general coincide with Biggar's brief remarks on the subject.

6. Final remarks

Do the preceding reflections, then, justify an outright rejection of the category of human rights? Well, they do justify the rejection of the popular, expansive, implausible, and inherently contradictory conception of them, espoused by the UN, ECHR, and many organizations. This is indeed Biggar's thesis. The current folk conception of human rights must be simply discarded.

But this conception does not exhaust human rights conceptions. One may well return to Locke's classical one: few rights, none of them nonforfeitable, none of them demanding an action but only abstentions –no social, economic, or welfare rights. This is the conception manifested in the Preamble to the United State's Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness"[19] (notice: a right not to happiness, but to the pursuit of happiness). *Pace* Bentham and Burke, this is also the conception espoused by the 1789 French Declaration of the Rights of Man and of the Citizen.

Well, such a classical liberal modest conception may truly claim to have the features of universality and compossibility and may even be well suited for judicial adjudication if one wants to have judicial review of legislation. For instance, if properly constructed as the right of the innocent not to be intentionally killed, then the right to life becomes much more amenable to judicial adjudication than, say, a right to housing, education, healthcare, and so on[20].

It is quite clear that human rights discourse, as espoused by some activists, NGOs, and judges, national and international, has recently broken mooring with common sense. But this recent trend does not need the flat rejection of the category of human rights: the fundamentalist conception of human rights, as espoused by such activists, NGOs, the UN,

[19] Even if the declaration speaks of "unalienable" rights, it is clear that "inalienability" here does not mean that they are impossible to forfeit, but only that they may not be alienated in a social compact.

[20] Not to speak of some new alleged rights, not already legally recognized, which, either are sheer nonsense, or describe simply an ideal state of affairs. Consider the proposed "right to peace". This "right" either means that peace is good and should be sought when possible –a proposition hardly disputable–, or, if it is meant to be a true, enforceable right, then it is pure nonsense. Consider: how do you enforce a "right to peace" against a state that initiates a war of aggression, when all other means –including economic or diplomatic sanctions– have failed to stop the aggression? Well, *through warfare*. You may call this warfare by other names, "peace enforcement", "humanitarian intervention", or whatever, but warfare it remains. According to international law jargon, the Gulf War of 1991 was a "peace enforcement" operation. But you will hardly find in any bookstore a book on the "Peace Enforcement Operation in Irak", and surely many on the "Gulf War". A "right to peace" that can be enforced only through warfare is sheer nonsense, and the assertion of it shows how accurate Biggar's description of some human rights fundamentalists is.

The text of the 2016 Declaration on The Right to Peace can be found here: https://digitallibrary.un.org/record/858594?ln=es&v=pdf#files (accessed 23 December 2024). In this declaration, it is asserted that "Everyone has the right to enjoy peace such that all human rights are promoted and protected and development is fully realized" (art 1. of the Declaration on the Right to Peace)

and some courts, does not exhaust the conceptions of the concept of human rights[21]. There is another possible conception of the concept: the old sober Lockean one. If constructed as classical natural rights in the Lockean sense, requiring only abstentions, human rights do not have many of the problems we can discern in contemporary discourse[22]. This last more coherent conception is, it seems to me, that espoused by authors as different as Friedrich von Hayek[23], Maurice Cranston[24], John Finnis[25,] or Robert P. George[26], and probably even by H. L. A. Hart[27], notwithstanding their diverse philosophical lineage.

What are we to do in the meantime, however, as national and international courts tend to impose their political agenda against the text of the treaties they are purportedly interpreting, even against the clear intent of the signatories? Biggar again gives us good advice: "should courts fail to be duly cautious, legislatures that have the constitutional right to ignore their judgements should have the courage to exercise it" (Biggar, 2020, p. 333). One could add: if such a possibility does not exist according to positive law, then states

[21] The distinction between "conception" and "concept" was made famous by Rawls in his *Theory of Justice* (see Rawls, 1971, p. 5), although he never explained it. A good explication of it is that of Sarah Sawyer, who says that conceptions are "the collection of beliefs a subject associates with a concept" (Sawyer, 2021, p. 239).

[22] Moreover, it is quite clear that these negative natural rights, in Locke, even if "inalienable", are forfeitable by a guilty action of the rights-bearer. Immanuel Kant thought along similar lines. The fathers of liberalism were no rights fundamentalists at all.

[23] See Hayek (1958) and (1966).

[24] See Cranston (1983).

[25] John Finnis makes clear that true absolute human rights are only those that are counterparts of the strict duty not to do an action that directly intends to damage what he calls "basic human goods". His list of true universal rights coincides, then, more or less with a Lockean one, although it does not include property, which is a derivative right on his account.

Other putative rights are much more contingent and do not appear at the beginning of a practical reasoning but only at the end of it. So, he says that the putative social and economic rights are only "a way of sketching the *outlines of the common good*" (Finnis, 1980, p. 214).

[26] See George (1995).

[27] Hart never asserted that there were natural rights but, famously, asserted that, "if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free" (Hart, 1955, p. 175). It is true that this assertion does not imply the denial of the existence, even hypothetical, of *other* natural rights. It is asserted only that *if* there are moral rights, *then* there is an equal right of all men to be free. From this assertion, it can't logically be deduced that this equal right of all men to be free is the *only* natural right to exist *if* there are natural rights.

However, the whole tenor of Hart's text shows quite clearly that he believes that, if there are natural rights, then they are related only to freedoms, especially if we take into account the way he analyzes the concept of right and says that "General rights have as correlatives obligations not to interfere to which everyone else is subject" (Hart, 1955, p. 188), and his clear differentiation, against Marxists, between poverty, on the one hand, which is one type of evil, and lack of freedom, on the other, which is another quite completely type of evil (see Hart, 1955, p. 175, n. 2).

He also emphasizes the similarity between his thesis and that of modern natural rights theorists (see Hart, 1955, pp. 175-176), even though he claims that his (hypothetical) natural rights, unlike theirs, do not pretend to be "absolute", "indefeasible", or "imprescriptible".

Overall, even though Hart never plainly asserted the existence of natural rights, it seems clear that he believed that if they exist at all, they can only be freedoms. His position does not stem from any particular political stance but only from his logical analysis of the notion of "a right" as different from other normative concepts like "duty", "good", or "bad".

ought to seriously consider the possibility of leaving the jurisdiction of activist international courts. If that means leaving an international treaty on human rights, then it should be done. Similarly, at the local level, legal or, ideally, constitutional amendments should be made to limit the possibility for judges' capacities for engaging in judicial activism.

Critics of this move will certainly depict it as a sign of disbelief in human rights themselves, as an attempt to leave local politicians or law enforcement agents immune to any prosecution, unbounded by any limit[28].

Such caricature[29] should not deter brave, responsible local politicians nor impress honest legal theorists. To the charge that, in leaving some international jurisdiction, you show your disbelief in human rights, the answer is clear: we show disbelief in this or that *court* of human rights. Just as disbelief in this or that church does not logically imply disbelief in God (ask Voltaire), disbelief in this or that court does not show disbelief in the normative standard they are supposedly applying. Believers in human rights should not be deterred by criticism of believers in the *priests* of human rights when considering whether this or that international treaty should, after all, be denounced, or the jurisdiction of activist courts be more limited.

Acerca del artículo

Notas de conflicto de interés. El autor declara no tener ningún conflicto de interés en relación con la publicación de este artículo.

Contribución en el trabajo. El autor asumió todos los roles establecidos en *Contributor Roles Taxonomy* (CRediT).

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[28] For instance, Brenda Hale says that Biggar's criticism of human rights fundamentalism "will chime well in those political circles where there is currently agitation to pare back human rights protection" (Hale, 2021).

[29] As Biggar recalls us, so-called human rights activists "indulge in caricature, insult, and neglect" their critics (Biggar, 2020, p. 315).

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