

**WORK IN PROGRESS: PLEASE DO NOT CITE**

**Hope's relations: A theory of the 'right to hope' in European human rights law**

“[E]ven those who commit the most abhorrent and egregious of acts...nevertheless retain their essential humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, some day, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. *To deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading.*”

~ 22662/13 et al., *Matiošaitis and Others v Lithuania* (2017), para.180 (emphasis added)

What does it mean, to experience hope? And how is this experience made the object of a right as a matter of European human rights law? These are the two questions that motivate this paper, which takes as its starting point the idea, expressed in the extract above, that there exists in European human rights law a ‘right to hope’. The emergence of this phrase in the jurisprudence of the Strasbourg court has attracted a notable degree of attention in the European human rights law scholarship of recent years; and much has been written recording the fact of this development (if it is a development) and pondering the meaning of the right (if it is, indeed, a right).<sup>1</sup> What I am interested in in this paper, however, is *how* this ‘right to hope’ has come to be – in how, in short, it has been constructed. This is a puzzle that is in many ways inseparable from that of the meaning of the right, it being a question that asks about the articulation of the right within the context of European human rights law, and therefore within the context of European human rights law’s framework of meaning.<sup>2</sup> In what follows, these aspects will accordingly be treated together, with the contribution of this paper being that it offers an account of the construction of the ‘right to hope’ in European human rights law. And, since we cannot examine this subject without thinking about the experience of hope itself, the account offered here will, simultaneously, speak to two broader questions.

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<sup>1</sup> See, e.g., Angelika Nußberger, ‘Three square meters of human dignity?’, in Linos-Alexandre Sicilianos, Iulia Antoanella Motoc, Robert Spano and Roberto Chenal (eds.), *Regards croisés sur la protection nationale et internationale des droits de l’homme/Intersecting views on national and international human rights protection: Mélanges en l’honneur de/Guido Raimondi* (2019, Wolf Legal Publishers, Tilburg, The Netherlands), 669-686; Marion Vannier, ‘A Right to Hope? Life Imprisonment in France’, in Dirk Van Zyl Smit and Catherine Appleton (eds.), *Life Imprisonment and Human Rights* (2016, Hart Publishing, Oxford and Portland), 189-214; Kanstantsin Dzehtsiarou and Filippo Fontanelli, ‘Family visits and the right to hope: Vinter is coming (back)’ (2015) *European Human Rights Law Review* 2, 163-173.

<sup>2</sup> By this I mean European human rights law’s conceptual framework – its framework of “intelligibility”, to borrow a term from Jonathan Lear, who describes a “loss of intelligibility” as involving a situation in which “the concepts and categories by which the inhabitants of a form of life have understood themselves...cease to make sense as ways to live” (Jonathan Lear, ‘What Is a Crisis of Intelligibility?’, in *Wisdom Won from Illness: Essays in Philosophy and Psychoanalysis* (2017, Harvard University Press, Cambridge MA), 50-62, p50-51).

The first is as to how European human rights law engages with human experience at all: a question indicated from the outset and that I have begun to explore elsewhere.<sup>3</sup> The second is as to the meaning of hope: a question which will be primarily addressed with reference to meaning as it is constructed in European human rights law, but which cannot be seriously articulated or reflected upon at a more general level without acknowledging the urgency which accompanies questions of hope at any time, including our current times. The thinking through of hope that has shaped the writing of this paper could not have been anything but affected by the contemporary context. The resulting account is, like all accounts, one that has been written at a particular time.

Those, then, are the questions and underpinning considerations of this paper; what of the ‘right to hope’ itself? If we look to the extract above in this respect, what we see is a conception of hope that seems to be located squarely in relation to the individual – that casts it as something that is held at the level of the individual. As will be discussed in further detail in the pages that follow, this is consistent with European human rights law’s form of law more broadly: a form of law that is claimed to be based on, and in existence for, ‘the individual’.<sup>4</sup> But there are also two specific features of the conception of hope articulated in the extract above that are worth drawing out for immediate reflection. The first is the connection that is drawn between hope and atonement. Hope is presented in relation to atonement. This implies not only a certain way of thinking about the self in European human rights law (a way perhaps revealed, to an extent, in the notion of “the capacity to change”), but also that hope is relational. For insofar as the notion of atonement connotes a form of relationship with another,<sup>5</sup> then the effect of its linking to hope here is that hope, too, emerges in European human rights law as involving a type of relation, and, therefore, recognition.

The second notable feature of the conception of hope in question is the idea that denying a person the experience of hope would involve denying them “a fundamental aspect of their humanity”, which would be degrading. Hope is here associated with dignity; and it is this link that has been the focus of the European human rights law literature in this area, which more broadly suggests that the articulation of a right to hope is a novel development,

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<sup>3</sup> *On coming to terms: How European human rights law imagines the human condition* (2018, PhD thesis: [http://etheses.lse.ac.uk/3946/1/Trotter\\_On-coming-terms-European-human-rights.pdf](http://etheses.lse.ac.uk/3946/1/Trotter_On-coming-terms-European-human-rights.pdf)) (forthcoming with Oxford University Press in 2022); ‘The Child in European Human Rights Law’ (2018) *The Modern Law Review* 81(3), 452-479.

<sup>4</sup> The Convention is described as having as its “object and purpose...the protection of individual human beings” (14038/88, *Soering v UK* (1989), para.87) and as its “very essence...respect for human dignity and human freedom” (2346/02, *Pretty v UK* (2002), para.65).

<sup>5</sup> See, e.g., Linda Radzik, *Making Amends: Atonement in Morality, Law, and Politics* (2009, Oxford University Press), p10: “A secular theory of atonement...focuses on interpersonal wrongs. Its topic is the moral violations that we human beings commit against one another and the responses we make to our victims, our communities, and ourselves in light of those transgressions.” The conception of atonement that Radzik goes on to elaborate is one that is focused on the reconciliation of relationships (see esp. Ch.4).

and that, moreover, hope is now conceived of as being a part of – or is rather somehow bound up in – the notion of dignity in European human rights law.<sup>6</sup>

In order to think through the question of the construction of the right to hope in this context, these broad ideas of hope's relations need to be explored more thoroughly, and that is what I am going to do in this paper. Three arguments will be made. The first is that hope in European human rights law is intersubjective, and not only subjective – which is to say that hope is a property of relations between individuals, and not only a property of the individual per se. The second is that the notions of hope and dignity are inseparable in European human rights law, with hope being conceived of as both having and conferring a certain dignity. The third is that the right to hope in European human rights law is, fundamentally, a right to recognition.

The paper is structured accordingly. It begins by examining the articulation of the 'right to hope' in European human rights law (Section 1). It goes on to examine what hope is and means in this context (Section 2) and the relationship that is depicted between hope and dignity (Section 3). Finally, it suggests a way of thinking about the right to hope in European human rights law as a right to recognition: a right that is grounded in hope's relations (Section 4).

## **1. The 'right to hope' in European human rights law**

The question of hope and human rights is not, of course, a new one; and a vast literature implies a role for hope in relation to human rights and equally for human rights in relation to hope.<sup>7</sup> I say 'implies', because in fact much of this literature – with the principal exception of that concerning the subject of irreducible life sentences<sup>8</sup> (the starting point, too, of this paper) – does not elaborate a specific conception of hope or an account of its meaning per se. Rather, it tends to depict or presuppose a notion of the experience or politics of hope as in some way

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<sup>6</sup> See, e.g., the references in n.1 above.

<sup>7</sup> See, e.g., Lorenzo Cotula, 'Between Hope and Critique: Human Rights, Social Justice and Re-imagining International Law from the Bottom Up' (2020) *Georgia Journal of International and Comparative Law* 48(2), 473-521...[more references to be added...]

<sup>8</sup> This literature will be addressed in the following pages, but briefly, it has three main strands. One examines the 'right to hope' in European human rights law: a notion expressed in relation to the principle that a life sentence must be reducible de jure and de facto (which means that it must carry the prospect of release and the possibility of the review of the sentence) (see, e.g., the references in n.1 above). A second examines, in similar vein, national human and constitutional rights jurisprudence within European jurisdictions: thus studies have been conducted on hope in relation to French, German, and Polish sentencing law, for example (see, e.g., Vannier (2016), above n.1, and also in that same collection of essays [Dirk Van Zyl Smit and Catherine Appleton (eds.), *Life Imprisonment and Human Rights* (2016, Hart Publishing, Oxford and Portland)], Maria Ejchart-Dubois, Maria Niefaczna and Aneta Wilkowska-Płóciennik, 'The Right to Hope for Lifers: An Analysis of Court Judgments and Practice in Poland', 373-388; Axel Dessecker, 'Constitutional Limits on Life Imprisonment and Post-Sentence Preventive Detention in Germany', 411-434. A third strand of literature examines the emergence of hope as "a constitutional consideration" in U.S. constitutional jurisprudence (Alice Ristroph, 'Hope, Imprisonment, and the Constitution' (2010) *Federal Sentencing Reporter* 23(1), 75-78, p75), where sentences of life imprisonment without parole for juvenile offenders convicted of nonhomicide offences have been deemed unconstitutional (*Graham v Florida* 560 U.S. 48 (2010)).

related to or located within a given human rights imaginary or conception of social justice more broadly. It leans, in other words, towards a historicization or contextualisation of hope,<sup>9</sup> and away from a conceptual analysis.<sup>10</sup> This is not to say that there is a kind of lack in the literature; but there is a space, and it is an interesting one to observe, because the relative dearth of analytical reflections on the concept of hope in the specific context of the human rights scholarship – and even in literature which has ‘hope’ in its title – reflects the choices that are made in this scholarship and the way in which the concept itself seems to be presupposed in a great deal of writing.

If we turn our attention to the broader legal literature, however, we find that more has been written on hope, particularly in the context of the ‘law and emotions’ scholarship. This is a field (or ‘perspective’<sup>11</sup>) defined by the interest of its writers in “law’s various relations to our emotions and to emotional life”,<sup>12</sup> and the leading account of hope that has been offered in its vein is a piece by Kathryn Abrams and Hila Keren analysing the structure of hope as an emotion and the possible ways in which law and legal interventions can cultivate hope.<sup>13</sup> Further sustained engagements with questions of hope in law are to be found especially in the field of criminal justice, where notable contributions include Alison Liebling and colleagues’ analysis of the role of hope in relation to the personal development of prisoners in the context of their study into “the cultural and moral climate of a prison”;<sup>14</sup> Krystle Martin and Lana Stermac’s examination of the levels of hope in and among offenders in relation to their risk of reoffending;<sup>15</sup> and Gideon Boas and Pascale Chifflet’s discussion of hope in the context of international criminal justice.<sup>16</sup> And then in the field of legal anthropology there is Adam Reed’s fascinating ethnography of the category of hope in the context of life on remand in a Papua New Guinean prison: a piece that examines the experiences of inmates and asks not only of their experience of hope and of the work that

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<sup>9</sup> With the specific exception of the literature on the ‘right to hope’, this observation extends to European human rights law too.

<sup>10</sup> My point here is not that these are mutually exclusive exercises, merely that there is little conceptual analysis of hope itself in the human rights literature.

<sup>11</sup> Kathryn Abrams and Hila Keren, ‘Who’s Afraid of Law and the Emotions?’ (2010) *Minnesota Law Review* 94(6), 1997-2074, p2000, at p2034 describing the way in which “law and emotions scholarship embodies a particular lens: an effective standpoint” and then going on to say that this is about “[e]xamining law from the perspective of the emotions”.

<sup>12</sup> Robin West, ‘Law’s Emotions’ (2015) *Richmond Journal of Law and the Public Interest* 19(4), 340-361, p340. See further, e.g., Susan A. Bandes (eds.), *The Passions of Law* (1999, New York University Press).

<sup>13</sup> Kathryn Abrams and Hila Keren, ‘Law in the Cultivation of Hope’ (2007) *California Law Review* 95(2), 319-381. See also Kathy Abrams and Hila Keren, ‘Legal hopes: enhancing resilience through the external cultivation of positive emotions’ (2013) *Northern Ireland Legal Quarterly* 64(1), 111-123

<sup>14</sup> Alison Liebling et al., ‘Are Hope and Possibility Achievable in Prison?’ (2019) *The Howard Journal of Crime and Justice* 58(1), 104-126, p105, p116-118.

<sup>15</sup> Krystle Martin and Lana Stermac, ‘Measuring Hope: Is Hope Related to Criminal Behaviour in Offenders?’ (2010) *International Journal of Offender Therapy and Comparative Criminology* 54(5), 693-705.

<sup>16</sup> Gideon Boas and Pascale Chifflet, *International Criminal Justice* (2017, Edward Elgar Publishing), esp. Ch.7.

hope does in this context, but also, more deeply, “[w]hat does it mean to declare oneself hopeful or to be identified as a hopeful subject by another?”<sup>17</sup>

Of course, we can think of ways in which hope inevitably makes its way into and subtly shapes our other legal disciplines too. The references detailed above should therefore not be treated as expressive of a claim to be exhaustive; they are merely examples of contributions which are distinctive in my view for reason of their focus on hope. They are analyses to which we will, furthermore, return in considering the meaning of hope, in the course of which we will also weave in the broader literature on the subject (whilst remaining conscious of the need to avoid blending different conceptions of hope<sup>18</sup>). But before coming to all of that, there is a prior question to address: that of the construction, in the case law, of the right to hope in European human rights law.

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The idea that there exists, in European human rights law, a ‘right to hope’ is a product of the jurisprudence on sentencing, and, in particular, the case law pertaining to life sentences. Here, the ECtHR has made clear that “the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 [of the European Convention on Human Rights]” (the prohibition on torture and inhuman or degrading treatment or punishment),<sup>19</sup> and that a fundamental question in this respect will be of “whether a life prisoner can be said to have any prospect of release”.<sup>20</sup> For the purposes of Article 3, a life sentence must be reducible *de jure* and *de facto*: it must carry the prospect of release and the possibility of review of the sentence, “with a view to its commutation, remission, termination or the conditional release of the prisoner”.<sup>21</sup> And the basis of this fundamental principle of reducibility? Hope.

This was elaborated in *Vinter and Others v UK (2013)*, which concerned the compatibility of the whole life orders<sup>22</sup> given to the applicants (who were each serving sentences of life imprisonment for murder) with Article 3 of the European Convention on Human Rights (‘the ECHR’). The Grand Chamber explained that there were four main reasons as to why there needed to be “both a prospect of release and a possibility of review” for a life sentence to be compatible with Article 3.<sup>23</sup> Firstly, it said, detention must always be underpinned by “legitimate penological grounds” (including “punishment, deterrence, public protection, and rehabilitation”) – meaning that the life sentence must not only be justified by

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<sup>17</sup> A. Reed, ‘Hope on remand’ (2011) *The Journal of the Royal Anthropological Institute* 17(3), 527-544, p528.

<sup>18</sup> On which point see Ayşe Parla, ‘Critique Without a Politics of Hope?’, in Didier Fassin and Bernard E. Harcourt (eds.), *A Time for Critique* (2019, Columbia University Press, New York), 52-70 (at p54: “An important caveat concerns the ways in which hope often gets tossed around as a blanket category of analysis and experience. In various contemporary takes on hope...different kinds of hope and different conditions for hoping are too easily collapsed onto one another or appealed to simultaneously as if they are substitutable.”).

<sup>19</sup> 21906/04, *Kafkaris v Cyprus* (2008), para.97.

<sup>20</sup> *Ibid.*, para.98.

<sup>21</sup> *Ibid.*, para.98.

<sup>22</sup> A whole life order may be exceptionally imposed instead of a minimum term, with the effect that the offender cannot be released from prison other than by way of the Secretary of State’s exceptional exercise of discretion.

<sup>23</sup> 66069/09 et al., *Vinter and Others v UK* (2013), para.110.

reference to one or more of these grounds at the time of its imposition, but that there must be a subsequent review of this justification, in order to take account of any change.<sup>24</sup> Secondly, without any possibility of release or review of the life sentence, “there is a risk that [the prisoner] can never atone for his offence”, since “whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable”.<sup>25</sup> Thirdly, the Court was influenced by German constitutional law and its position that irreducible life sentences are incompatible with the provision on human dignity in the Basic Law.<sup>26</sup> This consideration, it stated, was also to be applied in ECHR law, bearing in mind that “the very essence of [the Convention system]...is respect for human dignity”.<sup>27</sup> Fourthly, the Court observed that the context of contemporary European penal policy more generally was one of an emphasis on rehabilitation (which was incompatible with the very notion of an irreducible life sentence).<sup>28</sup>

For these reasons, the Court said, life sentences must be reducible. They must involve a review which takes into account any changes in the life of the prisoner and the progress of that prisoner towards rehabilitation, and which checks, in the light of this, whether continued detention remains justifiable.<sup>29</sup> Moreover, there is to be no uncertainty in the mind of the prisoner as to any of this: the prisoner “is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought.”<sup>30</sup>

In the case in question, the life sentences could not be regarded as reducible in this sense, and there had, accordingly, been a violation of Article 3. Yet whilst the Court emphasised that this finding did not give the applicants “the prospect of imminent release”,<sup>31</sup> what it did, according to Judge Power-Forde in her Concurring Opinion, was secure the place of “the right to hope” in Article 3.<sup>32</sup> She continued:

“The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope

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<sup>24</sup> *Ibid.*, para.110.

<sup>25</sup> *Ibid.*, para.112.

<sup>26</sup> *Ibid.*, para.113.

<sup>27</sup> *Ibid.*, para.113.

<sup>28</sup> *Ibid.*, para.115 et seq.

<sup>29</sup> *Ibid.*, para.119.

<sup>30</sup> *Ibid.*, para.122.

<sup>31</sup> *Ibid.*, para.131.

<sup>32</sup> *Ibid.*, Concurring Opinion of Judge Power-Forde.

would be to deny a fundamental aspect of their humanity and, to do that, would be degrading”.<sup>33</sup>

With these words, Judge Power-Forde seemed to be drawing out a point that was subtly present in the Court’s remarks about atonement and human dignity, particularly as these were framed in terms of the overriding aim and process of rehabilitation, and, therefore, in terms of time. As to atonement, the Court had expressed the view that in the case of a “fixed and unreviewable” life sentence – a sentence that presented the possibility of the impossibility of atonement – “the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence”.<sup>34</sup> Its point about human dignity was meanwhile one about the effects of loss of chance: a point grounded in reference to the German Federal Constitutional Court’s jurisprudence and its recognition that “it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom”.<sup>35</sup> It was this notion of the temporality of rehabilitation – and its implicit demands for a longer view, involving recognition of the possibility of change and the capacity to change – that Judge Power-Forde then forefronted and elaborated in her own analysis, where she recast it primarily in terms of the prisoner’s subjective experience of hope and then as a right to this. And that there really was a ‘right to hope’ being articulated here was confirmed a few years later, when, in another case concerning irreducible life sentences (*Matiošaitis and Others v Lithuania (2017)*), the words of Judge Power-Forde’s Concurring Opinion in *Vinter and Others* were carried across into the majority’s judgment and articulated as a statement of European human rights law.<sup>36</sup>

Thus the idea of a ‘right to hope’ emerged in European human rights law, and since then it has been both embedded in the case law of the European Court of Human Rights (‘the ECtHR’) and drawn on more widely too.<sup>37</sup> The question that this poses is of the conception of hope here – of what hope is and means in European human rights law. Before we turn to this, there are two points worth bearing in mind. Firstly, the question of hope and its meaning – a question articulated here in the context of the jurisprudence concerning (irreducible) life sentences – is distinct from questions of the rationale, legitimacy, or justifiability of these sentences. I am not seeking to address such normative questions about sentencing in this paper,<sup>38</sup> but rather to examine the notion of hope that has been articulated in European human rights law with reference to these sentences. The inquiry is into the meaning of hope in European human rights law, with the presumption being that this is to be found in European

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<sup>33</sup> *Ibid.*, Concurring Opinion of Judge Power-Forde.

<sup>34</sup> *Ibid.*, para.112.

<sup>35</sup> *Ibid.*, para.113.

<sup>36</sup> 22662/13 et al., *Matiošaitis and Others v Lithuania (2017)*, para.180.

<sup>37</sup> See, e.g., [comparative case law]...

<sup>38</sup> These have been very well addressed elsewhere; see, e.g., Dirk van Zyl Smit and Catherine Appleton (eds.) (2016), above n.1. ...

human rights law itself.<sup>39</sup> In this sense, the project is one of philosophical anthropology: a discipline that forefronts “conceptual life” (particularly the question of “the concepts with which we understand ourselves and the world we inhabit”)<sup>40</sup> and addresses our frameworks of understanding – the frameworks of “intelligibility” that we use and rely on to make sense of our lives.<sup>41</sup>

Related to this is a second point, which is that the question of the meaning of hope in European human rights law is going to be addressed primarily in the context of the jurisprudence of the ECtHR concerning irreducible life sentences. That is not to say that hope has not arisen in other areas of the case law too. It has, of course,<sup>42</sup> as in references to the effects of hope (or the waning or loss of hope) on an individual or case more broadly;<sup>43</sup> in discussions of situations involving a lack of hope (of, for example, the improvement of prison conditions);<sup>44</sup> in evaluations of the legitimacy,<sup>45</sup> reasonableness,<sup>46</sup> realistic nature,<sup>47</sup> naturalness,<sup>48</sup> or enforceability<sup>49</sup> of a given hope; in analyses of the meaning of – and enabling

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<sup>39</sup> A comparable point has been made more clearly by Stephen Davies in ‘The Expression of Music’ (1980) *Mind* Jan 1980. 89, n353, 67-86, at p75: “The reasons for the musical movement are to be sought in the music itself; if the music makes ‘sense’ then its sense is given in the course of the music and an appreciation of the composer’s intentions is not yet an appreciation of the musical sense.”

<sup>40</sup> Jonathan Lear, *The Idea of a Philosophical Anthropology (Spinoza Lectures)* (2017, Koninklijke Van Gorcum), p15, p13.

<sup>41</sup> See Lear (2017), above n.2.

<sup>42</sup> This sentence is based on a review of all the judgments of the European Court of Human Rights mentioning the word ‘hope’ (last reviewed 3 October 2020, with 628 English results).

<sup>43</sup> See, e.g., 73316/01, *Siliadin v France* (2005), paras.128-129; 67724/09, *C.N. and V. v France* (2012), para.92; 43418/09, *Claes v Belgium* (2013), para.100; 33192/07 and 33194/07, *Kaçiu and Kotorri v Albania* (2013), para.99; 55508/07 and 29520/09, *Janowiec and Others v Russia* (2012), para.186; 23180/06, *Bandaletov v Ukraine* (2013), para.61; 23502/06, *Benzer and Others v Turkey* (2013), para.125; 21884/15, *Chowdury and Others v Greece* (2017), para.95; 36925/07, *Güzelyurtlu and Others v Cyprus and Turkey* (2017), para.215; 54270/10, *Costa and Pavan v Italy* (2012), para.66; 18052/11, *Rooman v Belgium* (2019), paras.157, 241; 25244/18, *N.A. v Finland* (2019), para.60; 2260/10, *Tanda-Muzinga v France* (2014), para.81. See also, concerning the broader effect on a case, e.g., 1451/10 et al., *Siništaj and Others v Montenegro* (2015), para.132; 2082/05, *Aydin Çetinkaya v Turkey* (2016), para.83.

<sup>44</sup> See, e.g., 31535/09, *Gorbulya v Russia* (2014), para.94; 11215/10 and 55068/12, *Dolgov and Silayev v Russia* (2016), para.26; 55089/13, *Dorneanu v Romania* (2017), para.93; 67907/16, *Kolgin v Russia* (2018), para.28.

<sup>45</sup> See, e.g., 63252/00, *Păduraru v Romania* (2005), para.84; 552/10, *I.B. v Greece* (2013), para.76. See, further, on the drawing of a distinction between a hope and a ‘legitimate expectation’ within the meaning of the case law pertaining to Article 1 of Protocol No.1, 27881/06, *Sinadinovska v North Macedonia* (2020), para.19; and on the distinction “between a mere hope of restitution, however understandable that hope may be, and a ‘legitimate expectation’, which must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act...”, 44912/98, *Kopecký v Slovakia* (2004), para.49.

<sup>46</sup> See, e.g., 52013/08, *Mosendz v Ukraine* (2013), para.108.

<sup>47</sup> See, e.g., 55723/00, *Fadeyeva v Russia* (2005), para.123; 44362/04, *Dickson v UK* (2007), para.72; 16064/90 et al., *Varnava and Others v Turkey* (2009), para.170; 4704/04, *Palić v Bosnia and Herzegovina* (2011), para.50; 39678/03, *Voronkov v Russia* (2015), paras.38-39, 45.

<sup>48</sup> See, e.g., 49151/07, *Muñoz Diaz v Spain* (2009), para.63.

<sup>49</sup> This arises in particular with respect to property rights; the ECtHR has made clear on a number of occasions that “[t]he hope that a long-extinguished property right may be revived cannot be regarded as a ‘possession’, and neither can the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively...” (32958/02, *Gaischeg v Slovakia* (2006), para.30). See also 35289/11, *Regner v The Czech Republic* (2017), para.103: “Article 6 is not applicable where the domestic legislation, without conferring a right, grants a certain advantage which it is not possible to have recognised in the courts... The same situation arises



conditions for – the capacity to hope;<sup>50</sup> and in more descriptive discussions of that which has been done – or not done – on the basis of hope.<sup>51</sup> But the focus of the question of hope and its meaning needs, at least initially, to be on the extract that sparked this article: an extract concerning the notion of an irreducible life sentence, and in which hope was articulated as a matter of right.

## 2. ‘Hope’ in European human rights law

At the root of the position that the very notion of an irreducible life sentence is objectionable from the perspective of European human rights law lies the fact that such a sentence involves no way out. Some would presumably argue that that is precisely the point of such sentences; as indicated above, however, my purpose here is not to engage in a debate as to the underpinning rationale, legitimacy, or justifiability of these sentences but rather to examine the objection to them that is set out in European human rights law. This objection is primarily that where the remainder of a life and the remainder of a sentence are synonymous, rehabilitation is undermined. It is undermined because progress towards it on the part of the prisoner has no effect: “whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable”.<sup>52</sup> And if the actions of the prisoner cannot and therefore do not represent anything in this way – if they cannot, in other words, carry meaning beyond their fact; if they cannot make a difference to the course of the prisoner’s sentence (and, therefore, life) – “there is the risk that he can never atone for his offence”.<sup>53</sup>

Implicit in this logic is the sense that without being able to atone, the prisoner is in a terminal condition: the notion of the risk of the inability to atone implies both the need to be able to do so and the world of possibility that lies beyond that. Atonement is here taken to be both embedded in and expressive of a broader idea of possibility in this way: its possibility is dependent on everything that underpins (and includes) the prospect of release and the possibility of a review of the sentence, but beyond that possibility itself – and, more specifically, the sense of possibility – becomes contingent on atonement.

This is where the connection to hope is made; and it is made at two levels. Firstly, a specific notion of hope – a notion of a hope to atone – is expressed. Thus, as Judge Power-Forde initially put it in *Vinter and Others v UK* (and as the majority subsequently articulated it in *Matiošaitis and Others v Lithuania*), prisoners sentenced for life “retain the right to hope

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where a person’s rights under the domestic legislation are limited to a mere hope of being granted a right, with the actual grant of that right depending on an entirely discretionary and unreasoned decision of the authorities.”

<sup>50</sup> See, e.g., 30240/96, *D v UK* (1997), para.52; 58858/00, *Guiso-Gallisy v Italy* (2005), para.90; 73316/01, *Siliadin v France* (2005), paras.128-129; 67724/09, *C.N. and V. v France* (2012), para.92.

<sup>51</sup> See, e.g., 36488/08, *Tamer Tanrikulu v Turkey* (2016), para.20; 79885/12 et al., *A.P., Garçon and Nicot v France* (2017), para.126; 34015/07, *Zherdev v Ukraine* (2017), para.81; 2156/10, *M. v The Netherlands* (2017), para.112; 56120/13, *Baysultanov v Russia* (2020), para.71.

<sup>52</sup> 66069/09 et al., *Vinter and Others v UK* (2013), para.112.

<sup>53</sup> *Ibid.*, para.112.

that, someday, they may have atoned for the wrongs which they have committed”.<sup>54</sup> Secondly, this specific hope, held by prisoners sentenced for life, is connected to a more general point about the experience of hope: “[t]hey [prisoners sentenced for life] ought not to be deprived entirely of such hope [that someday they may have atoned for their wrongs]. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading”.<sup>55</sup>

This is a revealing statement in what it tells us about the fundamentality of hope as it is conceived of in European human rights law, and I will come back to that element of it shortly. I want to dwell first of all on the relationship that is depicted here between hope and possibility. By ‘possibility’ I mean not only that which is possible (and can therefore be hoped for<sup>56</sup>), but also the idea of the sense of possibility alluded to earlier on in reference to the notion of atonement in European human rights law. For if, as was suggested above, atonement and possibility are intertwined in European human rights law, with possibility itself – and more specifically, the sense of possibility – contingent on atonement, then hope also emerges as dependent on a sense of possibility. This is because a connection is made between hope and atonement, with the deprivation of the hope to atone being linked to a broader denial of the experience of hope itself. Put differently, an existence without the prospect of release or review of the sentence is cast as being one that is stripped of the experience of hope: an existence that is, in a way, concluded;<sup>57</sup> a state that is one of the production of<sup>58</sup> hopelessness or despair.<sup>59</sup>

This notion of the denial of the experience of hope is interesting from the perspective of the literature on hope and agency, which mostly emphasises the individual activity and attention involved in hoping,<sup>60</sup> and in so doing implies that to deny someone the experience of hope could only conceivably occur by reference to the point of the hope in question or the

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<sup>54</sup> *Ibid.*, Concurring Opinion of Judge Power-Forde; 22662/13 et al., *Matiošaitis and Others v Lithuania* (2017), para.180.

<sup>55</sup> *Ibid.*

<sup>56</sup> On some accounts, this is a condition of a hope. E.g., Stan van Hoof (in *Hope* (2014, Routledge, Abingdon)) argues that a condition of a hope is that it be considered possible in the future – and, further, that it is this notion of possibility that is the key feature that distinguishes hopes and wishes (“a wish can be for something that is not possible”: p20) (p16-20).

<sup>57</sup> In a different but illuminating context, Adam Reed, in the ethnography that I referred to earlier (see n.17 above), uses the phrase “concluded subjects” to describe the way in which the convicts in his study of Papua New Guinea’s largest prison knew of their fate, claimed to be “shaped by the sentence handed down to them”, and, fundamentally “[could not] find hope in their constitution as certain types of prisoners” (p530-531). By contrast, a remand inmate who was a subject who was waiting: one “who [had] still to find out what he [would] become” (p530).

<sup>58</sup> This point about production comes from David Graeber, ‘Hope in Common’ (2008) (available at: <https://theanarchistlibrary.org/library/david-graeber-hope-in-common>) (last accessed 10 June 2020), 1-5: “Hopelessness isn’t natural. It needs to be produced.” (p1)

<sup>59</sup> On the idea that hope and despair go together see, e.g., Angus Fletcher, *The Place of Hope and Despair* (1999) *Social Research* 66(2), 521-529: “despair mates with hope in a twin relationship, and neither will be present without the threat or promise of the other” (p521).

<sup>60</sup> See, e.g., Patrick Shade, *Habits of Hope: A Pragmatic Theory* (2001, Vanderbilt University Press, Nashville)... (further references to be added).

possibility of the experience of hope itself. This, by extension, suggests two ways of thinking about the idea of ‘the experience of hope’ that is articulated in European human rights law. On one interpretation, ‘the experience of hope’ would involve the experience of hoping for a specific object,<sup>61</sup> in which case the denial of the experience of hope would involve the denial of the experience of hoping for that specific object (perhaps because of the elimination of the object or the viability of its attainment<sup>62</sup>). The other interpretation – which would appear to be far more consistent with the rather more general way in which the notion of ‘the experience of hope’ is expressed in European human rights law – would be that ‘the experience of hope’ is the experience of the capacity to hope: a capacity dependent on a sense of possibility. In that case, the denial of the experience of hope would involve the denial of the sense of possibility required to exercise the capacity to hope.

Of course this latter interpretation raises a broader question as to the circumstances in which that sense of possibility would be denied (or indeed maintained), and of what those circumstances, in turn, tell us about the experience of hope; and it will later be suggested that what is in issue here in European human rights law is, fundamentally, a question of recognition, such that the denial of hope involves the denial of recognition. But that we are talking here at all of the denial of the sense of possibility required to exercise the capacity to hope is evident: turning back to the case of the irreducible life sentence, the point being made in the way in which this case is presented in European human rights law is that any possibility (indeed, the very notion of possibility) beyond the fact of the sentence is inconceivable. More specifically, if it is conceivable, its viability is dismissed in that same moment.

The idea that the capacity to hope is bound up in and contingent on a sense of possibility in this way suggests that hope in European human rights law is more than an

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<sup>61</sup> Indeed on some accounts this is precisely what hope involves. See, e.g., van Hooft (2014) (n.56 above), at p48 describing how “a technical feature of hopes” is that “[h]opes are directed upon objects. One hopes that some event will occur, that one will obtain some item or that one attains some goal.”

<sup>62</sup> There is a debate in the literature as to the degree to which a hope must be realistic or rational. E.g., on one approach, the fact that the object of a hope is unattainable would not mean that it could not be hoped for, simply that this would not make sense (see, e.g., E. Fromm, *The Revolution of Hope: Toward a Humanized Technology* (2010 [1968], American Mental Health Foundation Books), p22: “There is no sense in hoping for that which already exists or for that which cannot be.”). On another approach, hope requires uncertainty, such that it could not be possible in a context in which the object was certainly unattainable (see, e.g., Gregory Karl and Jenefer Robinson, ‘Shostakovich’s Tenth Symphony and the Musical Expression of Cognitively Complex Emotions’, in Jenefer Robinson (ed.), *Music and Meaning* (1997, Cornell University Press, Ithaca, New York), Ch.7, p163: “What is the cognitive content of hope? In part, hope is an epistemic state: if I hope for something to occur, then necessarily I am uncertain whether it will occur. I cannot, for example, hope that I will meet Napoleon Bonaparte one day if I am absolutely certain that this is impossible. By the same token, it is possible to hope for anything to occur, however wildly improbable, provided one is not certain that it cannot occur. ... How *rational* a hope is depends partly on the degree of probability of the hoped-for event...”.

epistemic or emotional state,<sup>63</sup> a state of being,<sup>64</sup> or a stance on the world,<sup>65</sup> as it is sometimes described in the literature. It rather appears to be conceived of as a mode of being in and relating to the world. The idea of hope as a mode in this way is what appears to be reflected in wider ideas and accounts<sup>66</sup> of being oriented or sustained by hope,<sup>67</sup> of living for the hope of something,<sup>68</sup> of working to sustain hope,<sup>69</sup> of defending or protecting hope,<sup>70</sup> and of feeling it to be a necessary remainder in life<sup>71</sup> (and one posing the question of what would be left in its absence<sup>72</sup>). These all involve notions of hope as a mode of engagement.

In the literature analysing hope it is often hopefulness as opposed to hope that is categorised as a mode in this way; in fact this is sometimes the basis of a distinction between the two. Thus Stan van Hooft, for example, distinguishes hopes (“‘intentional’ psychological states”, directed at objects and “temporally constrained” in that way<sup>73</sup>) and hopefulness (which is not directed or temporally constrained and is rather a “general mood” or “general attitude” that is “[displayed] towards the world”:<sup>74</sup> a way of seeing; “a way of being”<sup>75</sup>). He writes that “[h]ope is a cognitive stance marked by the emotional quality of hopefulness, while hopefulness is a future-oriented way of seeing and understanding the world that is

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<sup>63</sup> See, e.g., Karl and Robinson (1997), above n.62, at p163 describing hope as “in part...an epistemic state: if I hope for something to occur, then necessarily I am uncertain whether it will occur”. At footnote 40 on p164 they go on to describe how “hope, the epistemic state, becomes hope, the emotional state, when in addition to the epistemic requirements we add that the agent derives pleasure from the contemplation of the hoped-for state.” And further: “Sometimes we will call the emotional state “hopefulness” rather than “hope” to mark the fact that not all hope is emotional.”

<sup>64</sup> See e.g., Fromm (1968), above n.62, describing hope in this way: “[t]o hope means to be ready at every moment for that which is not yet born, and yet not become desperate if there is no birth in our lifetime.” (p22). And further at p24: “To hope is a state of being. It is an inner readiness, that of intense but not-yet-spent activeness.”

<sup>65</sup> [See, e.g., Van Hooft’s discussion of Peterson and Seligman on this: above n.56, p8-9.]

<sup>66</sup> The point here is not to collapse different notions of hope into one another (and cf. Parla (2019), above n.18 on this) but to allow for broad consideration of different possible dimensions of hope in the light of the broad claim that is made in European human rights law about the way in which the experience of hope is “a fundamental aspect of...humanity”.

<sup>67</sup> References to follow.

<sup>68</sup> References to follow.

<sup>69</sup> See, e.g., Cheryl Mattingly and Uffe Juul Jensen, ‘What Can We Hope For? An Exploration in Cosmopolitan Philosophical Anthropology’, in Sune Lissberg, Esther Oluffa Pedersen, and Anne Line Dalsgård (eds.), *Anthropology and Philosophy: Dialogues on Trust and Hope* (2015, Bergahn Books, New York and Oxford), 24-53, p39 referring to the notion of “working to have the “strength” to hope, even when times are hard”.

<sup>70</sup> See, e.g., Michael Schudson, ‘You’ve Got Mail: A Few Observations on Hope’ (1999) *Social Research* 66(2) Summer 1999, 625-628, p627: “Hope does not just happen. People turn somersaults to keep it alive.”

<sup>71</sup> The notion of the remainder of life itself here comes from Jonathan Lear, who constructs an account of it in *Happiness, Death, and the Remainder of Life: The Tanner Lectures on Human Values* (2000, Harvard University Press, Cambridge MA) as that which is too disruptive to be contained within an account or system of character formation. I am using the term here to refer to that which is conceived of as remaining in a life.

<sup>72</sup> See, e.g., Fromm (1968), above n.62, at p67: “to hope is an essential condition of being human. If man has given up all hope, he has entered the gates of hell – whether he knows it or not – and he has left behind him his own humanity”.

<sup>73</sup> Van Hooft (2014), above n.56, p48-49.

<sup>74</sup> *Ibid.*, p49.

<sup>75</sup> *Ibid.*, p50.

trusting, confident and optimistic.”<sup>76</sup> This is in fact a familiar refrain elsewhere in the literature too, with the idea that hope is a stance or state, and hopefulness the mode – or that hope is a felt emotion, and hopefulness the move towards it – emerging at regular intervals. But such a categorisation or description does not appear to quite capture the relationality and fundamentality that seems to be involved in the conception of hope that is articulated in European human rights law: a relationality expressed in the way in which hope here seems to be about a mode of relating to the world and a fundamentality expressed in the claim that hope is an integral aspect of our humanity. This in itself reveals two things: one about the character of hope in European human rights law, and the other about its temporality.

### **A. The character of hope in European human rights law**

It is commonly said, in one way or another, that “[h]oping is an extremely subjective phenomenon”,<sup>77</sup> and so it is portrayed also in European human rights law. The reference in the case law is to an individual right to hope, an individual experience of hope; the point is of the right to hope of those who have committed the acts in question – of their experience of hope.<sup>78</sup> And as we have seen, this experience seems to be conceived of as being that of the experience of the capacity to hope: a capacity dependent on a sense of possibility.

The effects of this subjective quality of hope in European human rights law have not gone unquestioned in the literature. Most notably, Marion Vannier, writing of the right to hope in the context of life imprisonment in France, raises it in considering “whether a ‘right to hope’, as possibly emerging from the European human rights case law, is an apposite concept when attempting to measure the humanity and legitimacy of life sentences”.<sup>79</sup> Hope, she emphasises, is “a subjective human emotion”, a feeling that can change; “it is not a static experience”.<sup>80</sup> And this, she suggests, raises an issue of the reconcilability of a right to hope that is “tied to or interpreted in terms of de jure and de facto procedural reducibility” with “the humane and subjective nature of hope”, the question being “[i]f hope were to be construed in terms of the reducibility of life sentences, would it not distract attention from more subjective, and at times, inhumane experiences of incarceration?”<sup>81</sup> Or, to put it otherwise: could the right to hope in European human rights law eclipse the very experience of hope that it is seeking to protect?

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<sup>76</sup> *Ibid.*, p52. Cf., e.g., Paul Thagard, *The Brain and the Meaning of Life*, Ch. (2010, Princeton University Press, Princeton, New Jersey), p178: “Hope can be specific to one goal, as when you hope that you will win the lottery, or it can be more general a feeling that at least some good things will happen to you. Thus hope can be either an emotion, a specific feeling about some desirable state of affairs, or a mood, a more diffuse positive feeling that good things will happen.”

<sup>77</sup> Shlomo Breznitz, ‘The Effect of Hope on Pain Tolerance’ (1999) *Social Research* 66(2) Summer 1999, 629-652, p629.

<sup>78</sup> This is not to say that hope cannot be held in common, but merely that we are talking here of a right to hope that is articulated in relation to the individual in European human rights law.

<sup>79</sup> Vannier (2016), above n.1, p210.

<sup>80</sup> *Ibid.*, p210.

<sup>81</sup> *Ibid.*, p210.

This is an interesting question, but the first point to note about it is that whilst the articulation of the right to hope in European human rights law is indeed tied to the matter of the reducibility of life sentences, reducibility and hope are not rendered synonymous. Rather, the denial of the prospect of release and the possibility of the review of a sentence is taken to be a denial of the sense of possibility on which the capacity to hope (as it is conceived of in European human rights law) depends.<sup>82</sup> It is cast, as we have seen, as a denial of the possibility of atonement and a denial of the sense of possibility that lies beyond that. Hope, as a mode of being in and relating to the world, is in other words conceived of as being affected by the impossibility of possibility in this way. It emerges as dependent on a sense of possibility: a position which is not quite reflected in the claim that it is “construed in terms of the reducibility of life sentences”.<sup>83</sup>

This point reveals another that has been here all along: that what we are thinking through here is European human rights law’s conceptualisation of human experience, and the meaning that this conceptualisation holds. From this, in turn, unfolds a way of rearticulating Vannier’s question as one of the gap (if such there is) between human experience as it is conceived of in European human rights law and lived experience. The question that presents itself is: could European human rights law’s conceptualisation of experience – could the assumptions that are made within it about human experience – eclipse experience itself? This is a harder question, and the answer to it must surely be yes. But to an extent, that is a risk that is inherent in any attempt to write experience into law and to construct an according right. Law inevitably – and perhaps necessarily – makes assumptions about human experience; the task is to identify and account for these, and to ascertain their meaning within – and therefore beyond – law.

So hope itself is conceived of in European human rights law as being subjective, but that it is conceived of at all is the point that I am making. What we must next consider is the extent of this subjectivity, knowing as we already do of hope’s relationality in European human rights law (that it is a mode of being in and relating to the world). This relationality is explicitly evident in the context of the specific right to hope to atone, grounded as it is in the aim of rehabilitation, and others have taken up this point, with Kanstantsin Dzehtsiarou and Filippo Fontanelli assessing its implications for prisoners more broadly. They argue that “the notion of the right to hope implies *all* prisoners’ right to benefit from rehabilitation programmes, and in particular to enjoy long-term family visits”.<sup>84</sup> Family visits are highlighted in their analysis on account of “their significance in maintaining the prisoners’ social links and hope for re-socialisation”;<sup>85</sup> and in fact Dzehtsiarou and Fontanelli go on to further argue that

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<sup>82</sup> In this respect, it is more than what Kanstantsin Dzehtsiarou and Filippo Fontanelli say when they describe the way in which “[p]risoners for life must know that release is possible, if only remotely so. They have the right, under the Convention, to work towards the actualisation of this possibility and re-socialisation.” (Dzehtsiarou and Fontanelli (2015), above n.1, p168).

<sup>83</sup> Vannier (2016), above n.1, p210.

<sup>84</sup> Dzehtsiarou and Fontanelli (2015), above n.1, p164.

<sup>85</sup> *Ibid.*, p164.

“the right to hope is not just of the inmate, but of anyone else who cares about him or her”, with “family members [being] the direct beneficiaries of long-visit programmes”.<sup>86</sup>

This latter claim needs to be qualified. As we have seen in the preceding pages, there is a general right to hope in European human rights law, and that is set out both explicitly in relation to the case law on life sentences and implicitly in the wider points that are made in those cases about the fundamentality of the experience of hope. To the extent that Dzehtsiarou and Fontanelli are making this point when they indicate towards a general right, their claim is correct. However, the claim that a relational right to hope exists as a matter of European human rights law – that hope is a right by relation – is not one that can be made out on the basis of the present case law. In other words, the right to hope is not held in relation to another: A does not have a right to hope for some outcome in relation to B on account of her relation to him.

This is, in many ways, interesting, not least because in other contexts relating to knowledge, the ECtHR has acknowledged the effects of certain situations on relatives and recognised that these situations may raise questions of the relatives’ own rights on account of their relationship to the person in question. The case law concerning disappeared persons is an example of this. These cases concern the pain and suffering of relatives who have experienced the disappearance of family members and “who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty”;<sup>87</sup> and in a number of cases involving the indifference and incompetence of authorities in the face of such circumstances, the ECtHR has found the situation of the relatives to have constituted inhuman treatment.<sup>88</sup> The essence of the violation in such cases consists in a combination of the pernicious effects on relatives of uncertainty and fear as to the fate of their loved ones and the indifferent attitudes of authorities in the face of relatives’ need to know; and the Court, in treating these cases accordingly, emphasises the destabilising effects on relatives of not knowing what has happened and of therefore being unable to account for and come to terms with this. There is no comparable conceptualisation of hope – or of the right to hope – in European human rights law at present. It is not a right that is held in relation to another; it is not a right that is conceived of as being affected or activated by the situation of another; and it is not a right that flows out into others (as implied by Dzehtsiarou and Fontanelli’s perception of it as a right that “is not just of the inmate, but of anyone else who cares about him or her”<sup>89</sup>).

The relational character of hope in European human rights law emerges at a deeper conceptual level, and one that can be traced to the conceptualisation of hope as dependent on a sense of possibility: a conceptualisation which, in turn, is grounded in the way in which atonement and possibility are cast as intertwined. In particular, the sense of possibility in question is conceived of as being contingent on atonement; and if at its core, atonement

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<sup>86</sup> *Ibid.*, p170.

<sup>87</sup> 16064/90 et al., *Varnava and Others v Turkey* (2009), para.200.

<sup>88</sup> See, e.g., *ibid.*

<sup>89</sup> Dzehtsiarou and Fontanelli (2015), above n.1, p170.

connotes a form of relationship and a series of relationships (between the wrongdoer and herself and between the wrongdoer and those affected by the wrongdoing),<sup>90</sup> then so also does the notion of possibility which is connected to it. The sense of possibility in question is a sense of possibility in relation to the world. Hope's relationality, then, derives from this basis. The idea of hope as a mode of being in and relating to the world necessarily implies a certain degree of intersubjectivity: that hope in European human rights law is not only subjective as an experience but that at some fundamental level it is a property of relations between the individual who holds the right and the world and, therefore, between individuals.

### ***B. The temporality of hope in European human rights law***

The notion of hope as a mode brings us to the question of the temporality of hope – to the question of the form of time that structures this mode of being and relating.<sup>91</sup> The point is of the time of hope itself, which is, critically, not a matter of what hope does to time or of how hope relates to time, but rather of hope's own time. And this, furthermore, is not a question of hope's own time in the abstract, but rather of the temporality of hope in the specific context of European human rights law.

Hope is constructed in European human rights law as an inherently temporal notion: as a mode of being in and relating to the world, and one that presupposes a sense of possibility in relation to the world and therefore a certain perspective, imagination, and sense of individual continuity. The latter is especially reflected in the way in which a notion of "the capacity to change" is linked to hope in the cases in question (the idea being, as we know, that "hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change"). At first glance, this idea could simply be read as expressive of what Linda Radzik describes as a conceptualisation of atonement as "moral transformation"<sup>92</sup> – a process which, she adds, is often described in the legal literature in this context as one of "reformation" or "rehabilitation".<sup>93</sup> But in implying the potential for change, the idea of "the capacity to change" also implies a way of thinking about selfhood; and when we turn back to the case law more broadly we find this as at the core of European human rights law's idea of individual

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<sup>90</sup> This is what is forefronted in theories that conceive of atonement as being about reconciliation – see, e.g., Linda Radzik's theory set out in her book referred to at n.5 above (and esp. Ch.4). In terms of the relationships involved, she writes: "Presumably the relationships that must be repaired in the aftermath of wrongdoing are those that have been wrongfully damaged. As we have seen, that between the victim and the wrongdoer is merely the most obvious one involved. Wrongdoing can also damage or threaten the relationships between the wrongdoer and the community, the victim and the community, the victim and herself, and the wrongdoer and himself." (p81). But the relational quality of atonement is, in a different way, also apparent in the other theories of atonement that Radzik identifies, namely the conception of atonement in terms of "the repayment of a moral debt" (Ch.2) or "moral transformation" (Ch.3).

<sup>91</sup> This is to take Jonathan Lear's definition of "temporality" ("a name for time as it is experienced within a way of life"): Jonathan Lear, *Radical Hope: Ethics in the Face of Cultural Devastation* (2006, Harvard University Press, Cambridge MA), p40.

<sup>92</sup> Radzik (2009), above n.5, Ch.3.

<sup>93</sup> *Ibid.*, p55.



identity, and, in particular, two underpinning accounts that it articulates of self-development (as about the development of the self through time) and self-realisation (as about the realisation of one's potential and/or conception of self).

The origins of European human rights law's notion of self-development lie in Article 8 of the ECHR, which includes, within the ambit of its right to respect for private life, "a right to personal development".<sup>94</sup> This has been variously conceived of from perspectives of personal identity,<sup>95</sup> personality,<sup>96</sup> and personal autonomy,<sup>97</sup> but the essence of the issue in all three framings lies in the development of the self through time, and, moreover, in the conduct of one's development and life in a manner of one's own choosing.<sup>98</sup> This demands, on the part of the individual, a capacity to see and foresee herself through time and to develop and realise her potential; on the part of European human rights law, meanwhile, it demands the provision of guarantees that enable and protect this process. Hence, for example, the emphasis that the ECtHR places on the importance of safeguarding the "mental stability" of the individual (this being "an indispensable precondition" for the enjoyment of the right to respect for one's private life, and, therefore, for the pursuit of self-development at all),<sup>99</sup> and, separately, the significance attached in the case law to the child's personal development<sup>100</sup> and "ability to reach [his or her] maximum potential".<sup>101</sup> In fact in relation to this latter point it is possible to see, through the category of 'the child' alone, a broader vision of individual development

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<sup>94</sup> This can be traced back to 44599/98, *Bensaid v UK* (2001), para.47. That case does not cite any case law in support of this proposition; the subsequent citation of 16213/90, *Burghartz and Schnyder Burghartz v Switzerland* (1992) and 15225/89, *Friedl v Austria* (1995) is in reference to the other right mentioned ("to establish and develop relationships with other human beings and the outside world"). In subsequent cases, *Bensaid v UK* is cited in support of the 'right to personal development' (e.g., 36515/97, *Fretté v France* (2002), para.1 of the Joint Dissenting Opinion).

<sup>95</sup> Details of one's personal identity (such as the details of one's birth parents: 42326/98, *Odièvre v France* (2003), para.29) are, thus, deemed relevant and/or necessary to personal development (e.g., 552/10, *I.B. v Greece* (2013), para.67 and 6339/05, *Evans v UK* (2007), para.71, in which the right to personal development is included as a part of "physical and social identity"), such that an interference with an individual's identity is deemed to constitute an interference with her personal development (e.g., 25680/94, *I v UK* (2002), para.70). In a few other cases, "the right to identity" has been distinguished from "the right to personal development", with the latter being cast as something that can be expressed either in terms of personality or in terms of personal autonomy. This was apparent in 35968/97, *Van Kück v Germany* (2003), para.75, insofar as the consideration was of the relationship between matters of identity and personal development. But it became more apparent in 30562/04 and 30566/04, *S and Marper v UK* (2008), in which the elements of Article 8 pertaining to identity were described and then it was added that "Article 8 protects, in addition, a right to personal development..." (para.66).

<sup>96</sup> This occurs principally where the protection of the individual's own image and her control over this is cast in terms of personal development (e.g., 1234/05, *Reklos and Davourlis v Greece* (2009), para.40). This association of personal development and the right to protect and control one's own image has roots in the Joint Dissenting Opinion of Judges Spielmann and Jebens in 68354/01, *Vereinigung Bildender Künstler v Austria* (2007), para.14. It is now a well-established principle and was subsequently articulated in, e.g., 40660/08 and 60641/08, *Von Hannover v Germany (No. 2)* (2012), para.96.

<sup>97</sup> In the case of adults, the right to personal autonomy means "the right to make choices as to how to lead one's own life, provided that this does not unjustifiably interfere with the rights and freedoms of others" (10161/13, *M. and M. v Croatia* (2015), para.171). Children have a "circumscribed autonomy" (*ibid.*).

<sup>98</sup> E.g., 56030/07, *Fernández Martínez v Spain* (2014), para.126.

<sup>99</sup> E.g., 31827/02, *Laduna v Slovakia* (2011), para.53.

<sup>100</sup> E.g., 33677/10 and 52340/10, *Fürst-Pfeifer v Austria* (2016), para.45.

<sup>101</sup> 23682/13, *Guberina v Croatia* (2016), para.82.

being articulated in European human rights law.<sup>102</sup> This is not only in the sense of the extent to which childhood is cast as being a time for “the fundamental programming of personality”<sup>103</sup> but also in the sense that childhood is cast as supplying the framework through which life is subsequently structured and interpreted.<sup>104</sup>

If we can already see in this an idea of individual continuity being articulated, and therefore some form of context for the notion of “the capacity to change”, this tightens further when we consider the close connection that is cast as existing here between the processes of self-development and self-realisation. The two processes are conceived of as having a reflective and reflexive quality, which means that they advance with each other and are a means and an end for each other. For example, the end of self-development may be the attainment of self-realisation, but that self-realisation is, in turn, the means towards further self-development. Moreover, self-development and self-realisation are also conceptualised as being related to a feeling of fulfilment; and “the right to self-fulfilment” (“whether in the form of personal development...or from the point of view of the right to establish and develop relationships with other human beings and the outside world”) has been included within Article 8 in this sense.<sup>105</sup> Dimensions of this that the ECtHR has specified include sexuality (which has “physical and psychological relevance” for self-fulfilment),<sup>106</sup> freedom of expression (which is deemed a condition of individual self-fulfilment),<sup>107</sup> and freedom of thought, conscience, and religion (the rights to which are treated as being important “in guaranteeing the individual’s self-fulfilment”).<sup>108</sup>

Taken together, these strands of self-development, self-realisation, and self-fulfilment generate a vision in which the focus is on individual continuity – specifically, on the individual moving forward in her life. This brings it close to the ideal of authenticity – the “project of becoming who you are”<sup>109</sup> – except, as it is expressed in European human rights law, it carries a greater urgency, supplying a direction and a purpose: the right and need to develop one’s own potential, and thereby one’s own self. The self is rendered a kind of “ethical telos”, the orientation towards which is one of “[devotion]...to its continuous realization”, to borrow a phrasing from Crispin Sartwell;<sup>110</sup> and this way of conceiving of the self implies a certain capacity to abstract from oneself too. In particular, it implies a capacity to anticipate one’s self and to conceive an image of one’s future self – something that is, as Radzik points out, an

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<sup>102</sup> See my article about the child in European human rights law (2018, MLR), above n.3.

<sup>103</sup> 39388/05, *Maumousseau and Washington v France* (2007), Dissenting Opinion of Judge Zupančič, joined by Judge Gyulumyan.

<sup>104</sup> See n.102 above.

<sup>105</sup> 56030/07, *Fernández Martínez v Spain* (2014), para.126.

<sup>106</sup> 17484/15, *Carvalho Pinto de Sousa Morais v Portugal* (2017), para.52.

<sup>107</sup> This goes back to 9815/82, *Lingens v Austria* (1986), para.41.

<sup>108</sup> 29617/07, *Vojnity v Hungary* (2013), para.36.

<sup>109</sup> Charles Guignon, *On Being Authentic* (2004, Routledge, London), p3.

<sup>110</sup> Crispin Sartwell, *End of Story: Toward and Annihilation of Language and History* (2000, State University of New York Press, Albany NY), p26.

essential part of the process of atonement.<sup>111</sup> The individual is consequently located in a rather ambiguous position: positioned as being in transition (as always engaged in the process of striving towards and realising her self) and as bearing the capacity to transcend her (current) self and to take the long view of this. This comes close to a liminal stage: a stage of passage, in which the feeling of being “betwixt and between” is experienced as one passes from one realm to the next.<sup>112</sup> As this is conceptualised in European human rights law, however, liminality is fixed as a more generalised state of openness to possibility: a state in which the essential pursuit is one of becoming.

Why this matters, from the perspective of our inquiry into hope, is for two reasons. Firstly, this is the broader context of European human rights law – the broader framework of meaning – in which the notion of “the capacity to change” needs to be understood. Secondly, in the connection that is made between the notion of “the capacity to change” and hope itself, hope emerges as the carrier of the vision of the future. It is directly linked to an innate potentiality (“the capacity to change”), and, consequently, to something that is already present and needs only to be developed.<sup>113</sup> It is the idea of continuity here – an idea which underpins European human rights law’s vision of continuous self-development and self-realisation – that is conceived of as being disrupted and terminated by the denial of the experience of hope. In the case of the irreducible life sentence, this is reflected in the way in which the denial of the prospect of release or possibility of review of the sentence is cast as generating a sense of finality and as bringing to an end the sense of possibility that things could be otherwise. In effect, it presents as a breakdown in the way of life envisaged in European human rights law:<sup>114</sup> a way of life that supposes a form of temporal continuity and conceives of this as that of the continuity of the hoping individual.<sup>115</sup> The idea of hope in European human rights law – an idea of hope as a mode of being in and relating to the world – is thus integral to European human rights law’s underpinning idea of ‘the individual’.<sup>116</sup>

### **3. Hope, dignity, and humanity in European human rights law**

With this last point we come back to the idea that the denial of the experience of hope is the denial of a fundamental part of what it means to be human in European human rights law: an

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<sup>111</sup> Radzik (2009), above n.5, p13: “In making amends, the wrongdoer can ease the burden of guilt and rebuild his image of himself as a good person.”

<sup>112</sup> Victor Turner, *The Ritual Process: Structure and Anti-Structure* (1969, Aldine de Gruyter), p95.

<sup>113</sup> See, e.g., Paul Tillich, ‘The Right to Hope’ (1965) *Neue Zeitschrift für Systematische Theologie Und Religionsphilosophie* 7(3), 371-377, p373: “[w]here there is genuine hope, there that for which we hope has already some presence”.

<sup>114</sup> Insofar as ‘the individual’ is treated as the constitutive principle of the legal order based on the ECHR (and see n.4 above), in talking about the continuity of ‘the individual’ we are also talking about the constitutive principle of this order, with the effect that the devastation of this continuity brings about non-being (i.e. it entails the loss of the framework in which being is and makes sense). On this idea see further Lear (2006), above n.91, ch.1.

<sup>115</sup> This notion of the ‘hoping individual’ comes from Fromm’s account of “a few definitions of ‘man’ which may encompass in one word that which is specifically human” – one of which is “*Homo esperans* – the hoping man” (Fromm (1968), above n.62, p66-67).

<sup>116</sup> See n.4 above.

idea expressed in the words that “to deny them [prisoners sentenced for life] the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading”.<sup>117</sup> In the preceding pages I have suggested that the experience of hope is conceived of in European human rights law as the experience of the capacity to hope – a capacity dependent on a sense of possibility – and that this, in turn, is connected to a deeper vision of individual continuity, which is expressed in the case law in notions of self-development, self-realisation, and self-fulfilment. From this, we already know that hope – as bound up in an idea of potentiality (which is itself presented as the underpinning of individual continuity) – is cast as fundamental to the meaning of being in European human rights law. The second idea expressed in the statement above is that the denial of this would be ‘degrading’: a concept that has a specific meaning in the context, the reference being to the prohibition of degrading treatment set out in Article 3 of the ECHR.

When we look to the case law to examine what it means for treatment to be ‘degrading’ in this sense – and therefore what it means, in European human rights law, to experience degradation – we find the concept being defined in reference to a lack of respect for dignity. Indeed, as the Grand Chamber of the ECtHR put it in *Bouyid v Belgium (2015)*, “the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity”,<sup>118</sup> and “there is a particularly strong link between the concepts of ‘degrading’ treatment or punishment within the meaning of Article 3 of the Convention and respect for ‘dignity’”.<sup>119</sup> That case concerned the allegation of two brothers that they had been slapped in the face by police officers and that this had constituted degrading treatment in violation of Article 3; and in examining their complaint the Grand Chamber further elaborated the connection between the notions of ‘degrading treatment’ and ‘dignity’.

In the first place, and as a general principle of European human rights law, “where an individual is deprived of his or her liberty or, more generally, is confronted with law-enforcement officers, any recourse to physical force which has not been made strictly necessary by the person’s conduct diminishes human dignity and is in principle an infringement of...Article 3”.<sup>120</sup> Here, that strict necessity could not be established: it appeared that “each slap was an impulsive act in response to an attitude perceived as disrespectful”, and the applicants’ dignity was accordingly undermined.<sup>121</sup> “In any event”, the Grand Chamber went on, “a slap inflicted by a law-enforcement officer on an individual who is entirely under his control constitutes a serious attack on the individual’s dignity”.<sup>122</sup> It proceeded to describe the effects of a slap to the face: “A slap has a considerable impact on

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<sup>117</sup> 66069/09 et al., *Vinter and Others v UK (2013)*, Concurring Opinion of Judge Power-Forde; 22662/13 et al., *Matiošaitis and Others v Lithuania (2017)*, para.180.

<sup>118</sup> 23380/09, *Bouyid v Belgium (2015)*, para.81.

<sup>119</sup> *Ibid.*, para.90.

<sup>120</sup> *Ibid.*, para.100.

<sup>121</sup> *Ibid.*, para.102.

<sup>122</sup> *Ibid.*, para.103.

the person receiving it. A slap to the face affects the part of the person's body which expresses his individuality, manifests his social identity and constitutes the centre of his senses – sight, speech and hearing – which are used for communication with others".<sup>123</sup> What was especially significant here, therefore, was that a channel of expression – a channel of communication and of seeking recognition – was violated. And the sense moreover was that not only was that channel violated, but that also at stake was the victim's own self-image and capacity to control that image: a point reflected in the Court's statement that "it may well suffice that the victim is humiliated in his own eyes for there to be degrading treatment within the meaning of Article 3".<sup>124</sup> A slap "inflicted by law-enforcement officers on persons under their control" was described as having the potential to be particularly humiliating in this respect, because it involved and exploited a series of dynamics, namely "the superiority and inferiority which by definition characterise the relationship between the [law-enforcement officers] and [persons under their control]" and the vulnerability of the latter (including age-linked vulnerability: the first applicant was a minor at the material time).<sup>125</sup> The Court ultimately held that the applicants' dignity had been diminished in this way, and that the slaps to their faces had constituted degrading treatment in violation of Article 3.

*Bouyid v Belgium* not only draws attention to the close connection that exists between the notions of degrading treatment and dignity in European human rights law. Its analysis of the humiliation involved in degrading treatment also tells us something about the way in which the individual is conceived of as establishing and communicating a self-image in European human rights law and about how European human rights law is conceived of as securing the capacity of the individual to project and control this image. In particular, self-image is cast as serving a relational and communicative purpose – as signifying a social identity and representing what has elsewhere been described as a vital "transaction" with the world<sup>126</sup> – and this is not least because it operates at the boundary between 'concealment' and 'exposure' – "between what we reveal and what we do not".<sup>127</sup>

The fact of this engagement means that self-image necessarily involves a projection of an image of oneself and also a taking in of responses to this image from the surrounding environment. The concern expressed in *Bouyid v Belgium* is that in cases of humiliation, these channels of communication are fundamentally abused – that the infliction of humiliation sets in train a process of reducing the individual. The point has been put more starkly still in cases involving violations of Article 3 on account of humiliating strip-searches in detention<sup>128</sup> and the display of defendants in 'courtroom cages';<sup>129</sup> and it is this: there comes a point where

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<sup>123</sup> *Ibid.*, para.104.

<sup>124</sup> *Ibid.*, para.105.

<sup>125</sup> *Ibid.*, para.106.

<sup>126</sup> This term comes from Nussbaum's discussion in Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (2001, Cambridge University Press, Cambridge), p78.

<sup>127</sup> Thomas Nagel, 'Concealment and Exposure' (1998) *Philosophy and Public Affairs* 27(1), 3-30, p4.

<sup>128</sup> E.g., 52750/99, *Lorsé and others v The Netherlands* (2003); 70204/01, *Frérot v France* (2007).

<sup>129</sup> E.g., 5829/04, *Khodorkovskiy v Russia* (2011); 33376/07, *Piruzyan v Armenia* (2012).

the individual is reduced to such an extent that not only does she lack control over her self-image, but her position as a subject with a self-image is thrown into question.<sup>130</sup> Such is the reduction that is involved in ‘degrading treatment’ in European human rights law; and it is a reduction that is expressed as involving an erosion of dignity. This, further, is the idea that we must bear in mind in considering that the ECtHR has described the denial of the experience of hope as involving the denial of a fundamental aspect of humanity – a denial which would be degrading.

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The conceptualisation arrived at is that the denial of the experience of hope (the denial of the experience of the capacity to hope) involves the denial of a fundamental aspect of humanity (involving European human rights law’s notion of individual continuity) and that this denial would be degrading (involving a reduction of an individual’s self-image and an erosion of their dignity). Hope and dignity are therefore related in European human rights law; and implicit in the account that I have set out here are two specific points of association: one hinging on the hope of dignity (by which I mean the hope that is involved in dignity in European human rights law) and another hinging on the dignity of hope (meaning the idea that hope itself carries a certain dignity).

#### **A. *The hope of dignity***

Although the notion of dignity does not explicitly feature in the text of the ECHR itself, the ECtHR has, as we have seen, deemed respect for human dignity to form its “very essence”;<sup>131</sup> and as Jean Paul Costa has suggested, it is clear from the travaux préparatoires that the drafters of the Convention “had the concept of dignity in their minds”.<sup>132</sup> A collective guarantee of human rights was conceived of as a means of preserving and securing dignity – and, more specifically, as a means of expressing and guaranteeing the hope of this dignity. An examination of the travaux therefore reveals repeated references to dignity: to the need to “fortify the structure and widen the bases of [the] fundamental freedoms which form the veritable ramparts of human dignity”;<sup>133</sup> to the aim of “[delimiting] the conditions in which alone the dignity of the human spirit will stand free, firm and unassailed”;<sup>134</sup> to the need to

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<sup>130</sup> See, e.g., 70204/01, *Frérot v France* (2007), in which Mr Frérot argued that the strip-searches in detention made the prisoners look “like slaves or animals for sale” (para.31), and 5829/04, *Khodorkovskiy v Russia* (2011), in which the ECtHR noted that Mr Khodorkovskiy’s display in a metal cage in the courtroom “aroused in him feelings of inferiority”, and “such a harsh appearance of judicial proceedings could lead an average observer to believe that an extremely dangerous criminal was on trial” (para.125).

<sup>131</sup> E.g., 66069/09 et al., *Vinter and Others v UK* (2013), para.113.

<sup>132</sup> Jean Paul Costa, ‘Human Dignity in the Jurisprudence of the European Court of Human Rights’, in Christopher McCrudden (eds.), *Understanding Human Dignity* (2013, Oxford University Press), 393-402...

<sup>133</sup> Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights, Volume I* (1975, Martinus Nijhoff, The Hague), p56, per M. Antonopoulos (Greece).

<sup>134</sup> *Ibid.*, p124, per Sir David Maxwell-Fyfe (UK).

“make human rights and human dignity realistic and tangible”;<sup>135</sup> and to the idea of “[bringing] Europe back to new concepts of human dignity”.<sup>136</sup>

The notion of dignity expressed in this way – “vague” as it perhaps was<sup>137</sup> – was associated in the travaux with hope, such that it was conceived of as representing, in itself, “the hope which Europe [could] and must hold out to the rest of the world”,<sup>138</sup> with it also being thought that the Consultative Assembly “could...by constant and remitting advocacy of human and political rights...inspire hope for the triumph of human dignity”.<sup>139, 140</sup> Dignity here was, furthermore, cast as inseparable from the idea of Europe itself: an idea reflected in references to “the building up of a new Europe”;<sup>141</sup> to Europe as having a common view on human dignity;<sup>142</sup> to “a European Law of Human Rights”;<sup>143</sup> to a Europe of the individual (as expressed in the creation of a court before which individuals could avail themselves of their human rights);<sup>144</sup> to making Europe “a community of hope”;<sup>145</sup> to the Court as “the true bearer of our hopes”;<sup>146</sup> to the Convention as a “first step we shall be making in the direction of a European way of life”;<sup>147</sup> and to a notion of a “vision of creating a true European community”.<sup>148</sup>

At the level of the philosophical foundations of the Convention, therefore, the notions of hope and dignity were, in a way, bound up in each other from the outset: a point reflected in the idea that the Convention would represent and guarantee dignity and serve as an expression of the hope of this dignity. As noted above, the term ‘dignity’ did not subsequently make it into the text of the Convention; but respect for human dignity has been conceived of by the ECtHR as grounding European human rights law. Beyond the ECtHR’s stipulation that dignity is inherent to the individual and to the vision of life that is constructed in European human rights law, however (“[t]he very essence of [the Convention system]...is respect for human dignity”<sup>149</sup>), the quality of dignity itself has gone unspecified in the case law. That this

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<sup>135</sup> *Ibid.*, p130, per Mr Norton (Ireland).

<sup>136</sup> *Ibid.*, p132, per Mr Norton (Ireland).

<sup>137</sup> See further Nußberger (2019), above n.1, p676-677.

<sup>138</sup> Council of Europe (1975), above n.133, p102, per M. de la Vallée-Poussin (Belgium).

<sup>139</sup> Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights, Volume V* (1979, Martinus Nijhoff, The Hague), p278, per M. Norton (Ireland).

<sup>140</sup> See also the idea of the Consultative Assembly itself as “[embodying] many hopes” (Council of Europe (1975), above n.133, p100, per M. de la Vallée-Poussin (Belgium)) and the notion of “the hope of a quiet life” potentially offered by a Convention guaranteeing human rights (Council of Europe (1979), above n.139, p230, per Sir David Maxwell-Fyfe (UK)).

<sup>141</sup> Council of Europe (1975), above n.133, p64, per M. Kraft (Denmark).

<sup>142</sup> *Ibid.*, p64, per M. Kraft (Denmark); p102, per M. de la Vallée-Poussin (Belgium).

<sup>143</sup> Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights, Volume II* (1975, Martinus Nijhoff, The Hague), p162, M. Bidault (France).

<sup>144</sup> *Ibid.*, p180, per M. Teitgen (France).

<sup>145</sup> *Ibid.*, p256, per M. Schumann (France).

<sup>146</sup> *Ibid.*, p262, per M. Philip (France).

<sup>147</sup> Council of Europe (1979), above n.139, p256, per M. Persico (Italy).

<sup>148</sup> Council of Europe, *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights, Volume VI* (1985, Martinus Nijhoff, The Hague), p92, per Mr Roberts (UK).

<sup>149</sup> 66069/09 et al., *Vinter and Others v UK* (2013), para.113.

is so seems largely because what dignity appears to be protecting in European human rights law is a form of potentiality:<sup>150</sup> a latent capacity to become and therefore begin to ‘be’ within the meaning of European human rights law.

This is seen primarily in the case law that indicates that it is in terms of potentiality that individual being begins in European human rights law. In the case of the embryo, for example, the Grand Chamber has stated that although “there is no European consensus on the nature and status of the embryo and/or foetus...it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person...require protection in the name of human dignity, without making it a ‘person’ with the ‘right to life’ for the purposes of Article 2.”<sup>151</sup> The lack of European consensus means that the issue of when the right to life begins has been enabled to fall within the margin of appreciation of the Contracting States;<sup>152</sup> but at the same time a notion of the potential to become human – of what we might describe as *vital potentiality* – seems to pull the embryo into the language of human dignity<sup>153</sup> (even though it does not secure legal status as such).

Subsequent case law has confirmed this idea of potentiality as a point of beginning in European human rights law. *Parrillo v Italy* (2015) is an example. The case concerned the fate of five embryos that Ms Parrillo had frozen during IVF treatment with her late partner and that she now wanted to donate to scientific research – something which was banned under an Italian law that came into force a few months after her partner’s death. In addressing Ms Parrillo’s complaint that this ban violated her Article 8 right to respect for her private life (and in ultimately concluding that the Italian Government had a wide margin of appreciation here, which it had not overstepped), the Court moved, over the course of its reasoning, from a view of the embryos as intricately connected to Ms Parrillo (they represented a part of her, they contained part of her genetic material, and they were in fact hers<sup>154</sup>) to a position in which

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<sup>150</sup> The association between potentiality and dignity has, of course, a long history in Renaissance humanism and in Catholic social thought. This is both in terms of potential to become human (which I will go on to describe here as ‘vital potentiality’, and is a matter of *what I am*), and in terms of the potential to become ‘me’ (which I will go on to describe here as ‘ethical potentiality’, and is a matter of *who I am*). See esp. on the connection between potentiality and dignity, Giovanni Pico della Mirandola, *Oration on the Dignity of Man* (transl. A. Robert Caponigri) (1956 [1486], Henry Regnery Company), p6-8. The connection between potentiality and dignity is notably drawn in German constitutional law, where constitutional protection extends to “all developing human life”: ‘*First Abortion Decision*’, 39 BVerfGE 1 (1975, German Constitutional Court), Part C., I., paras.1(b)-2. In this Decision, the German Constitutional Court stated that “[t]he potential capabilities lying in human existence from its inception on are sufficient to justify human dignity” (Part C., I., para.2)

<sup>151</sup> 53924/00, *VO v France* (2004), para.84.

<sup>152</sup> *Ibid.*, para.82.

<sup>153</sup> Cf. Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) *The European Journal of International Law* 19(4), 655-724, p709.

<sup>154</sup> Thus Ms Parrillo’s “ability to exercise a conscious and considered choice regarding the fate of her embryos [concerned] an intimate aspect of her personal life and accordingly [related] to her right to self-determination”, which meant that Article 8 was applicable here (46470/11, *Parrillo v Italy* (2015), para.159), and the embryos further “[contained her] genetic material...and accordingly [represented] a constituent part of [her] genetic material and biological identity” (para.159). They were conceived of as being Ms Parrillo’s in this way; though it is important to also note that they were never treated as ‘possessions’: the Court dismissed Ms Parrillo’s



the fact that they were outside her body with what was deemed an independent potentiality made all the difference.<sup>155</sup> Thus when it came to the question of the objective of the ban on donation, the ECtHR accepted that the Italian Government was pursuing the protection of the “embryo’s potential for life”,<sup>156</sup> on the basis that this “may be linked to the aim of protecting morals and the rights and freedoms of others, in the terms in which this concept is meant by the Government”.<sup>157</sup> In the same breath, it added that this did not represent an assessment on its part of “whether the word ‘others’ extends to human embryos”.<sup>158</sup> And yet it is hard to get past the sense that the embryos here were being conceptualised as carrying a potentiality independent of Ms Parrillo and one to be accorded legal recognition in these terms. They went from being deemed a part of Ms Parrillo (a “constituent part” of her identity, and seen in her image) to occupying an intermediate space between being a part of her and being ‘others’ (and seen in the human image more generally) with their own vital potentiality and divergent interests.

Thus a subtle relationship is articulated between potentiality and dignity, with vital potentiality – the potential to become human – warranting admission into the realm of European human rights law. Notably, this does not tell us how a conflict between an embryo and a woman is to be resolved; it merely says that a potentiality in the embryo is recognised (as in the granting of a status of ‘other’ to it). And it does not tell us when life begins in the terms of the ECHR (or, indeed, whether the embryo is granted a right to life); rather, it says that potentiality is recognised within the vision of European human rights law (which is not the same as saying that potentiality is the source of rights). The claim, therefore, is this: that vital potentiality marks the point of beginning in European human rights law – that individual being, within the meaning of European human rights law, begins in this notion of becoming.

And so we arrive at a position in which the philosophical foundations of the Convention indicate a close connection between hope and dignity – one reflected in the idea that the Convention would represent and guarantee dignity and serve as an expression of the hope of dignity – and in which dignity itself seems to be conceived of as protecting, and having within itself, a form of potentiality: a latent capacity to become and therefore begin to ‘be’ within European human rights law.

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complaint that there had also been breach of her right to peaceful enjoyment of her possessions under Article 1 of Protocol No.1: “[having] regard to the economic and pecuniary scope of that Article, human embryos cannot be reduced to ‘possessions’ within the meaning of that provision” (*ibid.*, para.215).

<sup>155</sup> Cf. the case law where the embryo/foetus is (or was) inside the woman, in which the ECtHR has tended to focus on the tight connection between the life of the embryo/foetus and that of the woman: 53924/00, *VO v France* (2004), paras.86-87; 13423/09, *Mehmet Şentürk and Bekir Şentürk v Turkey* (2013), para.109; 5410/03, *Tyisqç v Poland* (2007), para.106; 25579/05, *A, B and C v Ireland* (2010), paras.213, 237.

<sup>156</sup> 46470/11, *Parrillo v Italy* (2015), para.162.

<sup>157</sup> *Ibid.*, para.167.

<sup>158</sup> *Ibid.*, para.167.

## **B. The dignity of hope**

The idea that a notion of vital potentiality – of the potential to develop into a human being – secures entrance into the language of dignity and marks the beginning of time and being in European human rights law is especially interesting in the light of our earlier discussion of the temporality of hope; and in reflecting on this we come to see further how hope's relations emerge and are bound together. In considering the temporality of hope we saw how the experience of hope in European human rights law is conceived of as being bound up in a vision of individual continuity: a vision that is expressed in the case law in notions of self-development, self-realisation, and self-fulfilment, and that relies on a conception of individual potentiality. That conception of potentiality is, fundamentally, one of *ethical potentiality*, by which I mean that it is geared towards the continuous development and realisation of the self and derives an ethical orientation from the prescribed need to continually negotiate, within the context of the processes of self-development and self-realisation, the question of living a life that is good for the self. It comes in once vital potentiality has been realised; and hope, as we saw, being conceived of as intricately connected to the notion of the “capacity to change” in European human rights law, is cast as the carrier of this vision of the future.

By definition, and as noted earlier too, the idea of a right and need to develop one's own potential and thereby one's own self in European human rights law implies a capacity to anticipate one's self and to conceive an image of one's future self: both of which further imply a certain capacity to abstract from oneself too. This notion, of a form of abstract self-relation, has been theorised by Barbara Johnson, who offers a reading of the Lacanian mirror stage<sup>159</sup> in which she focuses on the effect, in that stage, of the identification “with a form...that interests the subject precisely because it *anticipates* stages of this development where he will be superior to what he is now”.<sup>160</sup> The subject, she suggests, “assumes an identity derived from the *discrepancy* between a present and an ideal self – and *that* is what is recognized with such jubilation. Henceforth the real self for the subject is the one in the mirror: ...An idealization. A fiction. An object...”.<sup>161</sup> She goes on to argue that the “image of this idealization will haunt the subject his whole life”; for “[n]o matter what he does, he can neither catch up with it nor equal it”,<sup>162</sup> such that, ultimately, “the subject comes into being in the gap of inferiority between a flawed viewer and the anticipated wholeness of an armor of fiction”,

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<sup>159</sup> In his account, set out in Jacques Lacan, ‘The Mirror-phase as formative of the Function of the I’ (1968) *New Left Review* 1(51) (Sept.-Oct.), 71-77, the first occasion of seeing the self is integral to the process of ego-formation. He argued that this occasion consists in the first time that a child sees her own image in a mirror: a moment of identification, whereupon the child “assumes an image” (p72). The identification of the ego with its own image inaugurates the ‘mirror-phase’ and instigates both an anticipation of future unity of self and body and a process of realisation that one possesses the capacity to project a self-image – the culmination of which marks the end of the ‘mirror I’ and the birth of the ‘social I’. (p75).

<sup>160</sup> Barbara Johnson, *Persons and Things* (2008, Harvard University Press, Cambridge MA), p56.

<sup>161</sup> *Ibid.*, p57.

<sup>162</sup> *Ibid.*, p57.

with “the definition of a ‘person’ [then being]: the repeated experience of *failing to become a thing*”.<sup>163</sup>

Johnson’s analysis is not one of subjectivity in European human rights law; but it nevertheless gives us cause to reflect on the form of abstraction that the notion of ethical potentiality articulated in this context entails. On the one hand, it implies that which we earlier saw: an individual who is constantly ‘becoming’, and a situation in which the construction of – and identification with – an idealised self, such as that which is presupposed by the notions of self-development, self-realisation, and self-fulfilment, entails the positioning of the individual as being in transition (as always engaged in the process of striving towards and realising herself) and as bearing the capacity to transcend her (current) self and to take the long view of this (a state earlier described as one of liminality). On the other hand, we also know that the self-image formed and maintained by the (hoping) individual in this context is conceived of as being a matter of human dignity. More specifically, we have seen how a need to be able to maintain and communicate this image is cast as fundamental; its reduction – by way of a reduction of the individual’s control over this image – involves an erosion of dignity. Something of the self is lost, European human rights law suggests, in the loss of the capacity to see a future self, with the effect that self-image itself is not only conceived of as being a matter of dignity, but that so also must be the location of the individual in the state that is conducive to the formation of this image in the first place: the generalised state of openness to possibility that is presupposed by the notion of hope itself.

If self-image is conceived of and protected in European human rights law as a matter of dignity and its formation is partly a consequence of the vision of hope articulated here (a vision which also, as we know, is conceived of as carrying the individual forward), then we come to the final point of connection between hope and dignity in European human rights law: the idea that hope itself carries a certain dignity. As a mode of being and relating, and one that is bound up in the account of individual continuity and the formation and maintenance of self-image in European human rights law, hope is cast as being fundamental to the sense of self in European human rights law – and fundamental, not least, for its implication in relations between individuals. The final task of this paper – which has so far considered the relations of the concept of hope in European human rights law – is to consider these relations between individuals: the relations involved in the experience of hope itself.

#### **4. The right to hope as a right to recognition**

This paper has so far set out an account of the origins of the right to hope in European human rights law, the meaning of hope itself in this context, and its connection to dignity. I have suggested that the experience of hope is conceived of in European human rights law as the experience of the capacity to hope – a capacity dependent on a sense of possibility. This, in turn, is connected to a deeper vision of individual continuity, which is expressed in the case law in notions of self-development, self-realisation, and self-fulfilment and is integral to the

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<sup>163</sup> *Ibid.*, p59.

idea of what it means to 'be' in European human rights law. The denial of the experience of hope is cast as involving the denial of this fundamental element of being in European human rights law and as something that would be degrading on account of the way in which it would involve a reduction of an individual's self-image and an erosion of her dignity. Hope and dignity are therefore bound up in each other in European human rights law, and I have further suggested that we can think of this as involving two notions: one involving the hope of dignity and the other the dignity of hope.

The concept and meaning of hope thus emerges in European human rights law as embedded in notions of dignity, humanity, and potentiality. An underpinning suggestion of this paper all along has been that the experience of hope in European human rights law involves relations among individuals too: that it is a mode of being in and relating to the world and one that is dependent on a sense of possibility (which itself implies a certain degree of intersubjectivity: that hope in European human rights law is not only subjective as an experience but that at some fundamental level it is a property of relations between the individual and the world and, therefore, between individuals). This sense of relationality is further reinforced when we consider the place that is occupied by the notion of self-image in European human rights law – the formation and maintenance of which (an inherently relational and communicative project) is deemed fundamental to the sense of individual continuity. There is, furthermore, a sense implicit in the account set out above of the need of the individual in European human rights law's account to assume her self-continuity across time. This is reflected, for instance, in the notions of vital potentiality and ethical potentiality (in which the individual is cast as needing to have a point of beginning and as needing to continually negotiate the questions of self-development and self-realisation). The idea of self-continuity here could also be thought of as supplying a form of security in the face of the uncertainty that inevitably pervades the notions of self-development and self-realisation, insofar as it is conceived of as enabling the individual to see herself in the future and to sustain a self-image to this effect.

The way in which hope and dignity are connected in this context – particularly in terms of the ascribed need of the individual in European human rights law to form, maintain, and communicate a self-image – points to a further connection: between the idea of individual continuity (reflected in and presupposed by the notion of the self-image) and a subtle sense of an idea that the individual is conceived of here as needing to be recognised by others. In a way we have already seen traces of this idea in the context of the points about the fundamentality of the experience of hope in European human rights law, the need for the individual to maintain control over her self-image, and the meaning of 'degrading treatment'; but it is articulated more clearly still in cases concerning bodily integrity: respect for which is cast as being about recognition. An example is *Price v UK (2001)*. Ms Price was four-limb deficient and also suffered from kidney problems. Following civil proceedings in which she refused to answer questions about her financial situation, she was committed to prison for contempt of court; but the sentencing judge who ordered her detention for seven days took

no steps to see whether there were facilities available which could accommodate the level of her disability. Ms Price was subsequently detained in inappropriate conditions, in which she was “dangerously cold, [risked] developing sores because her bed [was] too hard or unreachable, and [was] unable to go to the toilet or keep clean without the greatest of difficulty”.<sup>164</sup> When she brought a complaint about this before the ECtHR, the Court concluded that there was no evidence of “any positive intention to humiliate or debase” Ms Price, but considered that the fact of her detention in such conditions, and with such consequences for her, constituted degrading treatment in violation of Article 3.<sup>165</sup>

In a Separate Opinion, Judge Greve elaborated the Court’s reasoning further, arguing that the “compensatory measures” that are secured for a person with disabilities in a “civilised country” “come to form part of the disabled person’s physical integrity”.<sup>166</sup> Consequently, any obstacle set up in the path of a person’s access to these measures (as in the case of the fact that Ms Price was impeded from taking with her to prison the battery charger that she needed for her wheelchair) would constitute a violation of that person’s physical integrity. All that was required in Ms Price’s case was, Judge Greve argued, “a *minimum of ordinary human empathy*”<sup>167</sup> – a basic understanding and recognition of Ms Price’s position. Instead, there had been a failure to see her situation and to treat her accordingly – a failure, in other words, of recognition.

Axel Honneth, who has elsewhere similarly noted that the categories that we use to express a sense of “moral maltreatment” are often ones which are “related to forms of disrespect, to the denial of recognition”, suggests that this in itself invokes the sense that “we owe our integrity, in a subliminal way, to the receipt of approval or recognition from other persons”.<sup>168</sup> The experience of disrespect means that “the person is deprived of that form of recognition that is expressed in unconditional respect for autonomous control over his own body, a form of respect acquired just through experiencing emotional attachment in the socialization process”.<sup>169</sup> But what, according to European human rights law is seen when individuals relate to and recognise each other in this way? Judge Greve’s suggestion in *Price v UK* was that recognition is about empathy, so that the imagination is exercised to try to envisage and understand the experience of the other (something which requires a capacity to position oneself in the place of the other).<sup>170</sup> But the case law pertaining to hope indicates a demand that is thinner than this, and one that consists in recognising the other as both capable of and needing to hope. The sense is of a need to recognise the need and

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<sup>164</sup> 33394/96, *Price v UK* (2001), para.30.

<sup>165</sup> *Ibid.*, para.30.

<sup>166</sup> *Ibid.*, Separate Opinion of Judge Greve.

<sup>167</sup> *Ibid.*

<sup>168</sup> Axel Honneth, ‘Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition’ (1992) *Political Theory* 20(2), 187-201, p188-189.

<sup>169</sup> *Ibid.*, p190.

<sup>170</sup> See further Martha Nussbaum’s argument that we need a stronger mode of relating to others in these terms too: Martha C. Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (2012, The Belknap Press of Harvard University Press, Cambridge MA), p143-146.

fundamentality of the experience of (the capacity to) hope: a point reflected in the way in which the denial of the experience of the capacity to hope is conceived of as involving the denial of a fundamental aspect of humanity (involving a notion of individual continuity and the recognition of this continuity) – a denial which would be degrading. To put the point differently, the conceptualisation of the individual that emerges here is not only one of the hoping individual – a notion alluded to earlier on in reference to the idea of individual continuity in European human rights law – but also of the individual who needs to be treated as capable of hoping in order to be constituted at all.

We can therefore perhaps think of the right to hope in European human rights law as a right to recognition: a right that reflects the relationality of the concept of hope as we have seen it in this paper and that suggests that the point of hope in European human rights law is less about the content of hope itself and more about recognition as a subject capable of hope. As the preceding pages have demonstrated, this would be a subject who relates to the world in a way that is presupposed by the notion of hope in European human rights law and who has a sense of continuity across time: a subject who is, in other words, constituted as such in European human rights law.

## 5. Conclusion

What does it mean, to experience hope? And how is this experience made the object of a right as a matter of European human rights law? Those are the two questions which led to this paper, which has offered an account of how the ‘right to hope’ has been constructed in European human rights law. It began by examining the articulation of the right to hope in the case law of the ECtHR: an articulation that has occurred in the jurisprudence pertaining to irreducible life sentences, and in relation to which the ECtHR has stated that a life sentence must be reducible *de jure* and *de facto* – that it must carry the prospect of release and the possibility of the review of the sentence. This principle is grounded in a notion of the individual’s right to hope; and I argued that the idea of the experience of hope that emerges in this context is one of the experience of the capacity to hope: a capacity dependent on a sense of possibility. Hope itself is further cast as a mode of being in and relating to the world and one that has a subjective and intersubjective character and is bound up in a vision of individual continuity. This notion of individual continuity is treated as fundamental to the meaning of being in European human rights law, with its denial – by way of the denial of the experience of the capacity to hope – being conceived of as degrading (a process involving a reduction of an individual’s self-image and an erosion of her dignity).

The paper went on to consider the relationship that is articulated between hope and dignity in European human rights law; and I suggested that there are two specific points of connection that emerge between the two. The first is one that I described in terms of the hope of dignity, by which I meant the hope that is involved in dignity in European human rights law. This idea is reflected firstly in the sense, evident at the time of the drafting of the ECHR, that the Convention would represent and guarantee dignity and serve as an expression

of the hope of dignity. It is secondly reflected in the way in which dignity itself seems to be conceived of in European human rights law as protecting, and having within itself, a form of vital potentiality: a latent capacity to become and therefore begin to 'be' within European human rights law. The other point of connection between hope and dignity that I highlighted in this context is one that I described in terms of the dignity of hope, meaning the idea that hope itself carries a certain dignity. This idea derives from the way in which self-image is conceived of and protected in European human rights law as a matter of dignity, with its formation in the first place being bound up in the vision of hope articulated here.

What, then, is the right to hope in European human rights law? In the final part of the paper, I suggested that when we draw the strands of the account set out here together, we arrive at a way of thinking about the right to hope as a right to recognition: a right that reflects a conceptualisation of a hoping individual and one who furthermore needs to be treated as capable of hoping in order to be constituted at all. Thus hope, we can say, emerges in European human rights law as intertwined in conceptual relations (namely with potentiality and dignity), as involving the relationality of the individual (it being a mode of being in and relating to the world, and one that is both dependent on a sense of possibility and bound up in a notion of the relational and communicative qualities of the individual's self-image), and finally as fundamental to the vision of the individual that underpins European human rights law.