

Human Rights and the Executive

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Where the law protects human rights, the executive branch of government does well if it complies with the law, and goes wrong if it does not comply. And then you may think that the paradigmatic function of any executive agency in respect of human rights is either to comply with the demands of the law, or to be the defendant in human rights adjudication. That role is essentially passive: it is the role of compliance, with legal accountability for non-compliance.

But I will argue, instead, that respect for human rights depends primarily on the active role of the executive branch.

Everyone can agree that respect for human rights depends on compliance by the executive. After all, the executive is the branch of government that employs guns. The executive is capable of ignoring the law and abusing citizens and throwing the judges and members of parliament into prison. Those features of the executive are compatible with the passive picture of the executive's role in human rights law: the state's respect for human rights is lost if the executive is not subjected to human rights law.

But I think that the passive picture is incomplete. The state needs the active initiative of the diverse variety of executive agencies, to take the lead in specifying the requirements of human rights and giving them effect. And the executive must take an active role of leadership in the development of human rights law, and is not merely subject to it. For a state to respect human rights, perfect executive compliance with legislation and with judicial orders is not enough.

This claim is inspired by *Legislated Rights*, in which Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley Miller, and Francisco Urbina have rehabilitated the role of the legislature in securing respect for human rights.¹ The theme of their book is that human rights ought to be protected in ways that can only be accomplished by the legislature. The argument is a sound corrective to any tendency to think that human rights are only a matter for courts. And the book gives an original and persuasive account of the role of the legislature in determining the requirements of human rights, and of its responsibility for seeing that those requirements are met. The authors take a 'modest' view that judicial review of legislation may or may not be a good idea, and they do not claim that 'the balance sheet of risks of pathologies ...favours or opposes judicial review of legislation per se' (25). But the balance sheet unequivocally demands that the legislature should act to secure human rights.

Reading this impressive book about the role of the legislature leads me to ask what the role of the executive branch of government is and ought to be in securing respect for human rights. And I think that we can put it very strongly: the executive has primary responsibility for the state's respect for human rights. I may seem to be disagreeing with *Legislated Rights*, which presents the role of the legislature as primary. But I see what follows as an essay in pursuing the project that the authors took up in *Legislated Rights*. The book itself makes some important points about the role of the executive, and we can build on what the authors have done.

Specification by the executive

The central message of *Legislated Rights* concerns the need in a political community for authoritative specification of abstract natural rights. Human rights can be stated with great

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¹ Grégoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge: Cambridge University Press 2018). I will refer to the book by page numbers in brackets. For a very useful critical synopsis of the argument of the book, see Leah Trueblood, Book Review (2019) 82 MLR 577–602.

generality, but they can only be delivered with particularity. Their abstract requirements must be made concrete. And insofar as the rights are to have legal effect, the need for specification is a need for *legal* specification.

It is a crucial insight. The authors of *Legislated Rights* have drawn it from the account that John Finnis has given of the way in which law can give specifications or *determinations* of abstract requirements of good government. Finnis drew the idea from Aquinas:

‘...every detail of a maternity hospital could have been somewhat different and large portions of the design could have been very different, even though ...every feature has *some* rational connection with the commission. The kind of rational connection that holds even where the architect has wide freedom to choose amongst indefinitely many alternatives is called by Aquinas a *determinatio* of principle(s)—a kind of concretization of the general’²

Finnis added his own major contribution, which was to elucidate the role of such specifications in the law’s capacity to serve the common good of a community. *Determinatio* is not an intrinsically communal activity. You need to engage in it if you build a building all by yourself, for yourself. Finnis comments on ‘the value of establishing (partly by discovery and partly by commitment and *determinatio*) an intelligible order in one’s own actions’.³ But it is therefore of value in ‘one’s own interaction with other intelligent beings’.⁴ In fact, it is *essential* for any community. Human beings can only function as a community if they achieve a unity of action which will depend on such specifications of the abstract principles on which they ought to act together. The problem of how to secure those essential specifications in community is a coordination problem. The specifications that the law provides are solutions to coordination problems.

The law can provide coordination that a political community urgently needs, by specifying what is to be done. A tax, for example, is a *determinatio* that solves a coordination problem. So does a legal entitlement to a welfare benefit. A solution to a coordination problem (such as a tax or a welfare benefit) can be just or unjust, but there is no possibility of just government without a solution to the problem of what impost or allocation is to be the community’s impost or allocation. The solution to a coordination problem provides the ‘specific convergence’, as Maris Köpcke calls it (55) that can be the community’s way of respecting the dignity of its members (and promoting their dignity by protecting them from each other, and so on). And the legal system itself is a solution to the ‘framework’ coordination problem of how the community is to achieve that coordination.⁵

Legislated Rights is an elaboration of Finnis’s account of the coordination that a community needs its law to provide. The authors add the insight that a legislature has a distinctive role to play in giving specific effect to the abstract moral requirements of human rights. It is like the role of an architect in the building of a house. The builder’s role is the paradigm of an executive role. If some independent tribunal has authority to pass judgment on the decisions of the architect or of the builders, that body is analogous to a court. The point of *Legislated Rights* is that the architect must specify what is to be done by the builders (and analogously, the legislature must specify how the executive is to respect human rights).

But of course, the builders of a house also have a role in the project of specification. In fact, that project cannot possibly be completed by the architect—or the architect would have to

² Finnis, John, ‘Natural Law Theories’, *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), Edward N Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2016/entries/natural-law-theories/>>. See also John Finnis, *Natural Law and Natural Rights*, 2d ed (OUP 2011) 284-90, and Thomas Aquinas, *Summa Theologiae* I-II q 95 a 2.

³ *Natural Law and Natural Rights* 380.

⁴ *Ib.*

⁵ *Ib* 249.

determine the force of every swing of a hammer. Likewise, in achieving respect for human rights, the community needs executive agencies to complete the task of specification.

Maris Köpcke uses provision of home care for disabled persons as an illustration (76-78), in a cogent argument that respect for human dignity cannot be achieved without legislation. The abstract duties of a political community to provide support for the ill and disabled need to be made determinate by the legislature. Consider the lavish guarantee of some useful supports for a decent human life in Article 25 of the Universal Declaration of Human Rights:

‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’

If we can even imagine a country that makes Article 25 into a justiciable constitutional right, with no other legal provision for social services, we will not be imagining a well-governed country. Legislation is needed (this is the primary point that the authors make in *Legislated Rights*) to establish a scheme that gives effect to the abstract right to (e.g.) home care for people with particular disabilities under carefully regulated conditions, establishing a law-governed scheme (and authorising the necessary expenditure) in a way that a court could not do. The human right to medical care and other social services can only be realised through such legislative schemes.

But then, as Köpcke points out, provision is always specified individually. It is only as a result of an administrative decision as to the services needed in the particular case, that the legislated right to provision attains its effect.

This executive role of specification has two aspects. The first is the simple fact that someone has to *do* what the law requires in the particular case. Legislation can confer the right, but cannot secure it. Law is impersonal, and human dignity is personal. What secures the right is the action of someone who, for example, helps another person to use a toilet in the middle of the night, and does it respectfully. At this level of specificity –the essential delivery of the right– we are not actually talking about human rights *law* at all. For law is general, and this ultimate specification –giving practical effect to the right– is particular. We might describe this as a result of the limits of law: law is necessarily general; legislation can establish general rules in the specification of the state’s duty to respect human rights; but those rights are vindicated only at the point of application. Human rights law needs the executive to deliver.

The executive is the only branch of government that can help someone use a toilet. The executive agency does something that the law (in the form of the rights established by the legislative scheme) calls for, but cannot fully specify. Any legislative scheme will be incomplete for the purpose, and any judicial process will be inept for the purpose. It is the nurse who can and must decide, with the ultimate specificity, what is to be done, and who can and must do it. Should it be done before the patient takes her medication? After the TV programme? And should the patient herself decide? Or would it be helpful in some way just to tell her that now is the time? Good answers to *all* of these questions –even the one about the decision-making autonomy of the patient– may depend on the circumstances, and cannot be laid down by legislation. The specification function is *inescapably* executive, where it involves determining needs that are to be met in a particular case, in the application (now, in these circumstances...) of a scheme of social security or healthcare provision. The project of specifying rights is ultimately an administrative function, when it comes to actual provision of benefits demanded by the most abstract and fundamental right to human dignity. And the crucial legislative function is to provide a framework that itself requires further specification.

And then the second aspect of executive specification is more law-like: the organisation providing the nursing care will need policies. If a public body provides the care, it will need objectives, protocols, guidelines, and rule-governed processes to constrain and to reward and to coordinate and to discipline the care givers. If a private body provides the care, a state entity will

need to specify the care requirements in a contract or in some other form of regulation (and the private body is likely to need its own internal policies, as well, if only to secure its compliance with the rules).

Legislative specification is obviously important in regard to social and economic rights, but I think that it can play a useful or even essential role in giving effect to all human rights. We can say the same of administrative specification: think of the need for good administration of polling booths to secure the right to vote. Here is a consequence of the complexity of the executive in any political community: an agency may need to take positive action to secure the compliance of its own agents with negative rights. So positive duties may (depending on circumstances) arise from negative rights.⁶ The moral duty of the police not to commit assault is a purely negative duty, correlative to a human right, and given direct legal effect by the criminal law. But a police force will often have a corresponding positive administrative duty to engage in active day-to-day self-policing, to prevent its own officers from committing assault.

Administrative law is human rights law

It takes nothing away from the focal importance of the executive role, if we add that the executive exercise of the specification function ought to be supervised by tribunals and courts. That is one of the crucial judicial functions in securing respect for human rights. In fact, long before lawyers called it ‘human rights law’, administrative law provided protection from arbitrary detention⁷ and torture,⁸ and arbitrary search and seizure,⁹ and certain forms of discrimination.¹⁰ Of course, that is because criminal law and tort law –which have always been elements of administrative law, just as central as the prerogative writs– are also forms of human rights law.

The executive has no choice as to whether to pay social security benefits (or to allow tax credits...) provided for by legislation: it is an essentially legislative function to enact such rights, and the executive must make the payment, and it is an essentially judicial function to give legal effect to that duty. So the judicial role is partly simple enforcement.

But the judicial function also involves passing open-ended judgments on the exercise of the discretionary powers conferred on executive agencies by the law of social security, health care, education, and housing. So there is some attraction in the idea that the judiciary is responsible for human rights, and that the executive’s responsibility is to comply with the courts’ views as to what human rights require.

The standard of review in English law, if it can even be called a standard, is roughly that the court can give a remedy against an abuse of such powers.¹¹ That just shows that the project of securing human rights is primarily an executive project: the judicial control of executive discretions has to be deferential. Think of judicial review of decisions allocating housing. The administrators are more familiar than courts are with the public considerations that are at stake, as to the

⁶ I hope it will be clear that this is a rather uncontroversial proposition. From negative rights such as the right not to be killed or subjected to torture, human rights courts sometimes construct positive duties (e.g.) to protect persons from killing or torture by others. I am not defending that extension of legal rights, but only proposing that such a negative right may generate a positive duty for a public agency to take steps to prevent its own agents from killing or torturing (in circumstances where without such steps, the agency cannot be confident in its own compliance with its negative duties). And note that I am not saying that the positive duty of executive agencies to police their own compliance ought to be a *legal* duty. In fact, I do not think that the law can fully secure the positive steps necessary for executive agencies to secure their own compliance with the law. If we tried to do that, I think we would land in an absurd regress in which *every* legal duty D_n would be complemented by a new legal duty D_{n+1} to take steps to secure compliance with D_n .

⁷ *R v Cowle* (1759) 2 Burr 834, 856 (Lord Mansfield).

⁸ See *A (FC) v Secretary of State for the Home Department* [2005] UKHL 71 [11] (Lord Bingham).

⁹ *Entick v Carrington* (1765) 19 Howell’s St Tr 1029.

¹⁰ *Kruse v Johnson* [1898] 2 QB 91.

¹¹ See Endicott, *Administrative Law* 4th ed (OUP 2018) 241-4.

particularities of the available housing stock, as to the needs of other potential beneficiaries, as to the circumstances of a particular homeless person, as to the availability of resources, and so on. If the judges are zealous for their state to give effect to human rights, they will be vigilant in remedying abuses of power. But because of their concern for human rights, they will not take the crucial decision away from the body that is best equipped to make it.

Suppose that a homeless person wants to challenge the allocation of a particular flat in judicial review. In English law, the claimant cannot ask the court to decide what housing should be allocated. In fact, the claimant cannot demand that the allocation be made by an independent and impartial tribunal. If the law allowed that, the result would be ‘the emasculation (by over-judicialisation) of administrative welfare schemes’.¹² The state’s respect for the claimant’s dignity depends on good decision making by the executive agency administering the scheme. The claimant certainly can seek judicial review of such allocations: for procedural fairness, for compliance with any statutory duties of the housing authority, and on the ground that the authority acted on irrelevant considerations or reached a decision that is, in its substance, abusive. But the question of what housing is to be allocated is, to some considerable extent, up to the administrative authority. That aspect of English law is not an abandonment of respect for human rights. On the contrary, it places responsibility for the decision where it must be placed, in a constitution arranged with respect for human rights. This is true even though we should face the fact that it leaves the dignity of the person, to some considerable extent, at the mercy of an executive agency. The state’s success in delivering just specifications of rights in individual cases depends on the executive, and judicial control is bound to be an incomplete protection for human rights.

Try to imagine that the legislature has enacted a right to housing for the homeless, but the executive does nothing, so that beneficiaries of the right get housing only by engaging in human rights litigation, and getting enforcement of a judicial order. That would be a radically deficient legal regime. The reason is not only that the claimant would face the cost and delay and difficulty of judicial process, but also that the allocation of housing would be made by an agency that is not best placed to make it. This is a matter of the limits of the judicial function: in order to solve a problem of radical administrative antipathy (or even just apathy) toward human rights, the courts would have to move beyond mere declarations and injunctions—even structural injunctions—and *become* administrative agencies, or institute new administrative agencies. Which is to say that a good state apparatus needs an executive branch that does not merely comply with court orders, but actively discharges its human rights responsibilities. Structural failures in discharging the specification function cannot be remedied by other agencies. Paul Yowell puts this point briefly and very clearly:

‘Because of the executive’s partial insularity from the legislative and judicial branches, the internal reception of human rights within the executive is a topic of vital importance, though one that is largely beyond the scope of this book’ (121-2).

The borderland of legislation

The executive specification function is not merely a role of applying general rules in ways that give effect to rights. It also involves *making* general rules, whenever executive agencies are better configured or better placed to make rules that (as *Legislated Rights* shows) are needed to secure human rights; that is, whenever delegated legislation is appropriate. Paul Yowell highlights this legislative aspect of the executive specification function in *Legislated Rights*:

‘...although this book speaks mainly of primary legislation, the elected legislature is not the only law-maker of interest for the concept of ‘legislated rights’. ...some of the important

¹² *Begum v Tower Hamlets* [2002] EWCA Civ 239, Lord Bingham [5].

steps in working out a scheme of convergence or coordination will be at a level of detail beyond that of primary legislation. ...Administrative agencies and other delegated law-makers share some of the characteristics and capacities of an elected legislature but lack others, and an analysis of their strengths and weaknesses is an important part of arriving at a full understanding of how human rights are specified by institutions...' (129)¹³

That passage shows a healthy wariness of legislation by executive agencies. The authors put a high value on a legislative assembly: that is, a body that is representative, and instituted specifically for legislating, creating reciprocity between the state and citizens. It is crucial to their project that legislation should be based on reasoned deliberation, and a good legislature can be expected to deliberate openly and effectively on legislation because it has many members forming somewhat independent judgments, because they can be expected to bring a diversity of arguments to the deliberation, and because they are not managed in the way that executive agencies are managed. And it is deliberative because its characteristic way of working is to say 'yes' or 'no' to a proposal for legislation, after debate.

So delegated legislation needs to be restricted to matters which call for laws to be made in the public interest, but do not call for the deliberation of an assembly. Health and safety provisions, such as fire regulations, are the obvious example. On such matters, I do not think that delegated legislation is a regrettable necessity arising from the lack of time for debates in the legislature. The UK would actually have *nothing* to gain from a debate among 600 MPs in the House of Commons over how thick a fire door ought to be.¹⁴ I think the authors of *Legislated Rights* are right to leave open the possibility that the delegation of legislative power can be a very good idea, even though the delegation of excessive legislative power would be a lapse in constitutionalism.

Alongside the law-making function of using delegated legislative powers to issue general legal rules, executive agencies exercise similar functions when they make contracts, and when they make certain sorts of general and particular representations as to how they will exercise their functions, and when they adopt policies and practices and guidelines (which may be essential to the delivery of services). Those functions are similar to law making because they are ways of making general and particular norms that govern the exercise of a public function. And the law may give various forms of legal effect to representations and to policies through a doctrine of legitimate expectations,¹⁵ or a doctrine of adherence to policy.¹⁶ English law does so not exactly by turning expectations and policies into legal rights, but typically by requiring that the public agency in question must persuade a court that it had good reasons, if it is to depart from a legitimate expectation or from established policy. The law thereby gives a presumptive legal effect to the representations and to the patterns of conduct of executive agencies. Through that body of law, executive action shapes the legal position of persons, and the state's respect for human rights.

The heartland of legislation: it depends on the executive

According to the ancient enacting clause for legislation, still used in the UK, it is the executive –the Queen– that makes laws:

¹³ See also Köpcke's discussion of reasons to allocate legal power (80-81), which makes it clear that lawmaking power is sometimes best delegated to administrative agents.

¹⁴ Which, of course, is not to say that such regulations should not be open to challenge in the House of Commons, which can provide a very useful forum for contesting proposed regulations. Procedures for laying statutory instruments before Parliament have the potential to improve the making of delegated legislation both by facilitating challenges, and by putting the department that makes the regulation in the predicament of needing to avoid challenges, and needing to account for its measures in response to challenges.

¹⁵ *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

¹⁶ *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—...¹⁷

It is a formulaic reminder that the executive plays a crucial role in legislation in any Westminster system.

It is accurate enough to think of statutes as the work-product of the legislature, in the sense in which the authors of *Legislated Rights* speak of a legislature –an assembly convened for the purpose of deliberating and deciding on the making of open, general laws for the community. Grégoire Webber and Paul Yowell describe its function in this way:

‘It is the business of the legislature to understand a need for the law to be changed in some way, to form and revise reasoned proposals to change it, to debate, and then to choose a proposal to bring about a change to the law through an act of legislation.’ (5)

That choice certainly is legislative. But it seems to me that to achieve the crucial institutional cognition –to grasp a need– the legislature generally needs the leadership of the executive. And then, formulating a proposal is an executive task. The initiation of legislative proposals in Westminster systems is an executive act. Virtually all bills are proposed by the government (which can ordinarily use its control of the timetable to kill proposals from backbench MPs). A bill is sponsored by a department of government, and drafted by lawyers who treat the sponsoring department as their client. It is proposed by the government, and then reviewed in a legislative committee, and debated in the House of Commons. The House of Commons can force amendments on the government, and the House of Lords can propose amendments and slow down the process. It would be a bad mistake to think that the government can get whatever it wants through Parliament. But it certainly is the executive that *initiates* legislation.

That arrangement makes good constitutional sense. In the UK, deciding whether to ban handguns or dangerous dogs, or whether to authorise new forms of surveillance in response to terrorist threats, or whether to raise the income tax, are all matters that require legislation. And on all of them, the departments of government that deal with the matters at stake (the Home Office, the security services, the Treasury, the health service, etc etc) have expertise, and capacity to acquire expertise, and they have a crucial familiarity with the needs of the community to which Parliament must respond. They are the political community's best-equipped agencies for proposing new legislation. It seems to me that the crux of Parliament's role in legislation on such matters is to say ‘yes’ or ‘no’ to proposals from the government.

That is not all it does! A good committee system will not merely equip members of the legislature to vote ‘yes’ or ‘no’ on the reading of a bill; it will bring creative legislative thinking to its study of a bill, and it ought to be able to propose amendments (with time for their consideration). It may reshape the bill. Yet one function of the assembly will, I think, remain central and paramount: deciding whether to approve proposals for legislation from the executive.

Whatever else you may say about the British constitution, it frames this executive role in initiating proposals for legislation very successfully, as a result of the brilliant nineteenth-century development of the rule that the party with a majority in the House of Commons should form a government. That is just one possible form of interaction between the executive and the legislature (although it has been taken up by many countries), and it is not essential. In other systems, where the personnel of the executive and the legislature do not overlap, the legislature can use one or both of two techniques: (1) there must be some way in which executive institutions can propose bills to achieve what they know the country needs, or (2) the legislature must develop its own executive functions, to exercise the power of initiative.

¹⁷ See e.g. the Wild Animals in Circuses Act 2019, Chapter 24.

You see the implications for the role of the executive in human rights law: the argument for a central role for the legislature in *Legislated Rights* entails a central role for the executive. For the act of proposing a bill is an executive act. Specifying human rights in legislation depends on the good exercise of executive responsibility. In the words of Harry Reid, the former majority leader in the United States Senate, “You can’t legislate when you have a chief executive who’s weird....”¹⁸

The executive in litigation

Litigating on behalf of the community is an executive function of government. In the passive picture of its role, the executive is seen primarily as a defendant in human rights litigation. That is indeed one very important aspect of its role, but we should see its role as a defendant as one element in a wide-ranging, diverse, and creative role.

First of all, the role of any executive agency, being challenged in court on human rights grounds, is that of a good *public* litigant: it should resist a claim vigorously where there are public considerations, compatible with the respect for the rights of the claimant that the public interest demands, that militate against the claim. It should concede the force of sound legal arguments against its position. And in fact, the *only* justification for defending its position is that doing so serves the public interest, including the interest in justice, and in respect for human rights in particular.

Suppose that a claimant is challenging legislation as contrary to human rights (and therefore unconstitutional or, in the UK, incompatible with rights under the ECHR). The legislature is not a party to the litigation. Who is the defendant? It tends to be a party that has acted, is acting, or is proposing to act in accordance with legislation that the claimant is challenging. In the European Court of Rights, the defendant is the state (represented, of course, by the executive). In any of these cases, the litigation decisions will be executive decisions.

And now suppose that the executive official responsible for the litigation thinks that the legislation is, as the claimant argues, contrary to human rights. Perhaps the legislation was brought in under a previous legislature with a different policy platform that the current government opposes. There is a risk to constitutionalism, if the executive can procure a change in the law not by proposing it to the legislature for deliberation and decision, but by going along with a legal challenge. Even mere indifference on the part of the executive involves a risk. An adversary system of litigation threatens to break down if two parties come to court not to put the arguments on both sides, but in concert (or with the defendant not opposing the claim) to ask the court to overrule the decision of another agency that is unrepresented: the legislature. As a result, the role of the executive in human rights adjudication may create a problem for the integrity of public decision making. It is important to notice that the solution to this problem is not for the legislature to become a party to litigation over the compatibility of legislation with human rights! The legislation may have been made by a legislature with a different composition. In any case, its deliberative structure (which equips the legislature to legislate) does not equip it to adopt a litigation strategy and tactics. The only solution to the problem is for the executive to approach the litigation with respect for human rights and also with circumspection (and its accountability, to the legislature or directly to the people, may help). This fact provides another striking illustration of the fact that a state’s respect for human rights depends on the conduct of the executive branch.

Finally, we should not forget the crucial, active role in human rights law of executive agencies as prosecutors. It is essential to the rule of law and to respect for human rights. It is essential to the state’s fulfilment of its duty to protect human rights against organised and unorganised crime. And it is essential to the state’s fulfilment of its duty to protect human rights against the abuse of public power. The criminal law should give public officials no exemption from the law of murder or assault or kidnapping, and no defence on grounds of state necessity. But these

¹⁸ ‘Harry Reid Has a Few Words for Washington’ By Mark Leibovich, New York Times, Jan. 2, 2019
<https://www.nytimes.com/2019/01/02/magazine/harry-reid-senate-cancer-trump.html>

aspects of human rights law are not enough: there must be independent, energetic prosecutors, if respect for human rights is to be secured. The independence of prosecutors is, in fact, as important as judicial independence to the state's respect for human rights.

Conclusion

In a well-ordered community, the legislature regulates the executive and the courts give effect to the law governing the executive; those aspects of constitutional governance support and constrain the role of the executive, which is the primary branch of government (the branch, of course, that people often refer to as 'the government'). The legislature and the courts cannot achieve respect for human dignity; only the executive can achieve that.

The passive picture of the role of the executive in human rights law is alluring. It goes along with the general sense that a legislature is ok because it is democratic, and courts are ok because the independent judges act on principle, but the executive is not ok: it is neither democratic nor principled; it acts in its arbitrary self-interest. But in fact, in every decent political community, it is the executive that takes the lead in respecting human rights. In her study of the executive branch of government, Margit Cohn writes that:

'...the executive, entrusted with the role of management of the polity under law, operates as both an "executor" of law, under its commitment to the rule of law and subject to the political ideal of separation of powers, and as an "executive," or CEO, entrusted with steering the state in sickness and in health.'¹⁹

Perhaps it is not exactly the *polity* that the executive manages; the executive manages resources and agencies and institutions for the polity. But Cohn's picture of the complexity of the executive is a healthy reminder that the name 'executive' can be misleading: this massively complex branch of government is not simply there to execute the policies of the legislature and the orders of the courts. It must (while subject to the separated powers of the legislature and judiciary) steer the polity.

Of course, the state's responsibility for respecting human rights involves every public agency; the state can only discharge it successfully if each agency carries out its own distinctive role with respect for human dignity. By pointing out the central role of the executive, I hope I will not seem to have downplayed the roles of courts or legislatures.

Legislated Rights articulates the specific, irreplaceable role of the legislature in securing human rights protection. That role as a law maker gives it crucial responsibility because human rights protection must often be given legal form and legal force. That central message of the book is sound and very important. There are aspects of the specification of rights that can only be carried out by the legislature, and in human rights law there is a distinctive need for the prospectivity, generality, and stability that are characteristic of legislation. And as I have emphasised, I have not been contradicting the authors of *Legislated Rights*, because they recognise the distinctive roles of executive agencies. As the Preface says, human rights involve 'aspects of human wellbeing that should be actively pursued and promoted by *all* authorities responsible for a community' (vii). Perhaps they overthink the legislative role somewhat, when they say that 'legislatures have the central and strategic role in realising human rights' (vii). If we can describe one branch as having the central and strategic role, it is the executive branch.

As for the courts, notice that the argument of *Legislated Rights* implies that they have an essential role in securing respect for human rights: the courts must give legal effect to legislation specifying the requirements of human rights. Part of that role is simply to enforce requirements

¹⁹ Margit Cohn, 'Tension and Legality: Towards a Theory of the Executive Branch' (2016) 39 *Canadian Journal of Law & Jurisprudence* 321-350 at 345.

imposed by the legislature. I think that it would be compatible with the views defended in *Legislated Rights* to say that the courts also have a legitimate interpretive role that can be very important and creative, and that provides an institutional facility for further specification of human rights norms established by legislation.

I should add that although the authors focus, quite appropriately, on legislation, their argument actually applies more broadly to rights *established by law*. As Paul Yowell puts it: 'Our use of the term 'legislated rights' is meant to extend to ...rights embodied partially (or even mainly) in common law' (129). The courts can in some respects develop rights arising at common law more flexibly than they can develop the law made by the legislature. Perhaps the authors tend to think that judicial law making has characteristic drawbacks, so that there is something generally risky about the common law, and judicial development of the common law is only ever justifiable if there are special reasons for it. Paul Yowell suggests that there is a general problem with judicial law making in the common law tradition:

'The judge in a case under the common law has a dual role of law-applier and (potentially) law-maker. This means that the relevant law-maker is severely restricted in how he can change the law; simultaneously, any change in the law is problematic with regard to the Rule of Law virtues of clarity and certainty.' (129)

And Urbina suggests that the common law has a general difficulty in bringing about intelligent legal change because unlike a legislature, it addresses 'one conflict or the claims of one person' (173, cf. 175).

It seems to me that we cannot generalise about these things. Urbina is undoubtedly right that *some* changes can best be made with a broader vision that is not available to a court that hears the claim of one person. For example, I am not proposing that the courts ought to determine the levels of income tax, in response to the claims of one person. But some changes in the law can best be made by such a court precisely because of its perspective: the perspective that equips a court to act with equity. Grounds of equity can become, through the common law process, the basis for improvements in the general rules. And then, judicial lawmaking shares this feature with the administration of equity by judges: it is not generally good or bad; it should be carried out in those matters on which a court can pass judgment effectively, and it should not be carried out in those matters for which they are not suited.

The judicial function in developing administrative law, discussed above, illustrates the possibility that courts might make law justly and in the public interest. And in a common law system, the courts have a legitimate responsibility for sustaining and for developing elements of the law that are crucial protections for human rights –the law of tort and the law of criminal defences are prime examples.²⁰

Let me conclude by summarising the distinctive human rights responsibilities of executive agencies that I have pointed out:

- As administrative agencies (specifying the effect the state gives to human rights law in the individual case, where the case involves operating a scheme of protection or support or delivery of any service)
- As lawmakers (where authority to make law is delegated to them)
- As makers of rules and guidelines and as generators of legitimate expectations (even where no law-making authority is delegated to them)
- As initiators of proposals for legislation within or in concert with the legislature

²⁰ As Paul Yowell says, 'The right to life is... protected first and foremost by laws prohibiting murder and other forms of homicide. The right is protected further by the cause of action in tort law for wrongful death...' (120-121).

- As defendants in human rights cases
- As prosecutors in respect of alleged violations of human rights.

I have only touched on some illustrative aspects of the capacity and the responsibility of the executive branch. There are many other aspects: for example, the *ad hoc* executive action of emergency services. When police officers come to the scene of a fatal collision, they have the opportunity that any well-equipped citizen has. Likewise, in responding to a burglary in progress, they have the opportunity that a private security guard has. But in acting in an executive capacity on behalf of the community, they acquire a wider capacity, and responsibility, and authority. They have a responsibility that other passers-by do not have, to meet the needs of persons involved. It is correspondingly, ordinarily, up to them to regulate their own response to people's needs.

We think of the executive as the branch of government that uses guns; it is worth remembering that it is also the branch of government that employs nurses.