3

Down the Deeper Wells of Time

Oh unhappy women! O the criminal deeds of the gods! What is to happen? To what tribunal can we appeal when we are being done to death by the injustice of our masters?

Euripides, *Ion*

They were very well formed, with handsome bodies and good faces. . . . They do not carry arms nor are they acquainted with them, because I showed them swords and they took them by the edge and through ignorance cut themselves. They have no iron. Their javelins are shafts without iron and some of them have at the end a fish tooth and others of other things. All of them are alike are of good-sized stature and carry themselves well. . . . They should be good and intelligent servants . . .. They brought balls of spun cotton and parrots and javelins and other little things that it would be tiresome to write down, and they gave everything for anything that was given to them. I was attentive and labored to find out if there was any gold; and I saw that some of them wore a little piece hung in a hole that they have in their noses. . . . And these people are very gentle . . .. [W]henever Your Highnesses may command, all of them can be taken to Castile or held captive in this same island; because with fifty men all of them could be held in subjection and can be made to do whatever one might wish.

The Diario of Christopher Columbus's First Voyage to America 1492–1493, 11 – 14 October 1492, Abstracted by Fray Bartolomé de las Casas

Manifiesto es que . . . la libertad sea la cosa más preciosa y suprema en todos los bienes deste mundo temporales, y tan amada y amiga de todas las criaturas.[1]

Bartolomé de Las Casas

How dare you talk to us of duty when we stand waist deep in the toxin of our past?

Toni Morrison, *The Nobel Lecture in Literature*

[1] "It is obvious that . . . liberty is the highest and most precious of all worldly goods and is beloved of all creatures."

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3.1 BACK TO THE ROOTS OR TRAPPED IN ANACHRONISM?

The history of human rights since the eighteenth century teaches us that these rights are based on ideas that seem to transcend the parochial boundaries of culture, religion, imaginary race, class or any other such characteristics. They appear to speak forcefully to human understanding, albeit not irresistibly so.

One question raised by the development of the last 250 years concerns the deeper roots of these ideas about human rights in history. Are there any, and if so, of which kind? The answer to this question adds a further piece to the puzzle of the origins of human rights in the ethical and legal life of the human species. Furthermore, it helps us to clarify the exact nature of the object of our inquiry by investigating whether human rights, seen from this wider perspective, are a Western idea of the Enlightenment or the Natural Law tradition, a piece of twentieth-century ideology, a justified normative concept accessible to all (the foundational assumption of the human rights movement) or something else altogether. This question opens up a vast territory, many aspects of which are not particularly well charted, although outstanding scholarship has explored some of them. The following remarks cannot aspire to fill all of these gaps. They also cannot engage with the full complex social, political, economic, religious and cultural context of the historical examples of thought about rights we will discuss. Moreover and importantly, they imply no assumptions about a linear, continuous historical process, coherent ideas about rights over millennia or simple causal connections between the thoughts about rights of different epochs, but serve limited expository purposes: They pursue merely the modest aim of highlighting some important findings for the specific cognitive interests of our inquiry.

3.2 A STANDARD THESIS

A standard thesis encountered in discussions about the history of human rights holds that neither antiquity nor cultures not considered "Western" had any concept of *rights*, let alone human rights. Rather, the term *right* referred only to a property of a state of affairs, "namely that the state of affairs is right or just or fair."[2]

According to this view, the modern sense of a subjective right emerged in the European Middle Ages in the work of canonists. Only since the twelfth and

[2] Griffin, *On Human Rights*, 9. Cf. on this thesis Hart, *Essays on Bentham*, 163; on the discussion but doubting the thesis, acknowledging the existence of subjective rights in Roman Law Brian Tierney, *The Idea of Natural Rights* (Michigan: Wm. B. Eerdmans Publishing Co., 1997), 13 ff.,16 f., 34, 42, including the observation that authors pursuing this historical thesis, like Villey who defended a neo-Aristotelian, neo-Thomist objective Natural Law theory buttressing a conservative social ethics, are motivated by disagreement with an ethics and legal philosophy that gives rights a central place, as this approach is supposedly "Utopian, arbitrary and sterile," Tierney, *Idea of Natural Rights*, 21. Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 2002), 1 ff.

thirteenth centuries has the term *ius* come to cover not only what is fair, but also the meaning of the modern sense of a right – an "entitlement that a person possesses to control or claim something."[3] This set in motion the process that finally led to the idea of human rights. In this process, the idea of *natural rights* played a key role. Rights instruments and documents before the eighteenth century, such as the *Edict of Milan* (313) by Emperor Constantine on freedom of religion, the *Magna Carta* (1215), the *Virginia Charter* (1606), the *Petition of Right* (1628), the *Habeas Corpus Act* (1679) and the *Bill of Rights* (1688/1689) are not seen to properly belong to the history of human rights, however. This is because they did not protect rights of humans by virtue of their humanity, but the rights of specific groups of people – for instance, the entitlements of the feudal lords of England secured by the *Magna Carta* or the ancient rights of Englishmen secured by the *Bill of Rights*.[4] Consequently, it would be an error to list such rights as predecessors of human rights.

This thesis implies that not only ancient cultures, but also non-European cultures were unfamiliar with the idea of rights. Before the efforts of the glossators, who brought something new into the world, human beings around the world lived in a world without rights, this thesis seems to suggest.

What to think of this thesis, especially if one gives up certain simplistic "evolutionary prejudices"[5] about the development of law from primitive beginnings to complex modern (European) codes? Important documents such as the abovementioned *Edict of Milan* (313) date to before the supposed invention of the concept of "rights" in medieval thinking. The fact that much medieval thought on law and justice is based on ancient sources, in philosophy as much as in law, is another reason that should deepen our interest in the contributions of earlier epochs.

But not only that. As already mentioned above, events like the "Scramble for Africa" led to a confrontation between different epochs of human cultural development. The modern, technologically and scientifically advanced culture of Europe encountered the cultures of Africa and other continents, which in many respects were often more like some of those many and diverse human ways of living of an earlier age. Some indigenous cultures may thus serve as one indirect clue to the moral conceptual framework of earlier human societies, which were acephalous and based on oral traditions, like the few human groups who still live under comparable conditions today.[6]

[3] Griffin, *On Human Rights*, 30.

[4] Griffin, *On Human Rights*, 12.

[5] Cf. for an instructive case study on such unhelpful prejudices José Louis Alonso, "Fault, Strict Liability, and Risk in the Law of the Papyri," in *Culpa: Facets of Liability in Ancient Legal Theory and Practice*, ed. Jakub Urbanik (Warsaw: The Raphael Taubenschlag Foundation, 2012), 19, 74.

[6] For an example of such an approach from the study of Hereros, cf. Andrew B. Smith, "The Origins of Pastoralism in Namibia," in *People, Cattle and Land: Transformations of a Pastoral Society in Southwestern Africa*, eds. Michael Bollig and Jan-Bart Gewald (Cologne: Rüdiger Köppe Verlag, 2000), 72.

Given the history of racism, it is important to note two things about this methodological approach: First, it does not imply any hierarchy between these cultures, simplistic notions about cultural advancement aside that are already refuted by the comportment of Europeans during colonization. Second, such developmental differences obviously do not say anything about the rights of the individuals living in these cultures, which are independent of this development. Just because somebody has not acquired the skills to build computers, it does not follow that they have less worth as a person. Your right to life does not depend on your digital competences.

These indigenous cultures will form our first object of study, based on the assumption that what we know about the moral ideas of indigenous African people during the colonial period, for instance, will tell us something about our remoter past. The point of this inquiry is not to show that people like the Herero already had a differentiated bill of human rights, including the doctrinal tools of a proportionality or strict scrutiny test. Nor is it to assume that they were "contemporary ancestors."[7] The point of studying the moral universe of indigenous people is a much more subtle but still crucially important one. This study may tell us something about the moral intuitions and concepts with which these human beings reacted to the practices of slavery, exploitation, mass killings and – as in the case of the Herero – genocide even in narrow technical legal terms, all of which today are regarded as paradigmatic cases of human rights violations. These intuitions were not moral judgments in explicit human rights terms. But they may tell us something important about the seeds of human moral thought that slowly grew into the concept of human rights.[8] This inquiry has a moral dimension, too: By reasserting their inner moral world, it contributes to restoring the full humanity and individuality of the victims of these crimes.[9]

3.3 NOT A MORAL BLANK SLATE: THE PERSPECTIVE OF INDIGENOUS PEOPLE

Indigenous people seem to be something of a blind spot for many current human rights histories. This is not surprising if the leading research paradigm is that human

[7] Cf. Chapter 2 n. 8.

[8] Tierney, *Idea of Natural Rights*, 13 comments: "The concept of individual subjective rights has become central to our political discourse, but we still have no adequate account of the origin and early development of the idea. The lack of such work leaves open one of the central questions of modern debate – whether the idea of human rights is something universal, common to all societies, or whether it is a distinctive creation of Western culture, which emerged at some specific, identifiable point in European history." This is a good example of identifying an important question but framing it imprecisely. The question is not whether there are human rights in every society, because obviously there are not. The question is rather: In a specific historical and social context, are there specific normative phenomena – including incidents such as claims and duties or intuitions about normatively demandable freedom and equality – that are possible building blocks of the ultimately formed explicit human rights idea?

[9] Which helps to address a problem of genocide studies: "Victims left behind mourners. Killers left behind numbers," threating to extinguish both humanity and individuality, Snyder, *Bloodlands*, 407.

rights are the product of European culture, whether stemming from the revival of Roman law in the Middle Ages,[10] novel reading in the eighteenth century[11] or other such culture-specific developments.

There is a traditional strand of research that investigates the law of early human acephalous societies and includes famous early and controversial work in legal anthropology on so-called primitive societies[12] – which are in fact not primitive at all. This research already shows in often-fascinating detail that these societies have intricate normative codes and concepts.

A prominent example of contemporary research – much praised and controversially discussed – that underlines the importance of not neglecting indigenous cultures when writing the history of normative concepts was produced by David Graeber and David Wengrow. They argue that there is much new archaeological and anthropological evidence from early cultures, including those from the Upper Paleolithic, to suggest that there was a great variety of political forms – egalitarian, proto-democratic, participatory, cooperative and peaceful, but also hierarchical, authoritarian and full of violence and cruelty.[13] Indigenous cultures were not living in some kind of dream-like mode of existence that never changed, but rather they took conscious choices about what we today call the political organization of their societies – sometimes increasing equality, care for others and participation, sometimes erecting authoritarian systems, among many other forms of social order.[14] Graeber and Wengrow try to show that some expressions of indigenous thought even influenced the Enlightenment's political philosophy of freedom and equality, which was stimulated by the indigenous critique of European civilization.[15] Moreover, the desire for liberty is well-documented in many ancient societies.[16]

Contrary to some popular conceptions that hunter-gatherers lived in small, competing groups, the respective cultures often spanned geographically huge spaces, in which individuals moved widely, creating groups that were not based on biological kinship relations in any discernable sense but rather on common cultural bonds:[17] "[T]he common stereotype that 'primitive' peoples saw anyone outside their particular local group only as enemies appears to be entirely groundless."[18] Hunter-gatherers already created city-like communities producing impressive

[10] Tuck, *Natural Rights Theories*, 13: "It is among the men who rediscovered the Digest and created the medieval science of Roman law in the twelfth century that we must look to find the first modern rights theory, one built round the notion of a passive right."
[11] Hunt, *Inventing Human Rights*, 35 ff.
[12] This is a classic thesis, cf. Edward Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge, MA: Harvard University Press, 1954).
[13] Graeber and Wengrow, *Dawn*, 85 ff., 119, 197, 203.
[14] Graeber and Wengrow, *Dawn*, 86, 107, 112, 115, 349, 354, 482.
[15] Graeber and Wengrow, *Dawn*, 17 ff., 29 ff.
[16] Graeber and Wengrow, *Dawn*, 41 ff., 452, 473, 492, 523.
[17] Graeber and Wengrow, *Dawn*, 122, 279 ff.
[18] Graeber and Wengrow, *Dawn*, 547 n. 4.

artifacts and architecture.[19] In particular, hierarchical state-like structures were not the necessary outcome of the slow introduction of agriculture – large-scale communities based on forms of communal participation developed in different forms as well.[20] This variety of social organization was based on complex normative concepts, including subjective rights, from the right to perform certain sacred actions to differentiated rights to the use of (communal) property.[21] Thus, not only the myth of the "noble savage" but also the myth of the "stupid savage" has to be abandoned.[22] As soon as modern humans had developed, they started – endowed with common biological and cognitive abilities constituting the "psychic unity of mankind" – "doing human things,"[23] which encompassed, one may add, normative "human things." History has to stop "infantilizing Non-Westerners" and restore "our ancestors to their whole humanity."[24]

If we return to the example of the subjugation of Africa, particularly in the nineteenth century, we find a considerable body of work that documents indigenous African people's reactions to these events. Such studies on indigenous people around the world present evident methodological problems, not least that some of this evidence has been produced and handed down through the colonial machinery, such as governmental reports, court proceedings, diaries of missionaries and so forth. Analyses thus have to factor in the fact that such sources may be heavily influenced by colonial perspectives and particular interests.[25]

Having said this, there are still many impressive testimonies about the suffering of colonized people at this time and – crucially for our inquiry – about their sense of the normative wrongness of what had happened to them.

The Herero rebellion is a case in point. The Herero were a nomadic people. Their pastoral way of life changed over time, and many aspects of its precolonial development remain unclear.[26] In the second half of the nineteenth century,

[19] Cf. for instance Graeber and Wengrow, *Dawn*, 89 ff. on Göbekli Tepe.
[20] Cf. for instance Graeber and Wengrow, *Dawn*, 211 ff. on Çatalhöyük; 297 ff.; 329 ff.
[21] Graeber and Wengrow, *Dawn*, 150, 157 ff., 179, 181, 250, 502.
[22] Graeber and Wengrow, *Dawn*, 71 ff. Cf. for a recent example of sophisticated knowledge Tim Ryan Maloney et al., "Surgical Amputation of a Limb 31,000 Years Ago in Borneo," *Nature* 609 (2022): 547 ff.
[23] Graeber and Wengrow, *Dawn*, 80, 83 ff., 95, 118, 96: "Anthropologists who spend years talking to indigenous people in their own languages, and watching them argue with one another, tend to be aware that even those who make their living hunting elephants or gathering lotus buds are just as sceptical, imaginative, thoughtful and capable of critical analysis as those who make their living operating tractors, managing restaurants or chairing university departments."
[24] Graeber and Wengrow, *Dawn*, 31, 24.
[25] Cf. Madley, *American Genocide*, 10 ff.
[26] Cf. Dag Henrichsen, "Ozongambe, Omavita, and Ozondjembo – The Process of (Re-) Pastoralization amongst Herero in Pre-colonial 19th century Central Namibia," in *People, Cattle and Land: Transformations of a Pastoral Society in Southwestern Africa*, eds. Michael Bollig and Jan-Bart Gewald (Cologne: Rüdiger Köppe Verlag, 2000), 149 ff., 152: "pastoral/pastroforaging social formation." For an overview, Michael Bollig and Jan-Bart Gewald, "People, Cattle, Land – Transformations of Pastoral Society," in *People, Cattle and Land:*

influences of various kinds, including those of the Christian missionaries, made themselves felt. The Herero had sophisticated sets of rules that organized and structured their communal life. These included rules for the use of land, the ownership of cattle, defining the territorial claims of certain groups, ceremonial matters, spiritual practices, family life and so forth. It is impossible to describe this way of life and the normative concepts and thoughts that underpin it without a terminology including concepts such as claims (to cattle, to land use, to territory) and duties (not to take away the cattle of somebody else, to accept the land use or territory of others) – let alone to practice it without access to normative categories like *claims* and *duties*. It thus seems implausible to assert that such normative phenomena were alien to the Herero.

The Herero's fight against their German aggressors underlines these findings, and in matters that relate directly to human rights. Trying to reconstruct the normative world of people such as the Herero and their perception of the events at that time obviously is not an easy task. Various sources and studies document the reasons for the rebellion – basically, it constituted self-defense against invaders who took away the Herero's land, property and possibility of gaining their livelihood, threatening their way of life. The Germans failed to uphold prior arrangements by contract. The Herero's complaints about these matters are based on normative ideas, not least the claims they thought they had to their land, cattle and way of life.

One such source, the report of the German General Staff about the military campaign against the Herero, provides an interesting glimpse into what was going on. This report cannot be suspected of idealizing the enemy, although the caveat about the effects of colonial perspectives holds here, too. The report outlines the reasons for the rebellion and in this context highlights the Herero's will to resist the appropriation of their land, cattle and labor by the colonizing power. In addition, it underlines two other factors: first, the warlike characteristics of the Herero; and second, their desire for freedom and independence. The report states that the Herero possess a "sense of freedom and independence" (*Freiheits- und Unabhängigkeitssinn*) rarely found among African peoples.[27] They united with former adversaries to fight the "intruder" who threatened their "independence"

Transformations of a Pastoral Society in Southwestern Africa, eds. Michael Bollig and Jan-Bart Gewald (Cologne: Rüdiger Köppe Verlag, 2000), 3 ff. On the evidence for earlier periods Andrew B. Smith, "The Origins of Pastoralism in Namibia," in *People, Cattle and Land: Transformations of a Pastoral Society in Southwestern Africa*, eds. Michael Bollig and Jan-Bart Gewald (Cologne: Rüdiger Köppe Verlag, 2000), 55 ff.; Thomas Frank, "Archeological Evidence from the Early Pastoral Period," in *People, Cattle and Land: Transformations of a Pastoral Society in Southwestern Africa*, eds. Michael Bollig and Jan-Bart Gewald (Cologne: Rüdiger Köppe Verlag, 2000), 77 ff. For later developments Jan-Bart Gewald, "Colonization, Genocide and Resurgence: The Herero of Namibia 1890–1933," in *People, Cattle and Land: Transformations of a Pastoral Society in Southwestern Africa*, eds. Michael Bollig and Jan-Bart Gewald (Cologne: Rüdiger Köppe Verlag, 2000), 187 ff.

[27] Kriegsgerichtliche Abteilung I des Grossen Generalstabs, *Die Kämpfe der deutschen Truppen in Südwestafrika, Vol. 1: Der Feldzug gegen die Hereros* (Berlin: Mittler und Sohn, 1906), 2.

(*Unabhängigkeit*) and "freedom" (*Freiheit*). Their resistance showed "how strong [their] sense of freedom and independence" was. They were not "weaklings" (*Schwächlinge*) who could be won over by "being bought" (*Kauf*) or negotiation, but instead were determined not to be subdued without offering fierce resistance.[28] The main reason for the rebellion, the report concludes, thus ultimately is this "warlike and freedom-loving nature" of the Herero.[29]

So freedom clearly mattered to the Herero, and enough to fight one of the world's major military powers. Furthermore, it does not seem plausible that the freedom they fought for was only the *factual ability* to act in certain ways without obstacle – the freedom of the hare to escape the fox, as it were – and not the defense of a *normative position*, the normative *claim* to freedom accompanied by the correlated *duty* of the German invaders to respect this freedom. The sources show that the Herero framed their fight in normative terms, referring to the injustice of their treatment by the Germans, including the unjust lack of sanctions for perpetrators of crimes. This implies that they believed that they could *claim* to be treated differently and that the Germans had a *duty* to do so. The Herero defended *claims* to land, cattle and the integrity of holy sites, and there is no reason to believe that this was not true for their freedom as well.

Such conclusions underline how important it is to break with the often-racist idea of "savages." A "savage" is someone who lacks basic cognitive abilities, including moral orientation, and is prey to beast-like impulses. The truth is that the European invaders encountered not savages, but human beings with complex moral concepts and rules, embodied in proto-legal or legal norms (depending on the concept of law used). This only deepens the horror of what happened to the Herero: The human beings starved to death in the Namibian desert must have felt not only the physical pain of their treatment, but also the moral outrage of their death.

This brief account encourages us to consider more closely what the history of slavery and the mass killings or even genocide of indigenous peoples can teach us about the deeper sources of human rights. Two more examples from different backgrounds indicate the kinds of question that arise if one reflects on the meaning of the testimonies of the indigenous victims.

Our first example concerns Yahling Dahbo, a former slave. Dahbo gave an account of the conditions of her life as a slave at a trial concerning her emancipation after British rule was established in The Gambia in 1889. Britain took some (albeit limited) measures to end slavery in the Crown Colony, although the practice persisted until 1930. Dahbo stated: "It was against my wish that Prisoner came to me at night, being a slave I was afraid. . . . I was at Prisoner's as a slave. Nobody has put the word slave into my mouth. Prisoner himself used to tell us that we were his slaves. That is all the reason I have for saying I am a slave. It is not because I [was

[28] Generalstab, *Feldzug gegen die Hereros*, 3 f.
[29] Generalstab, *Feldzug gegen die Hereros*, 3 f.

beaten] that I say that I am a slave. All the world beats. Not because I make rice farms. If you are in the hands of a person, if you are free born you will know."[30]

At the same trial, another woman, Dado Bass, testified about her life with the slaveholder: "I know I am a slave because they never tie free people or put them in irons. Prisoner used to tie me and put me in irons. He used to tie my hands with a rope. He used to put me in irons."[31]

A third women, Maladdo Mangah, had this to report: "It was not my will or pleasure to go with the prisoner. I could not help myself. I am a slave. . . . I have a child. She is in the hands of Mr. Edwin [the slaveholder]. Fatou James took the child at Bathurst saying she was a slave. It was not with my consent. I cried."

What are we to conclude from this dry protocol of the answers given by these women to the questions of the court? Does Yahling Dahbo's testimony simply report the brute fact of harm, or is there a normative dimension to her suffering? Did she evaluate the rape she endured in some kind of normative framework? Did she think (in whatever terms) that she could justifiably demand that this not happen and that the slaveholder was bound not to rape her, even though the customs of a slave society were on his side? What are the reasons why this is naturally assumed for European women of this time but not for her? Conversely, what are the reasons to think that the experience and evaluation of both African and European women share crucial common elements? Does rape only constitute a normatively evaluated harm after a cultural development comparable to that of Europe?

What about Dahbo's longing for freedom? Did it have a normative dimension, or was it just a non-normative wish, like "I wish I could fly?"

How did Dado Bass feel, and what did she think when the slaveowner placed a rope around her hands and put her in irons? What about Maladdo Mangah? What does it mean that it was not her "will or pleasure to go" with the slave holder? What does it mean that she thought her consent should have mattered when she was forcibly separated from her child? Did she think she had a claim to be asked about the separation? What was going on inside her when she cried? Was her pain accompanied by some kind of moral outrage?

Our second example is taken from the report of a chief of the Native American Pomo. Based on the oral accounts of eyewitnesses of an 1850 massacre during the genocide against Native Americans in California, he stated:

> [O]ne old lady a (indian) told about what she saw while hiding under abank, in under aover hanging tuleys [bulrushes]. . . . alittle ways from she, said layed awoman shoot through the shoulder. she held her little baby in her arms. two

[30] Alice Bellagamba, "'Being a slave, I was afraid. . .': Excerpt from a Case of Slave-Dealing in the Colony of the Gambia," in *African Voices on Slavery and the Slave Trade*, eds. Alice Bellagamba, Sandre E. Green and Martin A. Klein (Cambridge: Cambridge University Press, 2013), 343 ff., 351 ff.

[31] Bellagamba, "Being a slave," 355.

> white men came running torge the women and baby, they stabed the women and the baby and, and threw both of them over the bank in to the water. she said she heard the woman say, O my baby; she when they [the survivors] gathered the dead, they found all the little ones were killed by being stabed, and many of the women were also killed [by] stabbing ... They called it the siland creek (Ba-Don-Bi-Da-Meh).[32]

What do we assume about the perceptions of this dying mother in the last moments of her life? What was the exact nature of her attitude towards the death of her child? What did the people of her community think? What would we assume if the mother were Swiss? Is the inner emotional and moral world of an indigenous woman flat and impoverished, whereas the inner world of a Swiss woman is differentiated and rich? Why the one, why the other?

Many such questions present themselves if one engages more intensely with this kind of research. However, the above remarks should suffice to show plausibly that some basic elements relevant for the history of the idea of human rights can be found in sources other than the canonical texts of the European history of thought and European or "Western" cultural practices and historical records. These basic elements include powerful intuitions about the value of freedom and strong moral beliefs about one's claims to goods of fundamental importance for human life and correlated duties of others.

These findings are important for the question of who has epistemic access to the idea of human rights. Further analysis will show that many steps and transformations were required to bridge the gap between such elementary intuitions and beliefs and the explicit concept of human rights as understood today. These intuitions and beliefs are, however, part of the ethical raw material for developing the idea of human rights, and as such they are not beyond the reach of any human being.

A further conclusion suggests itself, if we take the methodological step mentioned above and interpret such results as providing some clues about the lifeworlds of cultures in the more distant past, albeit not mistaking them for a "direct window on the past," as clarified above. In light of these findings, we should take seriously the possibility that the human beings of these times were no moral blank slates, but rather lived in a differentiated normative lifeworld, as did the Herero, other indigenous peoples or indeed any other human group (including ourselves) – a lifeworld that historians of human rights have taken too little interest in thus far.

Consequently, the normative dimensions of events such as the Herero rebellion, the slave women's perception of their lot and the precise nature of the experience of the dying Pomo mother cradling her stabbed child properly belong in a history of human rights. Indigenous people are no strangers to this history, and their experience matters.

[32] William R. Benson, quote: Madley, *American Genocide*, 130.

These remarks do not imply that indigenous people only had rights because they entertained subjective moral beliefs about their justified claims. There is no doubt that human beings have rights even if they are not conscious of them. A four-year-old child has a right to life, even though they have no understanding of this idea. The subjective belief that one is a rights-holder is not an existence condition of the rights of humans. The point of these observations is only to identify the traces of this idea in the moral experience of human beings in order to understand its deeper roots in the human life form.

The next step of our inquiry will investigate whether such findings are challenged or bolstered by what we know about the relevant normative ideas in antiquity. Here, too, the aim is not to discover full concepts of human rights in ancient texts or practices. Rather, the goal continues to be to go back to the roots of the idea of human rights to identify the elementary moral notions that make it possible to form the idea of human rights.

3.4 THE MANY FORMS OF NORMATIVE THOUGHT IN ANCIENT TIMES

3.4.1 *The Imagery of Epics*

When talking of antiquity, our interest goes beyond just European or even only Greek and Roman antiquity. Such a narrow focus would unduly neglect important recorded sources of other regions and cultures (e.g. from India or China). Nor should we conclude from the fact that we do not have many recorded sources of certain times and cultures (e.g. the oral cultures of Africa) that these cultures have produced nothing of interest. They almost certainly did.

Despite these limitations and the fragmentary nature of the historical record, surviving sources offer many interesting points of departure for research on the wider history of subjective rights and their connection with liberty, equality and ideas of human worth as a subchapter of the history of human rights. Serious, open-minded study of cultures that formerly and wrongly were called "primitive" may provide some interesting hints about the use of rights in early human forms of life, as we have just seen. In addition, the oldest known legal codes of the third and second millennia BCE from Sumer and Babylon seem to express or imply a concept of a right – a finding that is hard to reconcile with the thesis that the concept is a much more recent invention of European legal thought.[33] The question of whether the

[33] Consider, for instance, from the *Laws of Ur-Nammu* (ca. 2100 BCE): "§ 30 If a man violates the rights of another and cultivates the field of another man, and he sues (to secure the right to harvest the crop, claiming that) he (the owner) neglected (the field) – that man shall forfeit his expenses." Martha Tobi Roth, *Law Collections from Mesopotamia and Asia Minor* (Atlanta, GA: Scholars Press, 1997), 20, or from the *Laws of Hammurabi* (ca. 1750 BCE): "§ 244: If a man rents an ox or a donkey and a lion kills it in the open country, it is the owner's loss. § 245 If a man rents an ox and causes its death either by negligence or by physical abuse, he shall replace

same holds for the Vedas, the oldest of which also stem from the second millennium BCE, is an important matter. It is equally fruitful to investigate whether rules such as the Ten Commandments entail something about rights. This is no trivial question, for the formulation of the normative content of a given moral or legal code as a command is not sufficient to rule out the possibility that this code implies such rights, as we have seen above.

For open-minded research that at the same time is critically aware of the danger of anachronism, in light of our methodological findings about the historiography of human rights, it may turn out to be a fruitful research strategy not to turn immediately to legal texts, as is often done, but to include wider cultural manifestations of normative ideas in our analysis to gain a more inclusive picture of the normative thinking of a given culture and epoch, which is never limited to the sphere of law.

One very interesting issue in this context is the imagery of epics. A good example of the depth of the questions these works of art raise is Homer's *Odyssey*, a text whose outstanding importance for the cultural development of humankind is beyond doubt. One central part of the epic concerns the suitors' abuse of Odysseus' property. They "continue to slay his thronging sheep and his spiral-horned shambling cattle," as Athena observes,[34] and they harass Penelope because "all prayed, each that he might lie in bed with her."[35] This is described as a moral outrage, justifying the anger of Odysseus and his son, Telemachos. The suitors are wrong to use Odysseus' goods because the cattle, wine and other amenities they feast on are the property of the absent Odysseus and of Telemachos. There is no doubt that the suitors are violating a rule by indulging in this behavior. It seems equally obvious that Odysseus and his heir, Telemachos, had a claim that their cattle not be slaughtered and their goods not squandered, and that the suitors were under a correlative duty not to do so. In addition, Odysseus and his son enjoyed the liberty to either dispose of their goods (e.g. by organizing a feast) or not do so, and the suitors could not demand the one or the other – they had, to use Hohfeldian terminology, a no-right that Odysseus and Telemachos do so, in the same way that Odysseus and Telemachos enjoyed a privilege to throw a party. This normative position is acknowledged by one of the suitors: "Never may that man come who by violence and against your will shall wrest your possessions from you, while men yet live in Ithaca."[36]

the ox with an ox of comparable value for the owner of the ox." Roth, *Law Collections from Mesopotamia and Asia Minor*, 127. These norms from the *Laws of Hammurabi* clearly imply the notion of legal responsibility, cf. Alonso, "Fault," 74 f. and thus very substantial notions about human action and agency. But not only that: The interesting question also arises of whether the owner of the borrowed ox has a *claim* to compensation.

[34] Homer, *Odyssey*, *Vol. I: Books 1–12*, trans. Augustus T. Murray, rev. George E. Dimock, Loeb Classical Library 104 (Cambridge, MA: Harvard University Press, 1919), Book 1, 91–2: οἵ τέ οἱ αἰεὶ μῆλ' ἀδινὰ σφάζουσι καὶ εἰλίποδας ἕλικας βοῦς.

[35] Homer, *Odyssey*, *Vol. I*: Book 1, 366: πάντες δ'ἠρήσαντο παραὶ λεχέεσσι κλιθῆναι.

[36] Homer, *Odyssey*, *Vol. I*: Book 1, 403–4: μὴ γὰρ ὅ γ' ἔλθοι ἀνὴρ ὅς τίς σ' ἀέκοντα βίηφιν κτήματ' ἀπορραίσει, Ἰθάκης ἔτι ναιετοώσης.

Odysseus' terrible revenge on the suitors when he finally returns is not presented as a wanton act of cruelty but justified with reference to the abuse of the goods of his house and the attempt to force Penelope into marriage while he is still alive, thus being the violation of rights he is entitled to protect, some of them concerning Penelope evidently of a patriarchal nature. Not surprisingly, then, the attempt of the suitors to appease him consists in offering to pay him compensation for the damage inflicted, which implies that he had a claim that they forbear from what they have done.[37]

Such observations are an invitation to track down the concept of a right in more detail – for example, in private law in the pluralistic normative orders of antiquity, which were of great complexity comparable in more than one respect to contemporary legal systems.[38] Some such rules even have clear significance for issues that haunt human rights law today, though evidently not in the form of current rights conceptions. A good example is represented by the legal rights of women – very limited in Athens, but quite strong in Egypt in the Hellenistic period, for instance.[39]

No attempt, however, can be made to do any justice even to these and other very ancient sources that are of evident importance if one takes this wider, non-Eurocentric perspective on the genealogy of rights. Nor is this necessary for the subject matter at hand. Instead, the discussion will turn to an example that is particularly relevant for the history of human rights: the first politically, ethically and legally entrenched democratic order on record in ancient Athens. The reason for this choice is that democracy is not just any system of government but the attempt to create an institutional framework that does justice to the autonomy, equality and dignity of human beings and thus to those values that today are understood to be at the core of human rights. There is an intense debate about the exact relation between democracy and human rights.[40] That human rights are central for any theory of democracy is, however, beyond doubt. It seems therefore worthwhile to investigate what traces of these ideas can be found in the rudimentary forms of democracy of antiquity.

The discussion of this and other related matters, its necessary selectivity notwithstanding, will add further arguments to bolster the point that the idea of rights is far

[37] Homer, *Odyssey*, *Vol. II: Books 13–24*, trans. Augustus T. Murray, rev. George E. Dimock, Loeb Classical Library 105 (Cambridge, MA: Harvard University Press, 1919), Book 22, 55–9.

[38] Cf. for a very fundamental example from peregrine law, Alonso, "Fault," 19, 74, on fault and strict liability in the Papyri.

[39] Cf. the analysis of the legal institute of *katochè* in Egypt, illustrating the strong legal position of women in ancient Egypt, who were able to act without a legal guardian and could include clauses in marriage contracts that prevented their husbands from disposing of the husband's own property without the consent of his wife – a legal position evidently including complex subjective rights, José Louis Alonso, "Interpretatio graeca: Rechtspluralismus und Umdeutungsvorgänge in den Papyri," Inaugural Lecture, February 25, 2019, University of Zurich, manuscript on file with author, 8 f.

[40] Habermas, *Faktizität und Geltung*, 109 ff. argues, for instance, for the "co-originality" of public sovereignty and human rights.

from a recent invention, as already suggested in the discussion of the normative lifeworlds of indigenous societies. Moreover, innovative thoughts about equality, freedom and human worth are not the prerogative of modernity, even in an explicitly cosmopolitan perspective.

There are many other examples from other spheres of the law of antiquity where rights play a role – for example, if a concrete person was awarded quasi-citizenship rights as a specific honor, including the right to enter a city, to reside there or to be professionally active.[41] These examples further illustrate that rights were part of the normative currency of the age.

3.4.2 *Democracy and Rights*

Many regarded democracy in ancient Greece as the political expression of equality and the principles of justice spelled out by equality. Accordingly, *Isonomia*, equal law, most probably even preceded *Demokratia* as a proper name for a democratic form of government.[42]

The egalitarian character of the democratic form of government established in Athens was limited in obvious and significant ways, not least through the exclusion of women and slaves. Furthermore, democratic policy made no attempt to create social equality. Despite these grave shortcomings, from a historical perspective the idea of equalitarian self-rule as the core meaning of *Isonomia* was still a striking achievement, in particular for the disadvantaged classes: "It promised the poorest citizens an equal right in the law-making, law-administration, law-enforcing power of the state. It expressed the spirit of a constitution, hitherto undreamed of in civilized society, which declared that the poor man's share in law and political office was equal to that of the noble and the rich."[43]

This order was established in several steps that gradually increased equality and transformed the Solonian order, which had limited magistracies to the members of the wealthier classes but already admitted every citizen to the courts before which officials could be held accountable under the law: "The demand for political equality, first voiced by only the poorest sections of the demos, became the first article of the democratic creed and was progressively implemented in waves of far-reaching reforms which swept away one by one all constitutional guarantees of political privilege for the upper classes."[44]

[41] Cf. the differentiated set of rights granted to Polos of Aegine, 306 BCE, Haritini Kotsiduou, *TIMH KAI ΔOΞA: Ehrungen für hellenistische Herrscher im griechischen Mutterland und in Kleinasien unter besonderer Berücksichtigung der archäologischen Denkmäler* (Berlin: Akademie Verlag, 2000), 256 f. (including rights as a citizen, right to enter and leave the port during peace and war, access to the public assembly, for him and his descendants).

[42] Gregory Vlastos, "Isonomia," *The American Journal of Philology* 74, no. 4 (1953): 337 ff.

[43] Vlastos, "Isonomia," 355 f.

[44] Vlastos, "Isonomia," 353. This included the Cleisthenean Constitution of 508 BCE and further reforms that followed it; the reforms of Ephialtes, 462 BCE; the eligibility of Zeugitai for

The democratic constitution of Athens enabling "the rule of the majority" included as its key elements the selection of magistrates by lot, the auditing of public officials, thus holding them accountable, and the referral of all resolutions to the authority of the public, as Herodotus put on record in one of the oldest reflections on the topic of democracy.[45] A further key element was the citizens' ability to initiate motions and legislation in the assembly (*ekklesia*).[46] The entitlements to political participation and to access to office doubtlessly can be called rights. They encompassed the claims to be included in the group from which a person was selected by lot, to attend the assembly with a vote that counted and to initiate a decision of the assembly, as well as corresponding duties of others to act accordingly: Officials in fact were obligated to include persons with such entitlements among those that could be drawn by lot, to count the votes of such persons as ones codetermining the final outcome of an assembly decision and to deal appropriately with initiatives of entitled citizens.[47]

Ancient Greek had no proper term for what is now called a subjective right or claim. The meaning of this term was expressed in various paraphrases[48] or implied in particular human practices, as not only Odysseus' and Telemachos' actions illustrate. The importance of the idea in practical terms is illustrated perhaps most dramatically by its decisive role in the fundamental normative architecture of the democratic political order outlined above. This is another reminder that we should not allow ourselves to be led astray by the linguistic particularities of a given language and draw wrong conclusions about the ideas important to a particular culture. Just because a certain human community expresses itself differently than another does not mean that certain ideas are alien to this culture.

Political rights were an explicit and decisive issue in the political struggles about the democratic constitution – for example, in the context of active or passive electoral rights, access to office and decision-making. These issues were not arcane

appointment by lot to archonship, 457 BCE; financial remuneration for jury services, councilors and, finally, for attending the assembly, ca. 450 BCE and after 403 BCE.

[45] Cf. the outline of democracy in the discussion about the different forms of government, Herodotus, *The Landmark Herodotus: The Histories*, trans. Andrea L. Purvis, ed. Robert B. Strassler (New York: Anchor Books, 2009), Book III, 3.80.6.

[46] Cf. Jochen Bleicken, *Die athenische Demokratie* (Stuttgart: UTB, 1995), 196 ff. This right was supplemented by the inclusion of the council (*boule*).

[47] The democratic state was widely regarded as "a common pool of rights and privileges equally shared by all its citizens," Vlastos, "Isonomia," 348 with further references n. 38.

[48] Cf. Vlastos, "Rights of Persons in Plato's Conception," 124 on the irrelevance of the linguistic fact for a theory of rights that to express the idea of a right various ancient Greek terms were employed. To express the same notion "one would resort to a variety of makeshifts: (1) 'what is due to one' (*ta opheilomena*), as in the definition of justice ascribed to the poet, Simonides, in R. 331e, 'rendering to everyone his due'; (2) 'the just' (*ta dikaia*), as in Demosthenes 15 (*Rhodians*), 29, 'in commonwealths the laws have made participation in private rights (*idiōn dikaiōn*) common and equal for the weak and the strong'; and (3) 'one's own' in the phrase 'to have one's own' (*ta hautou echein*), as in the definition of *justice* in Aristotle's *Rhetoric* (1366b9), 'the virtue because of which each has his own and in conformity with the law.'"

elitist debates but the daily bread of politics. Consider the classic speech of Athenagoras, the democratic leader of Syracuse during the early stages of Athens' doomed Sicilian campaign during the Peloponnesian War, who in his address to the popular assembly on the eve of war asked the young oligarchs the following rhetorical question: "Do you dislike having the same rights like all others? But how it is just for people who are the same not to have the same?"[49] The core of democracy, he argues, is that everyone has the same rights and duties.[50] The explicit linking of equal rights and justice in Athenagoras' speech echoes widely held democratic beliefs: "There is nothing more hostile to a city than a tyrant. In the first place, there are no common laws in such a city, and one man, keeping the law in his own hands, holds sway. This is unjust. When the laws are written, both the powerless and the rich have equal access to justice, ... and the little man, if he has right on his side, defeats the big man."[51] These views draw attention to the relation between justice, equality and rights, as well as to the empowering function of rights, and thus to questions crucial for our inquiry.

Isonomia, equal law in this sense, and *Isokratia*, equal share in government, were essential to what later was termed the democratic idea. A further foundational feature was *Isegoria*, free speech, to which we will turn after exploring the meaning of equality.

3.4.3 *Equality*

In Greek antiquity, the discussion about equality was interwoven not only with topics such as democracy and the political rights of citizens. Social inequality, relations with – in the Greek case – barbarians (that is, all non-Greek-speaking people) and, of course, slavery were also of great importance. These are all issues that remain intimately linked to or even form core areas of human rights debates today. A short glance at these issues thus may prove fruitful.

Despite the egalitarian political structure of the Athenian democracy among the limited group of people that counted as equals, democratic politics did not aim at material redistribution within the Athenian society. There were utopian

[49] Thucydides, *History of the Peloponnesian War, Vol. III: Books 5–6*, trans. Charles Forster Smith, Loeb Classical Library 110 (Cambridge, MA: Harvard University Press, 1998), Book 6, 6.38.5. The original reads: ἀλλὰ δὴ μὴ μετὰ τῶν πολλῶν ἰσονομεῖσθαι; καὶ πῶς δίκαιον τοὺς αὐτοὺς μὴ τῶν αὐτῶν ἀξιοῦσθαι; *Isonomisthai* is here rendered as equal in rights. The translations vary, but it is clear that the passage concerns political rights, cf. William Keith Chambers Guthrie, *The Sophists* (Cambridge: Cambridge University Press, 2005), 148.

[50] Thucydides, *History of the Peloponnesian War*, Vol. III: Book 6, 6.39.1.

[51] Euripides, "Suppliant Women," in Euripides, *Suppliant Women, Electra, Heracles*, ed. and trans. David Kovacs, Loeb Classical Library 9 (Cambridge, MA: Harvard University Press, 1998), 429–34: οὐδὲν τυράννου δυσμενέστερον πόλει, ὅτου τὸ μὲν πρώτιστον οὐκ εἰσὶν νόμοι κοινοί, κρατεῖ δ' εἷς τὸν νόμον κεκτημένος αὐτὸς παρ' αὑτῷ· καὶ τόδ' οὐκέτ' ἔστ' ἴσον. γεγραμμένων δὲ τῶν νόμων ὅ τ' ἀσθενὴς ὁ πλούσιός τε τὴν δίκην ἴσην ἔχει, ... νικᾷ δ' ὁ μείων τὸν μέγαν δίκαι' ἔχων.

schemes that failed to become reality and instead ended up the object of comedic ridicule.[52] The social reality of democracy was based on the "astonishing fact that the man who, as citizen, shares the kingly dignity, the sovereign power of the demos, may yet as a private individual labour under the indignity of utter destitution."[53]

The equality discussed thus far was the political equality of Athenian (male) citizens – as it was still 2,500 years later at the dawn of the human rights revolutions. But at least some of the limits of equality were the object of debate. The sophist Antiphon, for instance, famously argued against distinctions based upon birth and importantly ethnic origin, very clearly stating a universalist, cosmopolitan idea of the equality of all human beings:

> The sons of noble fathers we respect and look up to, but those from humble homes we neither respect nor look up to. In this we behave to one another like barbarians, since by nature we are all made to be alike in all respects, both barbarians and Greeks. This can be seen from the needs which all men have. [They can all be provided in the same way by all men, and in all this] none of us is marked off as either barbarian or Greek; for we all breathe the air with our mouth and nostrils and [eat with our hands].[54]

This passage rejects distinctions based upon social class, race and ethnic origin. It does so on the grounds of an anthropological theory that asserts the basic equal properties of all human beings. Antiphon explicitly includes the non-Greeks, the barbarians, which we should note means *all* non-Greeks. The argument of all humans' shared existential conditions is a powerful one and of great significance for the history of ideas. It has been appealed to by human beings in greatest need throughout history – as mirrored both in Shylock's plea for recognition in Shakespeare's literary reflection of human life[55] and in Primo Levi's self-assertion

[52] Aristophanes, "Assemblywomen," in Aristophanes, *Frogs*, *Assemblywomen*, *Wealth*, ed. and trans. Jeffrey Henderson, Loeb Classical Library 180 (Cambridge, MA: Harvard University Press, 2002).

[53] Vlastos, "Isonomia," 355. He rightly adds: "No impartial estimate of the democratic state can close its eyes to the consequences of this contradiction in terms of moral degradation, political corruption, and ceaseless class conflict to which Plato with merciless logic directs our attention," ibid.

[54] Hermann Diels and Walter Kranz, *Die Fragmente der Vorsokratiker*, Vol. 2 (Zürich: Weidmann, 2005), B 44: <τοὺς ἐκ καλῶν πατέρων ἐπ <αιδούμεθά τε κ<αὶ σεβόμεθα, τοὺς δὲ <ἐκ μὴ καλοῦ οἴκ<ου ὄντας οὔτε ἐπ<αιδούμεθα οὔτε σεβόμ<εθα. ἐν τούτω<ι δὲ πρὸς ἀλλήλους βεβαρβαρώ<μεθα, ἐπεὶ φύσει πάντα πάντ<ες ὁμοίως πεφύκ<αμεν καὶ βάρβαροι καὶ Ἕλλην<ες εἶναι. σκοπεῖν δὲ παρέχει τὰ τῶν φύσει <ὄντων ἀναγκαίων πᾶσιν ἀν<θρώποις· π<ορίσαι τε κατ<ὰ ταὐτὰ δυνα<τὰ πᾶσι, καὶ ἐν <πᾶσι τούτοις οὔτε β<άρβαρος ἀφώρισ<ται [δ] ἡμῶν ο<ὐδεὶς οὔτε Ἕλλην <·> ἀναπνέομεν τε γὰρ εἰς τὸν ἀέρ<α> ἅπαντες κατὰ τὸ στόμ<α κ> αἱ κατ<ὰ τὰς ῥῖνας κ<αὶ ἐσθίομε>ν χ<ερσὶν ἄ<παντες . . . >. Translation Guthrie, *Sophists*, 153.

[55] William Shakespeare, *The Merchant of Venice*, The Arden Shakespeare, ed. John Drakakis (London: Bloomsbury, 2010), 284, Act I, Scene 1: "I am a Jew. Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions?"

against the deathly and very real grip of racist ideology in Auschwitz.[56] It also lends itself quite clearly to a critique of patriarchal power structures. One needs, however, to recognize that the argument for the equal respect of all persons based on the equal properties of all human beings applies to women, too – unfortunately no small step in cultural and political terms, as history has proved.

In Antiphon's view, the equality of human beings has a normative consequence. We owe everybody equal *respect*, as otherwise we are behaving like "barbarians" (in this context, "barbarian" is used to refer to uneducated people who lack proper understanding rather than "non-Greeks").[57] At this point an interesting question arises: What is the normative correlative to respect owed to others? What are the normative positions of those to whom respect is owed in relation to the agent who owes respect? The fragment remains silent on this issue. It does not say that people without a "noble father" have a *right* to respect. One could therefore argue that there is no such right, that there is simply a blank space, that there is an entirely one-sided relation that consists of nothing but, first, a person's respect for others and, second, the obligation to show this respect to others but no correlative claim of these others. We already encountered this problem during the discussion of command-based ethical and legal codes: Such normative voids are hard to conceptualize. Another interpretation seems less far-fetched, namely that the others who are equals to be respected have a correlative *claim* to this kind of respect. If one reads the many pieces of democratic argument such as Athenagoras' speech, this seems to be an evident implication: Equals have a claim to equal rights because they deserve equal respect.

Antiphon's thought illustrates the depth of the reflection on equality and its normative consequences during Greek antiquity. Antiphon was, however, one voice in an obviously rich and controversial debate about human equality. His views align with some theorists[58] and clash with others, most notably (at least in certain respects) with the theories of Plato[59] and Aristotle,[60] which in different and complex ways defended the view that there are different classes of human beings. These anti-egalitarian arguments have political consequences, including the perceived legitimacy of slavery – the next issue to be considered. They also resonated through the centuries. Aristotelian arguments for inequality were, for instance, directly applied to justify the conquest of America, as we will see.

[56] Primo Levi, *Is This a Man?* (London: Abacus, 1987).

[57] Cf. Guthrie, *Sophists*, 153 on these difficulties.

[58] Cf. for instance the discussion by Aristotle, *Politics*, trans. Harris Rackham, Loeb Classical Library 264 (Cambridge, MA: Harvard University Press, 1932), 1277b.

[59] Cf. Plato, *Republic*, *Volume I: Books 1–5*, eds. and trans. Christopher Emlyn-Jones and William Preddy, Loeb Classical Library 237 (Cambridge, MA: Harvard University Press, 2013), 469b–c: only enslavement of barbarians permitted, but cf. also the picture of the wise Egyptians in Plato, "Timaeus," in Plato, *Timaeus, Critias, Cleitophon, Menexenus, Epistles*, trans. Robert Gregg Bury, Loeb Classical Library 234 (Cambridge, MA: Harvard University Press, 1929), 21e.

[60] Aristotle, *Politics*, 1254a.

3.4.4 *Slavery and the Search for Freedom, Equality and Equal Worth*

Slavery concerns questions of human equality, freedom and worth in equal measure. Consequently, it is a crucible of the pivotal normative principles that stand at the core of the human rights debate. It thus comes as no surprise that recent history has focused strongly upon the abolitionist movement, interpreting it – rightly – as a manifestation and moving aspect of human rights culture. It consequently is hard to talk about slavery and not think about its role in the history of the idea of human rights.

For very long stretches of time, slavery was a simple and self-evident social given. Slavery took very different forms – the life of a slave in a copper mine in Attica was scarcely comparable to that of a slave running a business for an Athenian citizen. There were even complaints that slaves in Athens had too much freedom of speech[61] and more rights to free expression than the citizens of other states.[62]

However this may be, there is little evidence that slavery was experienced as pleasant, and many documents attest to the suffering of slaves and the value of freedom. Euripides wrote: "[O] son . . . just one thing I urge upon you: never consent to live and go into slavery when you can choose to die as befits a free man."[63] The losses imposed by slavery included not only particular freedoms, such as freedom of speech,[64] but also self-determination more generally. Euripides' *Trojan Women*, for instance, is one great, heart-wrenching indictment of the "yoke of slavery."[65] The play is of particular interest because it concerns the fate of women. Women were not free in Athenian society, and even less free than in other ancient societies. Despite this, slavery is depicted as something even worse than the usual subjugation of women, testifying to the perceived importance of freedom for any human life.

Moreover, slavery was questioned in principled terms in antiquity. One good example is furnished by the observation of a loyal slave in Euripides' *Ion*: "Only one

[61] Aristophanes, "Frogs," in Aristophanes, *Frogs, Assemblywomen, Wealth*, ed. and trans. Jeffrey Henderson, Loeb Classical Library 180 (Cambridge, MA: Harvard University Press, 2002), 949.

[62] Demosthenes, "The Third Philippic," in Demosthenes, *Orations 1–17 and 20, Olynthiacs, Philippics, Minor Public Orations*, trans. James Herbert Vince, Loeb Classical Library 238 (Cambridge, MA: Harvard University Press, 1930), 226; Guthrie, *Sophists*, 156.

[63] Euripides, "Archelaus," fr. 245: ὦ παῖ, προβαλλ[ἓν δέ σοι μόνον προφωνῶ· μὴ ' πὶ δουλείαν ποτὲ ζῶν ἑκὼν ἔλθῃς παρόν σοι κατθανεῖν ἐλευθέρως. In Euripides, *Fragments, Euripides Vol. VII*, eds. and trans. Christopher Collard and Martin Cropp, Loeb Classical Library 504 (Cambridge, MA: Harvard University Press, 2008).

[64] Euripides, "Phoenician Women," in Euripides, *Helen, Phoenician Women, Orestes, Euripides Vol. V*, ed. and trans. David Kovacs, Loeb Classical Library 11 (Cambridge, MA: Harvard University Press, 2002), 388–93; Euripides, "Ion," in *Trojan Women, Iphigenia among the Taurians, Ion, Euripides Vol. IV*, trans. David Kovacs, Loeb Classical Library 10 (Cambridge, MA: Harvard University Press, 1999), 670–75; cf. below.

[65] Euripides, "Trojan Women," in *Trojan Women, Iphigenia among the Taurians, Ion, Euripides Vol. IV*, trans. David Kovacs, Loeb Classical Library 10 (Cambridge, MA: Harvard University Press, 1999), 600: ζυγὰ . . . δούλια.

thing brings shame to slaves, the name. In all else a slave who is valiant is not at all inferior to free men."[66] The equality of slaves and free human beings and thus the accidental nature of slavery find forceful expression in such passages.[67] As rightly has been concluded, "it would be perverse not to recognize an outright denial of natural divisions within the human race whereby one can be born to serve and another to rule, with the corollary that slavery is wrong in itself. A slave as such is of no less worth than a free man."[68]

Such statements about the equality of slaves and nonslaves were discussed widely some decades later, including by Aristotle. From this egalitarian perspective, slavery is unjust, for it is based on force, as Aristotle reports – even though he himself did not accept this conclusion, given his nonegalitarian anthropology.[69]

Here, too, we can inquire into the normative position enjoyed by human beings perceived as unjustly forced into slavery. Did they enjoy no such position? How plausible is this? Is it not less far-fetched to assume that those people unjustly enslaved by brute force had an implied moral right to be freed? As the discussion thus far has already amply illustrated, the category of a right enjoyed wide currency in the normative thinking and practice of antiquity, and it is certainly no anachronism to assume that this category was of importance in the context of slavery, too.

This debate about slavery implies a stance about the worth of freedom for human beings. There are very clear statements about what enslavement meant for the persons concerned, as the examples discussed powerfully illustrate. It did not take the dawn of modern individualism to feel the pain of bondage. It is not as if there were no strong arguments against slavery in antiquity. The problem was rather that they did not prevail. The situation was therefore no different from other epochs in

[66] Euripides, "Ion," 854–56: ἓν γάρ τι τοῖς δούλοισιν αἰσχύνην φέρει, τοὔνομα· τὰ δ' ἄλλα πάντα τῶν ἐλευθέρων οὐδὲν κακίων δοῦλος, ὅστις ἐσθλὸς ᾖ. The context does not contradict this statement: The slave advises Creusa to seek just self-protection and revenge without being depicted as somebody whose words cannot be taken seriously. Cf. as well Euripides, "Phrixus A or B," in Euripides, *Fragments: Oedipus-Chrysippus, Other Fragments, Euripides Vol. VIII*, eds. And trans. Christopher Collard and Martin Cropp, Loeb Classical Library 506 (Cambridge, MA: Harvard University Press, 2008), fr. 831: "For many slaves their name is a thing of shame, but their mind is freer than those who are not slaves"; Euripides, "Helen," in Euripides, *Helen, Phoenician Women, Orestes, Euripides Vol. V*, ed. and trans. David Kovacs, Loeb Classical Library 11 (Cambridge, MA: Harvard University Press, 2002), 728–33.

[67] Another example is a passage from Alcidamas' Messenian speech: "God has set all men free; nature has made no man a slave," which Aristotle discusses in the context of his argument for a natural, not just legal justice, Aristotle, *The "Art" of Rhetoric, Aristotle Vol. XXII*, trans. John Henry Freese, Loeb Classical Library 193 (Cambridge, MA: Harvard University, 1926), 1373b, the Alcidamas quote supplied by the scholiast, Aristotle, *Rhetoric*, 140 f.: ἐλευθέρους ἀφῆκε πάντας θεός· οὐδένα δοῦλον ἡ φύσις πεποίηκεν.

[68] Guthrie, *Sophists*, 159; cf. also Bernhard Williams' observation that slavery was regarded as an unjust evil, albeit one without a practical alternative, Bernhard Williams, *Shame and Necessity*, 2nd edition (Berkeley: University of California Press, 2008), 105 ff.

[69] Aristotle, *Politics*, 1253b 20.

the struggle against slavery: One needs not only good arguments, but also the political and cultural leverage to make them count.

3.4.5 *Liberty and Tyranny*

Freedom also played an important role in other contexts. One central example is freedom of speech. *Isegoria* or *parrisia*, free speech, was robustly protected in the Athenian democracy. It was regarded as one of the hallmarks of the democratic order. At various points limitations were imposed, but these were often lifted again and did not do away with the practice in any case. On all accounts, freedom of speech was a fundamental right that citizens enjoyed. The political importance of this freedom is mirrored in the wider culture of the time. Take the following exchange between Jocasta and her son by Oedipus, Polynices, after the latter's clandestine return to Thebes from exile:

Jocasta:	What is it like to be deprived of your country? Is it a great calamity?
Polynices:	The greatest: the reality far surpasses the description.
Jocasta:	What is its nature? What is hard for exiles?
Polynices:	One thing is the most important: no free speech.
Jocasta:	A slave's lot this, not saying what you think.
Polynices:	You must endure the follies of your ruler.[70]

Ion voices much the same sentiment in Euripides' eponymous drama. He does not know who his mother is but hopes that she is Athenian "so that I may have free speech as my maternal inheritance! For if a foreigner, even though nominally a citizen, comes into that pure-bred city, his tongue is enslaved and he has no freedom of speech."[71]

These passages are of interest in more than one respect. They make the supreme worth of freedom of speech vividly and directly tangible. They do so using the term *parrisia*, which refers to normatively protected liberty, not just to a factual ability to do something. Both passages understand freedom of speech as a right guaranteed by a particular community, in the case of Ion protected only for natives of the Athenian (mythical) polis. Ion does not know his origins. He only hopes he is Athenian. He nevertheless expresses quite clearly that in his view it would be legitimate for him to enjoy freedom of speech, whatever his origins. There is no indication that he considers it justified for the tongues of foreigners (such as he might be himself) to

[70] Euripides, "Phoenician Women," 388–93: ΙΟΚΑΣΤΗ: τί τὸ στέρεσθαι πατρίδος; ἦ κακὸν μέγα; ΠΟΛΥΝΕΙΚΗΣ: μέγιστον· ἔργῳ δ' ἐστὶ μεῖζον ἢ λόγῳ. ΙΟΚΑΣΤΗ: τίς ὁ τρόπος αὐτοῦ; τί φυγάσιν τὸ δυσχερές; ΠΟΛΥΝΕΙΚΗΣ: ἓν μὲν μέγιστον· οὐκ ἔχει παρρησίαν. ΙΟΚΑΣΤΗ: δούλου τόδ' εἶπας, μὴ λέγειν ἃ τις φρονεῖ. ΠΟΛΥΝΕΙΚΗΣ: τὰς τῶν κρατούντων ἀμαθίας φέρειν χρεών.

[71] Euripides, "Ion," 671–75: ἐκ τῶν Ἀθηνῶν μ' ἡ τεκοῦσ' εἴη γυνή, ὥς μοι γένηται μητρόθεν παρρησία. Καθαρὰν γὰρ ἦν τις ἐς πόλιν πέσῃ ξένος, κἂν τοῖς λόγοισιν ἀστὸς ᾖ, τό γε στόμα δοῦλον πέπαται κοὐκ ἔχει παρρησίαν.

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be enslaved. It simply is a political and legal reality that this right is not protected if one is not a citizen of the city. His claim to freedom of speech is thus based on other grounds than belonging to a certain polis – most probably on the fact that he is a human person.

Jocasta's reaction to Polynices' assessment is interesting, too: The right to free speech was not guaranteed for women in Athens, nor was it guaranteed in the mythical Thebes where the dialogue is set. But this does not mean that she, as a woman, does not fully understand Polynices' point. Rather, it seems that she resents "a slave's lot" as much as her son. This was a view not only formulated by Euripides but heard and understood, if not endorsed, by his audience in the elevated social and cultural context of Athenian tragedy.

The right to free speech is singled out as a key element of democracy that contrasts democratic social orders with tyranny. Importantly, this is because it gives a person the freedom not only to speak, but also *not* to speak: "Freedom consists in this: 'Who has a good proposal and wants to set it before the city?' He who wants enjoys fame, while he who does not holds his peace. What is fairer for a city than this?"[72] The right thus explicitly has the content of a privilege to express oneself or refrain from doing it, with others having a no-right to the one or the other course of action.

In these ancient works, we thus find important questions relevant to the history of human rights: first, questions concerning the value of freedom of speech; second, the reasons for legitimately claiming it as a right; third, the difference between rights that are actually legally and politically guaranteed and the legitimate claims that people have that their rights be thus protected; and fourth, the reasons for the limited inclusion of certain groups of people among the bearers of such rights and the justification of these reasons. All of these works illustrate that the debate concerns rights in the proper sense, not some other kind of normative or non-normative position. Above all, they manifest a deep sense of the importance and human interest of these questions.

Another significant issue when considering the role of freedom in antiquity is why tyranny was regarded as a problem in Athenian democracy. The fact that it was seen as a major problem is illustrated by the great efforts made to avoid such rule, dubious as the means adopted against the abuse of power may have been – considering, for instance, the practice of ostracism. The answer can only be: because political liberty, freedom from power unrestrained by democratic decision-making, was regarded as an important good.[73] No defense of democracy or critique of tyranny is possible without valuing political freedom, though the structure of suppression of women and slaves shows the limits of this concern for liberty and equality.

[72] Euripides, "Suppliant Women," 438–41: τοὐλεύθερον δ' ἐκεῖνο· Τίς θέλει πόλει χρηστόν τι βούλευμ' ἐς μέσον φέρειν ἔχων; καὶ ταῦθ' ὁ χρῄζων λαμπρός ἐσθ', ὁ δ' οὐ θέλων σιγᾷ. τί τούτων ἔστ' ἰσαίτερον πόλει;

[73] Cf. the vivid warnings in Herodotus, *Histories*, Book III, 80, 3.

The desire for freedom is also one reason for the political importance of the equality of citizens and the rule of law. The rule of law is a tool guaranteeing the equality of citizens. At the same time, the equal political power of citizens in a democracy maintains the rule of law because it prevents the use of arbitrary power by individual tyrannical rulers.[74] The rule of law thus protects equality, equality the rule of law.[75] The equality of citizens under the rule of law has a central aim, however: to secure the citizens' freedom. The protection against arbitrary power by the rule of law and equal political rights thus underline the importance of freedom and political autonomy.

3.4.6 *Rape, Injustice and Human Self-Determination*

One recurrent theme of Greek mythology is the rape of women by both men and gods. This should be of interest to us, for rape brings together the issues of patriarchy, self-determination, bodily integrity, equality and violence – all of which are intricately connected with human rights and human rights law. "A curse on that night and its fate" is what the women of Troy have to say about being "brought to the bed of a Greek."[76] Such passages leave us in no doubt whatsoever that the horrific and degrading meaning of rape was already perceived very clearly in antiquity – in fact, it was thematized on the grand stage of the theater with chilling intensity.

What do such representations of suffering tell us about the normative framing of rape? The fate of Creusa in Euripides' *Ion* is a further interesting example that is relevant when answering this question. Creusa, an Athenian princess, is raped by Apollo. She gives birth to Ion, whom she abandons in despair[77] and with whom she is reunited only after years of deep sorrow. Not only is the pain of the act of rape itself deplored,[78] but the god also is accused of violating normative principles and – crucially – inflicting a wrong upon *her*.[79] What does this imply for the normative position in which Creusa finds herself? Could these passages possibly be understood

[74] An important part of the radical shift in Plato's theory consists in the rehabilitation of the rule of law to prevent arbitrary power and of some of the democratic rights to protect human freedom in a constitution combining elements of monarchy and democracy, cf. Plato, Nomoi,, 693b ff., 714a ff.

[75] Herodotus, *Histories*, Book III, 80, 3. Vlastos, "Isonomia," 356 ff. For a warning analysis of how democratic mass rule under the influence of demagogues can destroy the rule of law, Aristotle, *Politics*, 1292a.

[76] Euripides, "Trojan Women," 204: ἔρροι νὺξ αὕτα καὶ δαίμων. Ibid. 203: λέκτροις πλαθεῖσ' Ἑλλάνων.

[77] Cf. the heart-wrenching line in Euripides, "Ion," 961: If you had seen the child stretching forth its hands to me! (εἰ παῖδά γ' εἶδες χεῖρας ἐκτείνοντά μοι).

[78] Euripides, "Ion," 342, 368.

[79] Euripides, "Ion," 972: ἀδικήσαντα. Cf. also ibid. 288, 367, 425–8, the remarkable reflection of Ion 429–51, Creusa's accusation of Apollo 859–922, 939, 941.

as implying that she had no claim that violence not be done to her and the god no corresponding obligation towards her, even though she passionately accuses him of doing her an injustice? There is nothing in the play that justifies Apollo's behavior. It does not seem plausible that Creusa and other characters in the play can accuse the god of inflicting the gravest injustice upon her and at the same time hold that she had no claim that he not violate her. She comments on the plight of women: "O unhappy women! O the criminal deeds of the gods! What is to happen? To what tribunal can we appeal when we are being done to death by the injustice of our masters?"[80] This observation is clear enough: The reason for her despair is not that she feels she and other women have no claim to be spared the indignity of rape, but that there is no institution able to enforce this legitimate claim given the perpetrators' overwhelming power. Is this merely a problem of the very distant past, unheard of in more recent attempts to protect the rights of human beings? If that is doubtful, then Creusa's remarks and the real suffering for which they stand deserve to be remembered.

3.4.7 *Justice and Rights*

Justice was a central concept for both ethics and law in the thought of this period. Its meaning and consequences were a core concern not only for Socrates, Plato and Aristotle – the remarks of Athenagoras indicate its particular political traction in public debate.

It has been underlined – and quite plausibly so – that central theories of justice in antiquity contain an implicit statement of rights. This implicit statement can be traced not by hunting for specific words that occur in the texts, but by undertaking an in-depth, substantive analysis of these theories, challenging as such an analysis may be.[81]

One common point of reference in these debates was Simonides' formula that justice consists in giving everybody that which they are owed.[82] Socrates saw this formula as relevant to but not exhaustive of justice. He clarified that it cannot mean that one does good to one's friends and inflicts harm upon one's foes. Justice, in his view, means not harming anybody.[83]

[80] Euripides, "Ion," 252–4: ὦ τλήμονες γυναῖκες· ὦ τολμήματα θεῶν. τί δῆτα; ποῖ δίκην ἀνοίσομεν, εἰ τῶν κρατούντων ἀδικίαις ὀλούμεθα;

[81] Vlastos, "Rights of Persons in Plato's Conception," 104 ff.; and the semantic analysis of Gregory Vlastos, "The Theory of Social Justice in the Polis in Plato's Republic," in *Studies in Greek Philosophy, Vol. 2: Socrates, Plato, and Their Tradition*, ed. Daniel W. Graham (Princeton, NJ: Princeton University Press, 1996), 70 ff.

[82] Plato, *Republic*, 331d: *ta opheilomena*, "that what is owed to somebody."

[83] Plato, *Republic*, 335e. Plato's Socrates is here understood as voicing genuine Socratic ideas – as widely assumed for the Socrates of Book I of the *Republic*.

This principle forms the starting point of Plato's argument in *The Republic* for a very particular understanding of justice.[84] The idea also is endorsed and qualified by Aristotle, among many other relevant voices: "Justice is a virtue which assigns to each man his due [τὰ αὑτῶν] in conformity with the law; injustice claims what belongs to others, in opposition to the law."[85]

Some interpretations see this formula as empty, understanding it to presuppose an additional standard for what is due to a concrete person – a lot, little, nothing? – without specifying what this standard might be. At first glance, this is true. However, all of the theories mentioned clearly understand the formula as a principle of the equality of persons, and this connection with equality, together with background assumptions about the natural interests of human beings, fills the formula with substance. Socrates' understanding is paradigmatic in this respect: The prohibition of harm, applied equally to everyone, whether friend or foe, already constitutes a substantial, nontrivial moral principle and derives from the formula of what is owed to others – it is everyone's due not to be harmed given that it is a fundamental interest of equal human beings not to suffer.

Importantly, the formula implies that rights are a normative correlative of just distribution. This does not mean only that justice demands the equal protection of given rights. This would leave open the question of what the normative reasons are for assuming that persons have these rights in the first place. Its additional, important point is that people have a right to a share of a just distribution of goods (their due). A just distribution is an equal distribution to which one has a right. If it is just to distribute a pie equally, Peter cutting the pie does not have free discretion to allocate the pieces as he will – the recipients have a right to an equal slice of the pie and the distributor a duty to distribute it accordingly.

This principle was reformulated by Ulpian and became one of the classic definitions of justice in the Western legal tradition through its incorporation into the *Corpus Iuris Civilis* and the reception of Roman law from the Middle Ages onwards. It appears in two versions, one with an explicit reference to rights (*iustitia est constans et perpetua voluntas ius suum cuique tribuere*; justice is the constant and unremitting will to render to everyone their own right), the other without (*suum*

[84] Plato's conception was at odds with the public conception of justice of his time (as far as we can reconstruct it), especially because he connects the harmony of the soul with justice and argues for radical inequality of political rights and his functional understanding of rights, cf. Gregory Vlastos, "Justice and Happiness in the Republic," in Gregory Vlastos, *Platonic Studies* (Princeton, NJ: Princeton University Press, 1981), 117; Vlastos, "Rights of Persons in Plato's Conception," 117: "A more extreme inequality in the tenure of political power has never been conjured up by the Greek imagination"; ibid. 122: The idea that only functional rights exist puts him at odds with the morality of his own society: "For Plato's public the question concerning the rights of persons whose urgency remained paramount over that of all other public issues concerned the just allocation of political rights which, for the Greeks, meant the right of direct participation in functions of government and therewith a share in the control of the state."

[85] Aristotle, *Rhetoric*, 1366b 7–8: ἔστι δὲ δικαιοσύνη μὲν ἀρετὴ δι' ἣν τὰ αὑτῶν ἕκαστοι ἔχουσι, καὶ ὡς ὁ νόμος, ἀδικία δὲ δι' ἣν τὰ ἀλλότρια, οὐχ ὡς ὁ νόμος.

cuique tribuere; to render to everyone their due).[86] The two versions need to be interpreted as synonymous, underlining the fact that the formulation "justice assigns to each person their due" implies a right, as it can be used interchangeably with a formulation that refers explicitly to rights.[87]

Another reading of this formula is possible, too. Here, the formula can be understood in an objective sense – for instance, as assigning the sanction for a crime that is just and in this sense due to the offender. What is meant, therefore, depends on the context.[88]

In the Greek debate, the principle encompassed not just one subset of rights, such as property rights,[89] but in fact included any entitlements, including far-reaching political claims.[90] Socrates' understanding of the issue once again is helpful in this respect: It refers to not inflicting any harm, not just harm to property.

Even the theory of justice that seems to break most radically with the concepts of justice common at that time, Plato's ideas in *The Republic* (later significantly modified in *The Laws*), needs to be understood as saying something about rights.[91] His shorthand formula for his concept of justice as "to do one's own" not only determines the duties of the members of the polis, but also indirectly defines what is due to them.[92] The members of the polis have a right to exactly those things that are necessary for doing what is "their own."[93] Therefore, the guardians, even women, have the right to rule if they have the required intellectual ability.[94] Otherwise, they could not fulfill their function, which is to govern the polis. Conversely, the guardians have no claim to any material privileges – the latter would just prevent

[86] Corpus Iuris Civilis, Dig. 1.1.10.

[87] Vlastos, "Social Justice in the Polis," 72 f. n 19: Ulpian relies on "one's own" to have fully as general and abstract a signification as "one's own *right*" (emphasis in original).

[88] As a consequence, it is a fallacy to take only the objective sense of the formula as its true sense, as Michel Villey, "Suum Jus Cuique Tribuens," in *Studi in onore di Pietro de Francisi*, Vol. 2 (Milan: Giuffrè, 1956), 361–71 argued – for example, that it was the *ius* of heresy to suffer the death penalty, ibid. 364; for discussion cf. Tierney, *Idea of Natural Rights*, 16.

[89] Cf. for this view Hart, "Are There Any Natural Rights?" 176.

[90] Vlastos, "Justice and Happiness in the Republic," 120 n. 27: "As the Aristotelian definition shows, the scope of ta autou and ta allotria in such contexts is broad enough to cover everything to which persons would be morally or legally entitled." He illustrates this with Demosthenes, "Second Olynthiac," in Demosthenes, *Orations 1–17 and 20*, *Olynthiacs*, *Philippics*, *Minor Public Orations*, trans. James Herbert Vince, Loeb Classical Library 238 (Cambridge, MA: Harvard University Press, 1930), 26, where the reference is to rights to political sovereignty.

[91] "Plato undertakes to do something never previously attempted in the history of the West: to determine on purely rational grounds all of the rights which all of the members of a particular society ought to have," Vlastos, "Rights of Persons in Plato's Conception," 105.

[92] Plato, *Republic*, 433a ff., 433e f. formulates that justice consists in doing and having one's own.

[93] This is the core of Plato's functionalist account of rights, cf. Vlastos, "Rights of Persons in Plato's Conception," 110: "All members of the polis have equal right to those and only those benefits which are required for the optimal performance of their function in the polis."

[94] This includes explicitly the vision and achievement of the highest good, cf. Plato, *Republic*, 540c.

them from doing "their own," namely to rule the polis based on true justice.[95] These rights are not human rights, because they are rights dependent on membership in a polis and (importantly) dependent on the fulfillment of a social function.[96] For Plato, being human in itself is no reason to have rights. This is a key reason for the hierarchical, antiegalitarian structure of his imagined ideal polis, and one of the main reasons it is so unconvincing.[97]

For the purpose at hand, these examples suffice to elucidate that ancient discussions about rights were intimately related to question of justice – and not only in the political sphere, but also in the fascinating debates about the idea of justice that continue to shape important aspects of the search for the right order even today. The concept of rights was simply presupposed in all of these debates. As in the case of indigenous culture, without this concept, neither a description nor an analysis of ancient thinking and practice is possible.

3.4.8 *The Worth of Human Beings*

The abovementioned debate about slavery already implied an important question: What are the essential features that characterize a being as morally relevant, with a claim to respect, freedom and equal rights? Who shares these features? All human beings? Just a subclass of humans? What are the normative consequences of such properties?

The worth of human beings and their special status in the order of the world – the themes that inspired the discourse about human dignity in its many, not only modern variations – were the subject of explicit reflection. One famous (and very beautiful) example can be found in the verses in Sophocles' *Antigone* in which he praises on the one hand human beings' ability to build (to use a later term) a second nature through culture, prevailing over their many foes in the physical world. On the other hand, however, humans are described as tragic beings, always prone to harming others and themselves if they lose their way by acting contrary to the laws of justice, which are the laws of the gods. The Greek epithet *ta deina*, used to capture the core of human existence, refers to a being that is not only great and wonderful, but also uncanny and full of destructive forces – as Antigone's tragedy vividly

[95] Cf. Plato, *Republic*, 419a ff.

[96] The inclusion of Plato's theory of the *Republic* in the predecessors of human rights, cf. Paul Gordon Lauren, "The Foundations of Justice and Human Rights in Early Legal Texts and Thought," in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 173, is, despite the role of women (and some other remarks) in his theory, ultimately unconvincing.

[97] Cf. Karl Popper, *The Open Society and Its Enemies, Vol. 1: The Spell of Plato* (London and New York: Routledge, 2009), 91 ff.; Vlastos, "Social Justice in the Polis," 91, 101 correctly observes: Plato has no concept of human dignity and thus of humans as ends-in-themselves; Vlastos, "Rights of Persons in Plato's Conception," 105, 120 ff.

illustrates.[98] Those wanting to write a history of the idea of what today is called human dignity would be well advised not to ignore such thoughts.

Encouraged by these examples, we can start to search for other traces of the idea of human worth. For example, Socrates' understanding of justice as (at least) implying that one should not harm anybody seems to make little sense if there is not something about other human beings that demands that much respect for their well-being. Socrates' respect for human autonomy, displayed in his attitude towards his partners in dialogue, appears to support this interpretation. He wants to incite them to think independently and is not trying to betray, manipulate or dominate them. In particular, he trusts in his interlocutors' moral autonomy, in their ability to truly understand what is just and to act accordingly.[99] His irony is a statement of respect for others' power of judgment, their ability to discern the serious meaning of thoughts dressed in the light colors of irony. This attitude towards others entails an acknowledgment of their worth as thinking and self-determined subjects, an acknowledgment that unsurprisingly has resonated as both an encouragement and an inspiration through the ages.

3.4.9 *The Human Polis*

The Stoics and their reflections on the content and nature of Natural Law provide another important body of thought that is of interest in our search for the deeper sources of the idea of human rights.[100] The thinkers counted as part of this tradition held many differing opinions. Some voices underlined the particular value of human beings because of certain properties they enjoyed – an argument that even today remains a central, albeit controversial source of the ascription of the predicate of dignity to humans. Furthermore, some Stoics developed a distinctly cosmopolitan vision: All human beings are members of one polis and therefore live under one kind of Natural Law. Stoic Natural Law criticized slavery as a violation of human equality, although some Stoics also defended slavery from this point of view. Here, we once again can ask: If some Stoics understood slavery as a violation of a cosmopolitan Natural Law of equality, then what was the slaves' normative position? Did they enjoy an entitlement to be freed? There is no doctrine of rights in Stoic philosophy, but it is certainly at least as plausible that claims were implied in the normative propositions of this philosophy as in the other examples discussed.

Cicero is an heir to the Stoic tradition in many ways, albeit with a strong dose of theoretical eclecticism. One important idea of his was to use *dignitas*, dignity, not

[98] Sophocles, "Antigone," in Sophocles, *Antigone*, *The Women of Trachis*, *Philoctetes*, *Oedipus at Colonus*, ed. and trans. Hugh Llyod-Jones, Loeb Classical Library 21 (Cambridge, MA: Harvard University Press, 1994), 332 ff.: "πολλὰ τὰ δεινὰ. . ."

[99] Cf. on the implied moral autonomy of his partners in dialogue, cf. Vlastos, *Socrates*, 44.

[100] Cf. for more details Matthias Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 7th edition (Baden-Baden: Nomos, 2023), 60 ff.

only to refer to the relative social position of human beings, but also to designate their worth as human beings as such – although he certainly did not draw the same practical conclusions as we do today with 2,500 more years of experience and reflection.[101]

3.4.10 *Actions and Rights in Roman Law*

Roman law developed a particularly sophisticated legal system that remains influential to this day. One seasoned topic of discussion is the existence of subjective rights in this action-based legal system. Because of this constitutive feature of Roman law, some scholars deny that it had any concept of subjective rights. The actions, the lawsuits, the *actio in rem* concerning objects and the *actio in personam* concerning mainly the law of obligations, however, do not support this conclusion. After all, a claim or subjective right, which is enforced by the lawsuit, forms the necessary basis of legal action. Moreover, the category of subjective rights played an important role in Roman law, including property rights, the rights making up the *patria potestas* over one's children or rights concerning one's wife (*manus*), the right to inheritance, the rights of tutors and curators and the patronage of the liberator over the slaves the liberator has freed. It seems difficult to interpret the given body of Roman law plausibly without reference to the category of subjective rights.[102] In addition, important instruments such as the *actio iniuriarum* made it possible for persons to sue others over violations of personal injuries, implying that respect for one's person was indeed a right.

Furthermore, famous passages of Roman law echo parts of the older traditions of Natural Law. These include the assumption of the equality of human beings and their freedom under Natural Law.[103] When setting out the foundational assumptions of Roman law, Ulpian underlines that originally all persons were just called human beings. According to Ulpian, slavery is an artificial creation. The distinction between free persons, slaves and liberated persons was only introduced later.[104] Freedom is defined as the ability to do what one wants to unless one is prevented from doing so by force or law.[105] The legal status of a free person entails not just the *factual ability* to do as one pleases unless prevented by force or law. It is a normative status, *iusta*

[101] Cf. on dignity as relative to social position Cicero, On invention, II, 166; Cicero, *De re publica*, I, 43. On dignity as the specific value of human beings as human beings, cf. for instance Cicero, *De officiis*, 1, 11 ff., 105 or his formulation that human beings are an image of god – "*cum deo similitude*," Cicero, *De legibus*, I, 25. For comments, Mahlmann, *Elemente*, 109 f.

[102] Cf. Max Kaser and Rolf Knütel, *Römisches Privatrecht*, 20th edition (Munich: C. H. Beck, 2014), § 4.

[103] Ulpian, Dig. 1.1.4.

[104] Ulpian, Dig. 1.1.4.

[105] Inst. 1.3.1: "*Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur.*"

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libertas,[106] which implies subjective rights. These include the claim that others do not circumscribe the liberty of a free person and treat him as slaveholders are allowed to treat their slaves. That means, more concretely, for instance, that a free person enjoys not only the legal ability (the power in Hohfeldian terms), but also the entitlement to acquire property for himself, not just for the slaveholder and under the restrictive conditions set out by the law on slavery, among many other concrete claims based on the legal status of a free person.[107] This legal status was not lost when a person was forced into slavery without legal grounds, implying that legal claims arising from the status of a free person continued to exist.[108]

The doctrines on original equality and freedom as part of Natural Law did not act as a shield against the legal entrenchment of institutions such as slavery. On the contrary, these institutions were put into practice in often gruesome and appalling legal detail. As the reference to the original equality and freedom of human beings shows, the architects of this system were well aware of other positions. They were conscious, too, that slavery meant misery for the person concerned. Accordingly, the legal possibility to be freed by *manumissio* was highlighted as a benefit (*beneficium*),[109] whereas slavery was a *calamitas*, a misfortune, as the *Digests* note, for instance, in passing – a misfortune great enough that it should not be legally imposed on children when their mother had conceived while she was still free but had borne the child when she already was enslaved.[110] It is consequently an oversimplification to state that criticism of institutions such as slavery on the grounds of human liberty were unknown in Roman law. Other considerations, unconcerned with the misfortune imposed on many human beings, simply prevailed, as they did in the many centuries of slavery to follow. Moreover, we should not overlook the elements of human freedom and equality protected in this normative system. Not only the conceptual tools of Roman law were important for subsequent developments, but also these elements. They were used, sometimes centuries later, as argumentative resources to reclaim liberty – for instance, when the idea of human beings' freedom under Natural Law was invoked to counter another misfortune imposed on others: the conquest of America.[111] This illustrates the methodological point made above: The history of the development of human rights is a history of expanding the scope of the content and the class of beneficiaries of certain rights, which were at first selectively guaranteed – a scope, moreover, that sometimes contracted again over the course of history. The intricacies of Roman law are relevant for this history – not because this law already formulated human rights

[106] Cf. Inst. 1.5.3 on the development of the differentiated rights associated over time with the status of a freed person.
[107] On the *potestas* of the slaveowner, Inst. 1.8. Dig. 1.6.1.1.
[108] Inst. 1.4.1.
[109] Inst. 1.5.
[110] Cf. Inst. 1.4.
[111] Cf. on the use of Dig. 1.1.4. in Las Casas' argumentation against slavery below.

proper, as some argue,[112] but because it illustrates the many forms that systems operating with individual rights and with content related to human rights (like freedom) can adopt. These systems form the raw material from which the idea of human rights ultimately was molded. They show what steps need to be taken to make this idea explicit and what obstacles stand in its way. Even in the system of Roman law, a reference to the universal freedom of human beings was inscribed, an idea that was irrelevant in practical terms but whose time would come. The fact that this reference to a Natural Law of freedom existed offers not only a hopeful, but also a sobering lesson, however: An explicit idea of universal freedom is no guarantee that a culture and its legal systems will not disregard its commands.

A final remark: As already discussed above, one of the most influential definitions of justice by no less a figure than Ulpian echoes the older Greek discussion linking justice and rights. This alone is sufficient evidence to show that claims or subjective rights were part of Roman law – unsurprisingly so, given that this law was one of the technically most sophisticated pieces of legal thinking ever developed.

3.4.11 *Varieties of Rights*

Even a brief discussion of these selected ancient sources already shows how lively, controversial and profound the debate about the equality, freedom and worth of human beings was, a debate with grand stakes for political rights, institutions such as slavery and the lives of women. This debate included thoughts about the universality of ideas such as equality, forging arguments that in principle remain current today about the existential equality of human beings and its normative consequences, arguments that in contemporary frameworks are discussed in universalist terms. They naturally included – implicitly or explicitly, and expressed using different linguistic means, as the Greek example in particular shows – the complex category of subjective rights in many variants.

These debates about competing ideas prevent us from regarding the complex world of Greek and Roman antiquity as a monolithic whole, stating, for instance, that this period had no concept of equality, freedom or rights. This is a crucial finding for the purpose of our study. Another point is worth mentioning: One cannot argue that Antiphon's defense of the equality of all human beings and Aristotle's critique of this idea had simple cultural causes, as very different thoughts were put forward eloquently in the same culture. These controversies *within the same cultural framework* were a matter of competing ideas and arguments and were not due to simple and superficial properties of their exponents' backgrounds.

To be sure, rights in the examples discussed were not part of human rights catalogues. Some theories were quite contrary to a plausible set of human rights

[112] Tony Honoré, *Ulpian: Pioneer of Human Rights* (Oxford: Oxford University Press, 2002).

in many respects – prime examples include Plato's division of humanity,[113] Aristotle's defense of slavery and slavery's legal regulation in Roman law. The examples nevertheless illustrate that these ancient sources contain aspects that are relevant and quite interesting for the convoluted history of the concept of subjective rights.

Acknowledging this does not mean glossing over the less attractive features of slave societies without rights for women, in the case of the Athenian democracy pursuing an exploitative, aggressive foreign policy ultimately to its own detriment. Nor does it mean that the admirable features of these cultures led to current human rights systems in a continuous line of development. Rather, these thoughts exemplify what later epochs, including our own, have underlined: There are many voices in history, including powerful ones that incite human beings to injustice, cruelty, subjugation and often self-destruction. However, there are other voices, too, which make a case for the equality, freedom and worth of all human beings, sometimes even couched in the language of rights. We should listen to these voices if we want to do justice to the greatness and tragedy of the history of the deeper sources of the human rights idea.

3.5 RIGHTS SINCE ANTIQUITY

3.5.1 *Rights at the Dawn of a New (European) Era*

One important document from the twilight of antiquity is the document commonly called the *Edict of Milan* (313), following Galerius' *Edict of Toleration*, issued in 311.[114] The *Edict* is part of Christianity's slow rise from a proscribed faith to the state religion of the Roman Empire.[115] It grants religious freedom not only to Christians, but also to members of other religions, ordering the restitution of the property people have lost through religious persecution. It establishes a right (*potestas*, *facultas*) to the free exercise of religion in broad and clear terms, including some

[113] As already mentioned, the core problem of Plato's theory of justice is that the citizens of the polis are ultimately not regarded as an end-in-themselves, Vlastos, "Social Justice in the Polis," 91.

[114] Cf. for the debate about the nature of the document, in particular whether it formed an edict and its context, Noel Lenski, "The Significance of the Edict of Milan," in *Constantine: Religious Faith and Imperial Policy*, ed. Edward Siecienski (London and New York: Routledge, 2017), 27–56.

[115] Lenski, "Edict of Milan," 33 sums up: "As this scheme indicates, the period between 306 and 313 represented a water-shed in the history of the legitimization of the Christian faith. As often happens in periods of social change, this process did not occur all at once but was slow and confusing. … The Edict of Milan represents the culmination of this process and stands apart from other related legal pronouncements of the era in its combination of the three principles of the restoration of public rights, the restitution of churches, and the return of other confiscated real estate to Christians. The concatenation of these three principles in a single legal text is attested for the first time ever in the Edict of Milan."

justificatory arguments about the need to protect this right for the sake of peace.[116] The *Edict* represents yet another example from late antiquity illustrating the important role played by the idea of rights at that time – rights as a naturally used normative resource for political action. With freedom of religion, the *Edict* concerns an issue that is fundamental for the history of human rights. It grants this right to all persons under the rule of the Emperor and does not limit it to persons with certain characteristics. The *Edict* also indicates the distance to be crossed from a right such as this, granted by an Emperor not fully living up to its promise, to later ideas about freedom of religion, including the natural rights tradition and finally the idea of human rights as inalienable rights of human beings that are not granted by an Emperor, but rather deny his claim to power.

It should be noted, however, that the *Edict* does not tell the whole story of ideas of rights at that time, such as the thoughts that the Christians had about their normative position. The *Edict* certainly did not grant to Christians and other believers something they had never heard of – a right to religious freedom – but rather mirrored their demands or at least their aspirations, issues that were of fundamental importance for them. While not formulated in the language of modern human rights, the *Edict* thus is a highly significant testimony of the prevalence of the issue of a right to freedom of religion at that time as well as to the wishes of human beings of different creeds concerning their normative status. As such, the *Edict* is very much part of the history of human rights.[117]

[116] Cf. Lenski, "Edict of Milan," 46 for a comparison of the language of the versions rendered by Lactantius and Eusebius, respectively. Cf. for example: "*Quae sollicitudini tuae plenissime significanda esse credidimus, quo scires nos liberam atque absolutam colendae religionis suae facultatem isdem Christianis dedisse. Quod cum isdem a nobis indultum esse pervideas, intellegit dicatio tua etiam aliis religionis suae vel observantiae potestatem similiter apertam et liberam pro quiete temporis nostri <esse> concessam, ut in colendo quod quisque delegerit, habeat liberam facultatem. <Quod a nobis factum est. Ut neque cuiquam> honori neque cuiquam religioni <detrac tum> aliquid a nobis <videatur>.*" *Edictum Mediolanense*, Lactantius, Mort. Pers. (Fritzsche, Lactantius, Opera, II, Leipzig, 1844), 288–9; "We thought it fit to commend these things most fully to your care that you may know that we have given to those Christians free and unrestricted opportunity of religious worship. When you see that this has been granted to them by us, your Worship will know that we have also conceded to other religions the right of open and free observance of their worship for the sake of the peace of our times, that each one may have the free opportunity to worship as he pleases; this regulation is made that we may not seem to detract aught from any dignity or any religion." Text and translation: https://droitromain.univ-grenoble-alpes.fr/Constitutiones/ed_tolerati.htm (accessed September 1, 2021). Importantly, the *Edict* is not motivated by *indulgentia*, "unmerited forbearance granted by an emperor to a religion that remained for him fundamentally repugnant," as explicitly Galerius' edict of 311, but by the idea of religious liberty, perhaps inspired by Lactantius himself, cf. Lenski, "Edict of Milan," 46 ff.

[117] Lenski, "Edict of Milan," 50: "Even if Constantine – as, indeed, all other rulers down to the present – never truly enacted these principles in full, their open and reasoned expression in this document remains remarkable. In this sense, the Edict of Milan was perhaps the first official document in the Western tradition to enact the principle of religious liberty into law."

This illustrates the methodological point made above about the many sources of ideas of rights. It is thus a fallacy to take certain political or legal documents as the only key to determining the state of a given idea's historical development. The fact that the Emperor granted a right does not mean that his subjects did not entertain other, more capacious concepts of legitimate claims. The fact that women had few rights in many ancient societies does not mean that women had no ideas that transcended this state of affairs – as powerfully expressed in the most important artworks of that time, as we have seen. We need to remember this point when turning to other important instruments of the development of the law.

3.5.2 *Natural Rights and Medieval Rebellion*

Medieval and scholastic thought worked with a well-developed notion of subjective rights. Twelfth-century authors referred to a faculty or power (*facultas*, *potestas*), using a traditional terminology to describe a normative position that, according to the analytical account above, can count as a right, though often with remaining analytical ambiguities. The rediscovery of Roman law acted as a catalyst for the development of legal thinking, spearheaded by canon law since the *Decretum Gratiani* (1140). It profoundly influenced the terminology and conceptions of rights.[118]

The *Magna Carta* (1215) belongs to this time. It grants certain rights to the nobility and freemen of England, and thus to a limited group of people. It was inspired by the English barons' desire to defend their existing rights against encroachment by King John. One of its most famous articles – 39, later 29 – concerns the right not to have one's rights interfered with without the Crown abiding by some medieval standards of the due process of law. There are, however, other interesting provisions, too – for example, concerning freedom of movement.

It is often argued that the *Magna Carta* does not belong in the history of human rights proper because of its limited personal scope and aim to reinforce the traditional rights of the nobility. On the other hand, it had an enormous impact on the development not only of English, but also of American constitutional law, as it was interpreted (not least under Coke's influence) as an instrument to protect freedom. The personal scope expanded given the increasing number of freemen. Accordingly, the *Magna Carta* is a good example of the incremental steps in which rights developed, leading from securing a right within a certain area of protection for a limited group of privileged people to the slow inclusion of wider circles of persons into the personal scope of protection – often against the resistance of the privileged minority.[119]

[118] Cf. for detailed studies, Tierney, *Idea of Natural Rights*; Tuck, *Natural Rights Theories*.

[119] Cf. James Clarke Holt, *Magna Carta*, 3rd edition (Cambridge: Cambridge University Press, 2015), 36: "For Coke, Magna Carta was an affirmation of fundamental law and the liberty of the subject. For the modern historian it is a statement of liberties rather than an assertion of liberty; a privilege which was devised mainly in the interests of the aristocracy, and which was

The idea of explicitly stated "natural rights" gained importance in this period. These rights concerned different issues, from Godfrey of Fontaines' idea of a right in mounting a case against papal power in the 1280s to Ockham's inalienable right to property.[120] Moreover, there are good arguments for holding that Thomas Aquinas included rights in his Natural Law theory. One example is his argument that persons in need can take the property necessary for their subsistence lawfully if they are in concrete danger because this property is owed to them by the owners. Under these circumstances, the property becomes the lawful property of the needy. It does not seem very plausible to deny that, according to this argument for basic human solidarity, persons in need have substantial claims to the support of others.[121]

The struggles for the restoration and protection of rights were not limited to the nobility and philosophical reflection. Fundamentally important rights were demanded from below in popular revolts. The famous proverb "When Adam delved and Eve span, who was then a Gentleman?" was used (and perhaps formulated) during the Peasants' Revolt of 1381 in a sermon of the preacher John Ball.[122] It reasserts the fundamental equality of human beings and clearly implies the claim to be treated accordingly. Another important and tragic example stems from the German Peasant Wars of 1525, one of the major popular uprisings in European history in which Luther ultimately sided with the feudal lords against the peasants whose movement in the end was crushed by force.[123] A central document of the

applicable at its widest to the 'free man' – to a class which formed a small proportion of the population of thirteenth-century England." This, however, was just the starting point of the further development, in particular concerning cap. 29, ibid. 39 f.: "Between 1331 and 1368, in six acts, Parliament passed statutory interpretations of this clause which went far beyond any of the detailed intention and sense of the original Charter. First, it interpreted the phrase 'lawful judgement of peers' to include trial by peers and therefore trial by jury, a process which existed only in embryo in 1215. Secondly, the 'law of the land' was defined in terms of yet another potent and durable phrase – 'due process of law', which meant procedure by original writ or by indicting jury. It was construed to exclude procedure before the Council or by special commission and to limit intrusions into the sphere of action of the common-law courts; it was even applied against trial for trespass in the Exchequer. Thirdly, the words 'no free man' were so altered that the Charter's formal terms became socially inclusive. In the earlier statutes of Edward III of 1331 and 1352 they became simply 'no man', but in 1354 in the statute which refers for the first time to 'due process of law', 'no free man' became 'no man of whatever estate or condition he may be'. ... The seventeenth-century interpretation which Coke typified produced some additions to the fourteenth century glosses, but they were in the main minor extensions to, or clarifications of, an already widely extended range of interpretations." This included the application of cap. 29 to villeins, interpretation of liberties as "liberty" and the argument that *Magna Carta* established grounds for the writ of Habeas Corpus, ibid. 41 f. On the influence of *Magna Carta* on the Levellers and American Law, ibid. 45.

[120] Tierney, *Idea of Natural Rights*, 13 ff.

[121] Cf. Thomas Aquinas, *Summa Theologica*, II-II, q. 66, 7. This is an indication that the neo-Thomists who criticize the idea of subjective rights are less Thomist than is sometimes assumed.

[122] Cf. Susan Marks, A *False Tree of Liberty: Human Rights in Radical Thought* (Oxford: Oxford University Press, 2019), 46 ff.

[123] Cf. Peter Blickle, *Die Revolution von 1525*, 4th edition (Munich: Oldenbourg, 2004).

uprising lists twelve articles with the peasants' demands. They concerned the abolishment or easing of the burdens imposed on the peasants by their lords and asserted the right to freedom of all human beings who are created equal. Therefore, they also insisted on the abolishment of serfdom. Such demands echoed older views, including those found in such important restatements of customary medieval law as the *Sachsenspiegel* (1215–1235), which influenced the law of the German states for 700 years. Its author, Eike von Repgow, argued for the initial equality and freedom of human beings: "All people were free when our ancestors came here to this land. My mind cannot comprehend that one person could belong to another." He regarded serfdom (the legal meaning of which the rules reported in the *Sachsenspiegel* flesh out in great detail), in contrast, as unjust violence: "The genuine truth, however, is that bondage resulted from coercion, imprisonment, and unlawful exercise of force, which has become unjust custom since ancient times, and now people take it to be right and good custom."[124]

These examples show the important role that rights and ideas of freedom and equality, explicitly derived from the existential conditions of human beings and conceptualized in religious terms, played in the struggles for social justice and liberation of ordinary people of that period – a role they continued to play in the centuries to come.[125]

3.5.3 *Natural Rights and the Conquest of America*

Spanish late scholastic thought contributed a further famous chapter to the history of natural rights. This school of thinking serves as another example for the purpose of our historical overview, and for two reasons: first, the depth of its arguments; and second, the political issue that stands in the background and sometimes in the foreground of reflection, namely the European subjugation and exploitation of South and Central America and the human suffering and loss these caused.

The founder of the School of Salamanca, Francisco de Vitoria, developed a differentiated theory of natural rights, particularly in his comments on Aquinas.[126] These rights form part of Natural Law. According to Vitoria, this law can be understood by all human beings, including non-Christians, and thus also can be

[124] Cf. Eike von Repgow, *Der Sachsenspiegel*, trans. Paul Kaller (Munich: Beck, 2002), Book III, 42 § 2, 4, 6; Eike von Repgow, *The Saxon Mirror*, trans. Maria Dobozy (Philadelphia: University of Pennsylvania Press, 1999), Book III, 125 f.; Blickle, *Revolution*, 105 ff.; David von Mayenburg, *Gemeiner Mann und Gemeines Recht. Die Zwölf Artikel und das Recht des ländlichen Raums im Zeitalter des Bauernkriegs* (Frankfurt am Main: Vittorio Klostermann, 2018), 240.

[125] Cf. for some more examples and comments Bloch, *Naturrecht*; Marks, *A False Tree*.

[126] Francisco de Vitoria, "On Law: Lectures on St. Thomas Aquinas," in Francisco de Vitoria, *Political Writings*, eds. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 155 ff.

comprehended by the inhabitants of the Americas, as they, too, enjoy the natural light, the common human faculty of understanding.

Vitoria provided a definition of a subjective right in line with earlier formulations: "A right is the power or faculty that somebody enjoys by law, which means a faculty, provided for me by law, concerning anything that I need."[127] Vitoria's theory of property is particularly relevant for such subjective rights. It is based on the idea that every human being has a claim to the goods of this Earth. Vitoria conceptualized the concrete order of property as the product of a common agreement establishing human law. This meant, among other things, that the indigenous Americans had a title (*dominium*) to their land – that it was not *terra nullius*, not a territory that belonged to nobody and was therefore up for conquest. It is clear that he is concerned with a normative claim, as he distinguishes this normative position from the factual ability to take somebody's goods.[128] The scope of the rights he discusses overlaps in crucial respects with current human rights positions, including the rights to life, bodily integrity, freedom and property, though traditional limitations apply – for instance, as to the freedom of women. In addition, he assumes a right to freedom of movement and to commerce between peoples based on their natural society and communication. There are also political rights, not least the right to determine the form of government.

A particular conception of the normative status of human beings forms the basis of this argument. They are subjects who are entitled to determine themselves, are free and exist for their own sake.[129] His discussion of the four reasons why the indigenous Americans could not have rights illustrates this clearly: This could be so because they are sinners, infidels, lunatics or insane.[130] None of these arguments proves valid: Sinners still can enjoy *dominium* because they are created in God's image and exist for their own sake. Infidels can have rights, as can lunatics and insane persons. In any case, indigenous Americans are no lunatics but self-determining human beings.

Vitoria assessed Spain's claims in America on this basis, dismissing influential voices that defended the Spanish conquest. Vitoria considers seven arguments that in his view are not sufficient to justify denying indigenous Americans *dominium*:[131]

[127] Francisco de Vitoria, *De Iustitia, Über die Gerechtigkeit, Teil 2*, ed. Joachim Stüben (Stuttgart and Bad Cannstatt: Frommann-Holzboog, 2017), quaestio LXII, articulus I, 8: "*Ius est potestas vel facultas conveniens alicui secundum leges, id est facultas data, v.g. mihi a lege ad quamcumque rem opus sit.*"

[128] Francisco De Vitoria, "De Indis," in *Vorlesungen (Relectiones) Vol. II: Völkerrecht, Politik, Kirche*, eds. Ulrich Horst, Heinz-Gerhard Justenhoven and Joachim Stüben (Stuttgart: Kohlhammer, 1997), 401; English translation in Francisco Vitoria, *Vitoria: Political Writings*, eds. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 248.

[129] Vitoria, "De Indis," 403; Vitoria, *Political Writings*, 249.

[130] Vitoria, "De Indis," 387 ff.; Vitoria, *Political Writings*, 240 ff.

[131] Vitoria, "De Indis," 407 ff.; Vitoria, *Political Writings*, 251 ff.

Neither the emperor nor the pope have power over the whole world sufficient to abrogate the rights of indigenous Americans. The discovery of America justifies the denial of rights of indigenous Americans as little as the discovery of Europe by indigenous Americans would have justified abrogating the rights of Europeans. Indigenous Americans had not been given sufficient reason to believe in Christianity, so proselytizing does not provide justification either. Sins do not justify the derogation of rights because it is unthinkable to be entitled to conquer all countries where there are sinners, as there are quite a few. The indigenous Americans have not elected the Spanish kings, nor was America a gift of God to Spain.

Vitoria based a possible justification for Spain's claims on the right to movement and commerce, including to war to defend this right. Spaniards enjoyed the right to spread Christianity peacefully and protect converters. These rights could be defended by force if denied. The indigenous Americans could elect Spanish kings voluntarily. Spaniards could lend support to other indigenous Americans in war. Another argument, likewise of interest for the history of human rights, was that indigenous American societies violated Natural Law by sacrificing humans and even practicing cannibalism. This violation justified intervention to stop this practice. In Vitoria's view, there were no slaves by nature, though he kept open the possibility that the Spanish dominion could be justified by indigenous Americans' need to be ruled because of being close to be incapacitated – but only if this rule aimed at their benefit and they indeed did not have the ability to rule themselves, which he was not asserting as proven.[132]

This leaves Vitoria in an ambivalent position towards the conquest of America. His thought contains strong critical potential, and his theory made it much more difficult to justify the atrocities perpetrated by the Spanish, not least on the ground of natural rights. He explicitly voiced strong doubts that the conquest could be justified, considering all of these reasons. On the other hand, rights and rights violations were used to justify the use of force against others. The Spanish conquest certainly had nothing to do with protecting the rights of indigenous Americans, and in political practice it was not based on restrictive arguments like Vitoria's. Vitoria's argumentation nevertheless represents an early example of the danger of potential misapplications of these notions, strengthening (albeit unwillingly) the ideological foundations of projects such as the conquest of America.

A now-famous voice that also forms part of the context of Spanish late scholastic thought is Bartolomé de Las Casas. His critique of the Spanish conquest of America starts from points that lie right at the heart of the idea of human rights.

The first of these points is the ascertainment of the equality of human beings as reasonable beings with the capacity for autonomous self-determination and consequently with equal worth:

[132] Vitoria, "De Indis," 457 ff.; Vitoria, *Political Writings*, 277 ff.

> All peoples of the world are made up of human beings, and there is only one definition of all human beings and of each one of them, which is that they are rational creatures; they all have their own reason and will and freedom of decision, because they are created in the image and likeness of God. All human beings have five outer and four inner senses and are driven by the same purposes; they all possess the natural or seedlike principles through which to understand, study, and discern the sciences and things that they do not know, and this goes not only for those with virtuous tendencies, but also can be found in those who are bad because of their depraved customs; all delight in the good and take pleasure in what is enjoyable and amusing, and all reject and abhor evil and are displeased by what is unpleasant and harmful to them.[133]

The second is the capacity for free self-determination and the central value of freedom for human beings:

> It is obvious that liberty is the highest and most precious of all worldly goods and is beloved of all creatures, both sentient and non-sentient, and most of all of rational creatures. . . . If human beings do not agree to an interference with their aforementioned liberty of their own free, uncoerced will, then everything is based only upon duress and violence, is unjust and perverted, and is null and void according to natural law, for this turns the state of freedom into that of servitude, which is the greatest detriment apart from death.[134]

Liberty is understood as a natural right of all humans: "Freedom is an inborn right that humans possess necessarily and in themselves from the beginning. Therefore it is a matter of Natural Law."[135] It is hard to find any qualitative distinction between

[133] Bartolomé de Las Casas, *Obras Completas Vol. 7: Apologética Historia Sumaria II* (Madrid: Alianza Editorial, 1988), Cap. 48, 536: "*todas las naciones del mundo son hombres y de todos los hombres y de cada uno dellos es una no más la definición, y ésta es que son racionales; todos tienen su entendimiento y su voluntad y su libre albedrió como sean formados a la imagen y semejenza de Dios. Todos los hombres tienen sus cinco sentidos exteriores y sus cuatro interiores y se mueven por los mismos objectos dellos; todos tienen los principios naturales o simientes para entender y para aprender y saber las sciencias y cosas que no saben, y esto no sólo es los bien inclinados, pero también se halla en los que por depravadas constumbres son malos; todos se huelgan con el bien y sienten placer con lo sabroso y alegre, y todos desechan y aborrecen el mal y se alteran con lo desabrido y que les hace daño*" (translation M. Hiley).

[134] Bartolomé de Las Casas, *Obras Completas Vol. 10: Tratados de 1552, Impresos por Las Casas en Sevilla* (Madrid: Alianza Editorial, 1992), Octavo Remedio, Razón Nona, 327 f.: "*Manifiesto es que . . . la libertad sea la cosa más preciosa y suprema en todos los bienes deste mundo temporales, y tan amada y amiga de todas las criaturas sensibles e insensibles, y mucho más de las racionales. . . . E, si no sale de su espontánea e libre y no forzada voluntad de los mismos hombres libres aceptar y consentir cualquiera perjuicio a la dicha su libertad, todo es fuerza e violento, injusto y perverso, y, según el derecho natural, de ningún valor y entidad, porque es mutación de estado de libertad a servidumbre, que, después de la muerte, no hay otro mayor perjuicio*" (translation M. Hiley).

[135] Bartolomé de Las Casas, *Obras Completas Vol. 12: De regia potestate, Questio Theologalis* (Madrid: Alianza Editorial, 1992), Notabile I, § I, 1; 34, 36: "*Nam libertas est ius insitum hominibus de necessitate et per se ab exordio rationalis naturae, et sic de iure naturali*," with reference to Dig. 1.1.4 and Decretum Gratiani, D.1., c.7.

this right and what is understood as a moral human right today. There is a further interesting point: Las Casas argues for liberty with reference to the idea – found in Thomas Aquinas among others – that human beings exist "per se" and thus not as a mere tool for others' ends. To use other, more modern words, humans are ends-in-themselves.[136] There consequently are no slaves by nature.[137] Las Casas for some time accepted the widely held idea that slavery was justified in war, and even proposed using such slaves from Africa for work in South America – a position he later famously renounced as a great error.

This liberty is the root of people's political self-determination, including their choice of government.[138] This extends to all human beings, including the indigenous Americans, a position that – in Las Casas' later thought – denied the legitimacy of Spanish imperial rule on the grounds of Natural Law, which implies subjective rights to self-determination:

> All non-believers, whichever religious sect they belong to and whatever sins they may have committed, according to natural and divine law as well as according to so-called *ius gentium* entirely justifiably possess the power over the things they have acquired without harming anybody. And by the same right they possess their principalities and kingdoms, their estates, dignities of office, their jurisdiction and powers to rule.[139]

Las Casas interpreted the 1493 Bull *Inter Caetera* of Pope Alexander VI, which permitted the Spanish conquest and missionizing of America, in a correspondingly narrow manner as legitimizing (if any) only a supervisory role of the existing Spanish rule for the purpose of religious teaching by gentle means, such as good example – "peaceable, loving and indulgent, charitable and enticingly, through gentleness, humility, and good examples."[140]

[136] Las Casas, *regia potestate*, Notabile I, § I, 1; 34: "*Quia in natura pari Deus non facit unum alterius servum, sed per omnibus concessit arbitrium. Cuius ratio est secundum Thomam . . ., quia natura 'rationalis, quantum est de se, non ordinatur ut ad finem ad alium, ut homo ad hominem'.*"

[137] Las Casas, *regia potestate*, Notabile I, § I, 1; 34, 36.

[138] "*La razón es porque la elección de los reyes e de quien hobiere de regir los hombres y pueblos libres, pertenece a los mismos que han de ser regidos, de ley natural y derecho de las gentes, sometiéndose ellos mismos al elegido por su proprio consentimiento, que es acto de la voluntad, que en ninguna manera puede ser . . . forzada, comoquiera que los hombres todos al principio nasciesen y fuesen libres.*" Bartolomé de Las Casas, *Obras Completas Vol. 10: Tratados de 1552, Impresos por Las Casas en Sevilla* (Madrid: Alianza Editorial, 1992), Tratado comprobatorio del imperio soberano, 447.

[139] Bartolomé de Las Casas, *Obras Completas Vol. 11.2, Doce Dudas* (Madrid: Alianza Editorial, 1992), Respuesta, Cap I, Principio 1, 35: "*Todos los infieles, de qualquiera secta o religión que sean, o por qualesquiera peccados que tengan quanto al derecho natural y divino y al que llaman derecho de las gentes, justamente tienen y poseen señorio sobre sus cosas que sin perjuycio de otro adquirieron. Y también con la misma justicia posseen sus principados, reynos, estados, dignidades, jurisdicciones y señorios.*"

[140] Bartolomé de Las Casas, *Obras Completas Vol. 10: Tratados de 1552, Impresos por Las Casas en Sevilla* (Madrid: Alianza Editorial, 1992), Treinta proposiciónes muy jurídicas, Prop. XXII, 210:

The concept of subjective rights likewise played an important role in Francisco Suarez's approach to Natural Law. Natural Law defines a scope of permitted action that gives rise to subjective rights to do or not to do those things permitted – for instance, to marry or to preserve one's freedom, to use Suarez's examples.[141] Freedom is of central importance: Human beings are free by nature and subject only to their creator.[142] As in Vitoria and Las Casas, there are no natural slaves. Suarez argues, however, that humans can subject themselves to slavery and – echoing a principle of his time – that legitimate slavery can be established by enslaving prisoners of war in a just war.[143]

Within this framework, political authority is legitimized with reference to the preservation of freedom. It originates in the will of all who unite in a political community: "According to nature, the perfect civil community is free and not subjected to any person outside of it; it enjoys total power over itself, which would be democratic if not changed."[144] The people have a natural right (*naturalis potestas*) to defend themselves against tyranny.[145]

Suarez's Natural Law theory included the whole of humanity, which he thought of as possessing a "certain unity" (*aliqua unitatis*), not only as a species, but also in political and moral respects, as indicated by the natural obligation of mutual love and compassion, "which extends to all, including the foreigner of whatever nation."[146] In addition, the mutual dependency of communities demands cooperation and mutual help, which form the basis for the idea of international law.[147]

3.5.4 *Natural Rights and the Worldly Law of Reason*

A further important exponent of the Natural Law tradition is Grotius, whose work for centuries formed the textbook not only of the legal but also of the ethical thought of

"*pacifica y amorosa y dulce, caritativa y allectivamente, por mansedumbre y humildad y buenos ejemplos*" (translation M. Hiley).

[141] Francisco Suárez, *De Legibus ac deo legislatore, Liber II*, eds. and trans. Oliver Bach, Norbert Brieskorn and Gideon Stiening (Stuttgart and Bad Cannstatt: Frommann-Holzboog, 2016), ch. 18 n. 2.

[142] Francisco Suárez, *De Legibus ac deo legislatore, Liber III, Teil 1*, eds. and trans. Oliver Bach, Norbert Brieskorn and Gideon Stiening (Stuttgart and Bad Cannstatt: Frommann-Holzboog, 2014), ch. 1 n. 1: "*homo natura sua liber est et nulli subiectus nisi creatori tantum.*"

[143] Suárez, *Legibus*, III, ch. 2 n. 9.

[144] Francisco Suárez, *Defensio fidei catholica et apostolica, Pars Prima* (Naples: Ex Typis Fibrenianis, 1872), 186: "*Sic ergo perfecta communitas civilis vere naturae libera est, et nulli homini extra se subicitur, tota vero ipsa habet in se potestatem, quae si non mutaretur, democratica esset.*"

[145] Suárez, *Defensio*, 190.

[146] Suárez, *Legibus* II, ch. 19 n. 9: "*Ratio … est quia humanum genus, quantumvis in varios populos et regna divisum, semper habet aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale praeceptum mutui amoris et misericordiae quod ad omnes extenditur, etiam extraneos et cuiuscumque nationis.*"

[147] Suárez, *Legibus*, II, ch. 19 n. 9.

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influential parts of the European societies.[148] He is therefore our next example of complex thought about the rights of human beings.

Grotius is widely regarded as restating the Scholastic idea of Natural Law rooted in patristic thought and the Stoa,[149] and transforming it into the conception found in the modern Natural Law tradition.[150] According to Grotius, human beings are able to understand Natural Law because of their natural reason – they are legislators guided by insight. The principles he derives reflect the social nature of human beings. These principles, like those of his predecessors, contain a highly differentiated notion of natural rights, including a sophisticated concept of rights that in many ways is on par with later analysis.[151] These rights are not fundamentally restricted to certain groups but apply to all human beings,[152] even though Grotius' theory was not short of elements able to buttress the imperial ideology of the European states.[153] These rights of all human beings include the right to self-preservation,[154] to the pursuit of well-being[155] and, as a precondition for this, to life, bodily integrity and freedom.[156] These rights establish duties of others to refrain from violating them. Grotius also discussed the right to receive what is one's due and thus the traditional relation between justice and rights.[157] Grotius outlined a theory of the extraterritorial enforcement of the rights of humans under qualified circumstances,[158] underlining the universalist dimensions of his theory.

Natural rights do not exclude the possibility of unrestricted, absolute power, however.[159] Human beings can relinquish their freedom[160] – a position important

[148] Robert Warden Lee, "Hugo Grotius," *Proceedings of the British Academy* 16 (1930): 267: *De jure belli ac pacis* "supplied the nations, particularly the protestant nations, of Europe with what they wanted – a rational theory of international relations emancipated from theology and the authority of churches. It was well adapted to be the textbook of the New Europe (a congeries of independent powers) to which the Peace of Westphalia had set its seal."

[149] On the scholastic and antique roots cf. e.g. Terence Irwin, *The Development of Ethics: A Historical and Critical Study, Vol. II: From Suarez to Rousseau* (Oxford: Oxford University Press, 2008), 99.

[150] Cf. e.g. Christian Thomasius, *Fundamenta juris naturae et gentium* (Halle: Salfeld, 1718), 4, § 1 on Natural Law theory: "*Uti enim Grotius hanc utilissimam disciplinam pulvere scholastico commaculatam & corruptam, ac tantum non exanimatam primus iterum suscitavit ac purgare incepit*"; or Knut Haakonsson, "Hugo Grotius and the History of Political Thought," *Political Theory* 13, no. 2 (1985): 239–65, 239.

[151] Cf. Grotius' notion of rights, Grotius, *Iure Belli ac Pacis*, I, IV, V, XVII.

[152] Grotius, *Iure Belli ac Pacis*, I, IV ff.

[153] Cf. his opinions in Hugo Grotius, *De jure praedae commentarius* (The Hague: Martinus Nijhoff, 1868). On the context of Dutch colonialism Richard Tuck, *The Rights of War and Peace* (Oxford: Clarendon Press, 1999), 79 ff.

[154] Grotius, *Iure Belli ac Pacis*, I, II, III.

[155] Grotius, *Iure Belli ac Pacis*, I, II, I, 6.

[156] Grotius, *Iure Belli ac Pacis*, I, II, I.

[157] Grotius, *Iure Belli ac Pacis*, Prol., para. 44.

[158] Grotius, *Iure Belli ac Pacis*, II, XX, XL. He underlines that any such action by means of war can only be justified by the gravest sort of crimes (*atrocissima & manifestissima*), ibid. II, XX, XLIII, 3.

[159] Grotius, *Iure Belli ac Pacis*, I, III, VIII.

[160] Grotius, *Iure Belli ac Pacis*, I, III, VIII.

for Grotius' idea of justified slavery, one example of those elements of his thought that were put to use to justify European imperialism.

3.5.5 *Transitions of Natural Law*

Samuel Pufendorf's theory of Natural Law strongly influenced the debates in the late seventeenth and eighteenth centuries that ultimately led to the explicit formulation of human rights, imperfect as this formulation remained. Important elements of Pufendorf's thought are his account of God's will as the source of Natural Law's obligatory power, his theory of international relations and his theory of sovereignty. The substantive content of Natural Law is spelled out by duties and the rights of persons. Like other thinkers in the Natural Law tradition, Pufendorf drew on a differentiated analytical notion of subjective rights. Natural Law's main aim, which determines its content, is to preserve the peaceful sociality of all humans.[161] Some of the duties of Natural Law are directed towards all human beings, men and women.[162] These absolute duties towards others include the prohibition of injury and the accessory obligation of reparation[163] and mutual respect between human beings.[164] For Pufendorf, too, there is no natural slavery.[165] He argues not only for the prohibition of injury of others, but also for an (imperfect) obligation to benefit others.[166] Where distribution is concerned, only an equal distribution honors the equal dignity of human beings.[167] Such obligations are connected to rights claims – as illuminated by the example of human beings' justified claims for equal respect based on the concept of human dignity: Human beings have a right to this respect.[168]

3.5.6 *Rights in the Best of All Possible Worlds*

Yet another interesting example is G. W. F. Leibniz, whose ideas on Natural Law for the most part remained unpublished during his lifetime, and for whom Grotius served as point of departure in his own complex thought on Natural Law, including subjective rights. Like Grotius, his thoughts include a sophisticated analysis of the structure of rights. In addition, he outlines some substantive content of human rights. Leibniz distinguishes three levels of Natural Law: *ius strictum*, *aequitas* and *pietas*. *Ius strictum* – importantly for our topic – encompasses the protection of life,

[161] Samuel Pufendorf, *De Jure Naturae et Gentium* (Lund: Junghans, 1672), II, 3.1.
[162] Pufendorf, *Jure Naturae et Gentium*, II, 3.24.
[163] Pufendorf, *Jure Naturae et Gentium*, III, 1.
[164] Pufendorf, *Jure Naturae et Gentium*, III, 2.1.
[165] Pufendorf, *Jure Naturae et Gentium*, III, 2.8.9.
[166] Pufendorf, *Jure Naturae et Gentium*, III, 3.1.
[167] Samuel Pufendorf, *De Officio Hominis et civis juxta legem naturalem* (Lund: Junghans, 1673), VII, § 4.
[168] Pufendorf, *De Officio Hominis*, VII, § 1.

physical and mental integrity, liberty and property. These are clearly conceptualized as normative positions with the quality of rights.[169] These rights are not created by legal communities; rather, liberty has profound metaphysical roots. It is the inalienable right of rational souls.[170] *Ius strictum* is based on the equality of persons[171] and, with reference to Aristotelian categories, on corrective justice.[172] Its principle is not to harm anybody (*neminem laedere*).[173]

The next level is *aequitas*, which concerns the proportional balance of normative claims. In this sphere, it is not the equality of human beings that is central, but rather their inequality, which stems from specific unequally distributed abilities and talents. On the basis of these inequalities, applying Aristotelian principles of distributive justice, the goods of society are to be distributed in a way that serves the common good.[174] This distribution is effected by law and through the action of authorities applying the maxim of this sphere, *suum cuique tribuere*,[175] a maxim implying rights, as discussed above. The political order is one of just inequality because of these differences between human beings. Importantly for our topic, just inequality includes the political rights of human beings. Leibniz argues that the "equality of human rights" (*l'egalité du droit des hommes*) would be self-evident if human beings' capability to rule was equal. Given that this capability differs, those who are the most capable are the ones who legitimately govern.[176] Though

[169] Vgl. Gottfried Wilhelm Leibniz, "Aus der Neuen Methode, Jurisprudenz zu lernen und zu lehren," in Gottfried Wilhelm Leibniz, *Frühe Schriften zum Naturrecht*, trans. Hubertus Busche (Hamburg: Felix Meiner Verlag, 2003), 79.

[170] Gottfried Wilhelm Leibniz, "Sur la nature de la bonté et de la justice," in *Das Recht kann nicht ungerecht sein…: Beiträge zu Leibniz' Philosophie der Gerechtigkeit*, ed. Wenchao Li (Stuttgart: Franz Steiner Verlag, 2015), 177. An interesting question concerns the meaning of Leibniz's monadology for the conception of individual rights, cf. Gottfried Wilhelm Leibniz, "Monadologie," in *Monadologie und andere metaphysische Schriften*, trans. Ulrich Johannes Schneider (Hamburg: Felix Meiner Verlag, 2003).

[171] Gottfried Wilhelm Leibniz, "Vorrede zum Codex Juris Gentium Diplomaticus," in *Die philosophischen Schriften von G. W. F. Leibniz*, ed. C. I. Gerhardt (Berlin: Weidmann, 1887), 388.

[172] Vgl. Leibniz, "Neue Methode," 81.

[173] Leibniz, "Neue Methode," 81; Gottfried Wilhelm Leibniz, "Entwürfe zu den Elementen des Naturrechts," in Gottfried Wilhelm Leibniz, *Frühe Schriften zum Naturrecht*, trans. Hubertus Busche (Hamburg: Felix Meiner Verlag, 2003), 137.

[174] Gottfried Wilhelm Leibniz, "Sur la notion commune de la justice," in *Das Recht kann nicht ungerecht sein…: Beiträge zu Leibniz' Philosophie der Gerechtigkeit*, ed. Wenchao Li (Stuttgart: Franz Steiner Verlag, 2015), 168, 173.

[175] Leibniz, "Neue Methode," 81.

[176] Cf. Leibniz's comments on Locke's *Second Treatise*, Gottfried Wilhelm Leibniz, "Letter to Thomas Burnett of Kemney, 2 February 1700," in *Sämtliche Schriften und Briefe*, Series I, Vol. 18, Akademieausgabe (Berlin: Akademie-Verlag, 2005), 380: *"Il y a pourtant quelques endroits peutestre qui demandoient une plus ample discussion, comme entre autres ce qu'on dit de l'Estat de la Nature, et de l'egalité du droit des hommes. Cette egalité seroit certaine si tous les hommes avoient les mêmes avantages[,] mais cela n'estant point[,] il semble qu'Aristote a eu plus de raison icy que Mons. Hobbes. Si plusieurs hommes se trouvoient dans un même vaisseau en pleine mer, il ne seroit point conforme à la raison ny à la nature, que ceux qui n'entendent rien à*

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often highly critical of monarchs and the aristocracy, he thinks that a "rule of reason" is more likely to be achieved in the hierarchical order of the monarchies of his day.

The principle of the highest sphere of Natural Law, *pietas*, which demands that human beings live decently,[177] is justice as the love of those who have gained wisdom.[178] This demands a principled concern for the well-being of others.[179] Leibniz thinks that the ultimate motivation of agents for action is to realize their own interests. These interests, however, include the desire to see others becoming happy.[180] The happiness of others is an intrinsic good. This stance has concrete consequences. Leibniz formulates very substantial demands of human solidarity: There is a duty not only to abstain from harming other people, but also to make their well-being possible, if no substantial disadvantages are incurred by the agent,[181] which raises the familiar question: What claims are implied?

Leibniz pursued a cosmopolitan perspective: The City of God is a moral universe formed by all rational souls under the same principles of justice that guide God's thought, decisions and actions.[182]

3.5.7 *Closing the Circle: The Explicit Doctrine of Human Rights*

The idea of human rights was finally formulated explicitly in the eighteenth century. For moral philosophers, thinkers and political theorists of the Enlightenment, human rights were a central, foundational and explicit element of their thought

la marine pretendissent d'estre pilotes, de sorte que suivant la raison naturelle le gouvernement appartient aux plus sages. Mais l'imperfection de la nature humaine fait, qu'on ne veut point écouter raison, ce qui a forcé les plus sages d'employer la force et l'adresse pour établir quelque ordre tolerable, en quoy la providence même s'est m'êlée. Mais quand un ordre est etabli, il ne faut point le renverser sans une necessité extreme, et sans estre asseuré d'y réussir pro salute publica d'une maniere qui ne cause pas des plus grands maux"; Gottfried Wilhelm Leibniz, "Letter to Thomas Burnett of Kemney, July 18, 1701," in *Sämtliche Schriften und Briefe*, Series I, Vol. 20, Akademieausgabe (Berlin: Akademie-Verlag, 2006), 284.

[177] Leibniz, "Neue Methode," 83.

[178] Gottfried Wilhelm Leibniz, "Vorrede zum Codex Juris Gentium Diplomaticus," in *Die philosophischen Schriften von G. W. F. Leibniz*, ed. C. I. Gerhardt (Berlin: Weidmann, 1887), 386; Leibniz, "Elemente," 241.

[179] Leibniz, "Neue Methode," 83; Gottfried Wilhelm Leibniz, "Universale Gerechtigkeit als klug verteilte Liebe zu allen," in Gottfried Wilhelm Leibniz, *Frühe Schriften zum Naturrecht*, trans. Hubertus Busche (Hamburg: Felix Meiner Verlag, 2003), 215 ff.

[180] Leibniz, "Elemente," 225, 237. However, there are also passages in which the reference to one's own interests disappears, cf. Leibniz, "Sur la notion commune," 172.

[181] Leibniz, "Elemente," 101, 153; Leibniz, "Sur la notion commune," 166 f.

[182] Leibniz, "Monadologie," paras. 85–6; Gottfried Wilhelm Leibniz, "Initium institutionum juris perpetui," in *Rechtsphilosophisches aus Leibnizens ungedruckten Schriften*, ed. Georg Mollat (Leipzig: J. H. Robolsky, 1885), 1: "*Itaque justum est, quod publice interest, et salus publica suprema lex est. Publicum autem non paucorum, non certae gentis, sed omnium intelligitur, qui sunt in civitate Dei et, ut sic dicam, republica universi.*"

both before and after the political declaration of these rights.[183] Approaches such as Locke's social contract theory and his defense of the natural rights to life, liberty and property already directly influenced the formulation of the *Declaration of Independence* in 1776. Moreover, Locke's triad of rights is based on another important idea we have repeatedly encountered, namely that human beings exist for their own sake, a position Locke ultimately framed in religious terms. These natural rights "belong to men as men and not as members of society."[184]

Natural Law theorists such as Barbeyrac,[185] Burlamaqui,[186] Wolff and de Vattel outlined in theoretical depth and with a political thrust different accounts of the idea of the natural, inalienable rights of individuals, in some cases making them the foundations of their conceptions of the rights of states and nations.[187] Wolff develops a specific concept of innate rights (*iura connata*) within the framework of a perfectionist theory of Natural Law. These rights are derived from Natural Law obligations based on the nature and essence of human beings, are inalienable[188] and encompass not only freedom, equality and the means of subsistence, but also other means of attaining the perfection of their human physical and mental faculties as the core command of Natural Law.[189] Human beings have all of the rights necessary

[183] Cf. Vincenzo Ferrone, *The Enlightenment and the Rights of Man* (Liverpool: Liverpool University Press, 2019), 9: "A decisive battle for the history of the rights of man in the Western world was being fought everywhere: from the most prestigious universities to the Berlin and Munich gazettes; at court as well as in the theatre."

[184] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), The Second Treatise, ch. 2, para. 14.

[185] Jean Barbeyrac, "Preface," in Gerard Noodt, *Du pouvoir des souverains et de la liberté de conscience*, 2nd edition (Amsterdam: Pierre Humbert, 1714), XXXI: "*Nous qui somme Hommes, avons-nous besoin qu'on nous apprenne quels sont les droits naturels des Hommes, & jus-qu'où chacun veut ou peut y renoncer? Le Peuple est-il fait pour le Prince, ou le Prince pour le Peuple?*"

[186] Cf. Burlamaqui, *Principes du droit naturel*, 80 on the "*fondement général des Droits de l'homme.*"

[187] Cf. Emer de Vattel, *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, Tome 1 (London: s.n., 1758). Preliminaires, § 5, 6. According to Natural Law, individuals are free and independent, § 4. Cf. on the equality of human beings and their rights and duties and the equality of nations big and small, § 18. On the right to resistance to protect basic rights against tyrants, § 51. There are many examples illustrating how far such conceptions still were from a plausible account of human rights. For instance, de Vattel also includes the right to abduct women in a demographic crisis (but not to force them into partnership or to rape them) among the rights that human beings can claim (on the exceptional ground of necessity) to preserve their group, Livre II, § 122; Christian Wolff, *The Law of Nations Treated According to the Scientific Method*, trans. Joseph H. Drake, rev. Thomas Ahnert (Carmel, IN: Liberty Fund, 2017), § 16, 17.

[188] Christian Wolff, *Institutiones Naturae et Gentium* (Halae Magdeburgicae, 1750), § 74: "*Jus* quoque *connatum homini ita inhaeret, ut ipsi auferri non possit*" (emphasis in original).

[189] Wolff, *Institutiones*, §§ 103, 107, 114 ff. Frank Grunert, "The 'Iura Connata' in the Natural Law of Christian Wolff," in *Philosophy, Rights and Natural Law, Essays in Honour of Knud Haadkonssen*, eds. Ian Hunter and Richard Whatmore (Edinburgh: Edinburgh University Press, 2019), 200 comments: "If we consider this list, …, there is no doubt that it looks very like an early catalogue of human rights, especially when we consider the construction of its philosophical basis."

to promote their happiness.[190] These innate, inalienable and explicit rights of human beings are embedded in a theory of the state, public welfare and security, which are themselves based on Natural Law and form values that can override individual rights in the civil state (*status civilis*), though not beyond the purpose of the state to enable human perfection.[191] As members of a human society organized in a state, natural rights continue to exist and serve as critical yardsticks for civil law but are substantially limited and not properly enforceable by the rights-holders against the sovereign.[192] The subjects maintain the right to resist abuses of power, derived from their innate rights, however.[193] Vattel took Wolff as a reference point for his reflections on Natural Law, which in turn influenced core ideas of the American Revolution, including the *Declaration of Independence* and its conception of unalienable rights.[194]

From a Jewish perspective, Mendelssohn, for instance, defended human rights within the conceptual framework of the natural rights tradition, including a most impressive account of freedom of religion, "the most valuable treasure of human bliss" – to be expected, perhaps, from a courageous member of suffering minority.[195]

Mendelssohn's correspondent Kant, to take this most influential last example of the practical philosophy of the epoch, formulated his doctrine of freedom as a human right. This is a complex and intricate right, because the freedom of the individual must be compatible with the freedom of all under a universal law of liberty. Kant's conception of human rights is based on the idea of human dignity in the concrete sense of respect for human beings as ends-in-themselves, which is the source of their equality.[196]

Human rights permeated art as much as they did theory. Internationally acclaimed plays of the epoch illustrate this, such as Schiller's *Don Carlos* or his *Wilhelm Tell*, in which the rights of human beings constitute crucial and explicit elements of great tragedy.[197] Human rights are a centerpiece of Schiller's theory of

[190] Wolff, *Institutiones*, § 118.

[191] Wolff, *The Law of Nations*, § 14.

[192] On the debate as to whether the innate rights are relinquished in the civil state, cf. Grunert, "Iura Connata," 196 ff., 201, opting for a differentiated solution: "iura connata: more than lost rights and less than human rights."

[193] Wolff, *Institutiones*, § 1079.

[194] Cf. William Ossipow and Dominik Gerber, "The Reception of Vattel's Law of Nations in the American Colonies: From James Otis and John Adams to the Declaration of Independence," *American Journal of Legal History* 57, no. 4 (2017): 521–55. As e.g. Wolff's treatment of the issue shows, the reference to the "pursuit of happiness" derives not only from de Vattel's work – and may simply form an obvious point.

[195] Mendelssohn, "Jerusalem," 1: "*das wertvollste Kleinod menschlicher Glückseligkeit*."

[196] Kant, *Metaphysik der Sitten*, 224.

[197] Cf. Matthias Mahlmann, "On the Foundations of a Democratic Culture of Freedom: Law and the Normative Resources of Art," in *The Quest for Core Values in the Application of Legal Norms: Essays in Honor of Mordechai Kremnitzer*, eds. Khalid Ghanayim and Yuval Shany (Berlin: Springer, 2021), 15–35.

political aesthetics, too, as we have seen. For the purpose of this illustrative historical sketch, there is consequently no need to elaborate further on these thoughts – the historical record is uncontroversial.

These theories were often limited in many ways, excluding large groups of persons, as we have repeatedly underlined, and sometimes were clearly contradictory, not least because the radicalism of some normative insights had not permeated the whole theory. One good example of this is Kant's idea that human beings are to be respected as the ultimate ends of human decision-making, as ends-in-themselves, a maxim that gained significant influence in contemporary ethics and law in the context of discussions about human dignity.[198] Kant's powerful critique of political practices on these grounds did not prevent him from denying suffrage to women and servants or justifying the rights of men over women, however – positions obviously irreconcilable with the idea that they are ends-in-themselves as human beings.[199] Such positions are thus best and most effectively criticized by the normative principles that Kant himself made explicit. Moreover, theoreticians' ideas did not necessarily determine their behavior – as Locke's involvement in the slave trade demonstrates. However, the idea of human rights had now been formulated in modern terms, entered the stage of world history and at last become a revolutionary force.

3.6 THE MANY ROOTS OF HUMAN RIGHTS

This review in outline of the concept of rights is far from exhaustive, particularly bearing in mind that not only the history of ideas, but also the history of ordinary human lives and struggles is important. There are many other periods and events that lend themselves to a fresh look from the perspective of human rights – from slave revolts in antiquity, the liberties granted under the Moghul rulers in India[200] or the rights claims of religious dissenters[201] to the claim by one of the leading protagonists involved in the drafting of the *Universal Declaration*, P. C. Chang, that Confucianism at its core is about human rights,[202] a statement comparable to the

[198] Cf. Mahlmann, "Human Dignity and Autonomy," 379 ff.

[199] Kant, *Metaphysik der Sitten*, 279, 313 ff. Other examples are some remarks on religious and ethnic minorities. However, he sharply criticized the European subjection of the world, cf. for instance Kant, *Metaphysik der Sitten*, 266.

[200] Cf. on the example of the emperor Akbar, Sen, "Elements of a Theory of Human Rights," 352 f.; Sen, *Idea of Justice*, 36 ff.

[201] Cf. Roger Williams, "The Bloudy Tenent of Persecution," in: *The Complete Writings of Roger Williams*, Vol. 3, ed. Samuel L. Caldwell (Paris, AK: The Baptist Standard Bearer, 2005) or the famous study by Georg Jellinek, *Die Erklärung der Menschen- und Bürgerrechte* (Berlin: Duncker & Humblot, 1895), 31 ff.

[202] Cf. on P. C. Chang's interpretation of Confucianism and human rights, Hans Ingwar Roth, *P. C. Chang and the Universal Declaration of Human Rights* (Philadelphia: University of Pennsylvania Press, 2018), 3 ff., 207 ff.

view of a spiritual leader of current Buddhism.[203] For the purpose of our inquiry into the history of human rights, however, avoiding ahistorical naivete in the theory of human rights is sufficient. In particular, our review sought answers to the following questions: What (if anything) does the history of human rights teach us about the relationship between human rights and human moral cognition? Is history all you need to know to understand the roots of human rights in the human life form? Answering these questions proved a difficult task, as the history of human rights is a minefield of controversies – so much so that even the method of inquiry itself required clarification.

Despite these difficulties and the limitations of the review, this endeavor produced some important results, which we will recapitulate in the following.

3.6.1 *The Importance of Methods of Inquiry*

The above discussion has shown that any historical account of human rights needs to pay close attention to: first, the need to search for implied ideas instead of for words or terms; second, the importance of a keen awareness of the many forms of human expression beyond theoretical thought, including art and the oral history of indigenous communities and their often highly significant content; third, the need to respect the profound ethical implications of human practices beyond elite circles, not least of human struggles; and fourth, the need to abandon Eurocentric or otherwise parochial perspectives. The example of the "freedom-loving" Herero or the questions generated by attention to the experience of enslaved women indicated the interesting results such an approach is able to generate. When we follow these methodological admonitions, we see that the traces of the idea of human rights are manifold – indeed, they are so copious that no existing history of human rights has done them justice so far, despite the sterling work carried out in this field.

3.6.2 *Varieties of Rights and the Significance of Distinctions*

Our historical review has shown that the idea of subjective rights played a central role in cultures and contexts as diverse as pastoral, indigenous societies, Greek antiquity, Roman law and Roman imperial politics, Scholastic thought, Natural Law and the law of reason, up to the Enlightenment, when human rights were explicitly (albeit imperfectly) stated more or less in their current form and became a revolutionary force. These rights did not deal merely with minor issues but addressed decisive human concerns such as autonomy and self-determination, political participation and decision-making, bodily integrity, freedom of speech and political equality. Some discussions involved major social and political

[203] Dalai Lama (XIV), *Human Rights and Universal Responsibility, Non-Governmental Organizations, United Nations World Conference on Human Rights*, June 15, 1993, Vienna.

controversies of their time, such as the fight for *isonomia*, equal political rights (even though these were guaranteed highly selectively) in the democratic era of ancient Athens, as well as the legal advice given to arguably the most powerful monarchs of their time about the rights of indigenous Americans during the conquest of America when the lives of many human beings were at stake (and not saved), to take just a few rather dramatic examples.

Unsurprisingly, these debates were not couched in modern human rights language. However, this does not mean that they are irrelevant for the history of human rights, as this history is – as emphasized above – not about *words* or *terms*, but about a normative *idea*. In light of the historical record, it seems obvious that the examples discussed above were in fact dealing with normative phenomena related to (but not identical with) the idea that currently is called "human rights." The examples are highly selective, particularly if one considers the methodological steps proposed above for the study of human rights to be reasonable. The baseline of these steps is, after all, that a history of human rights needs to be much more inclusive than traditionally assumed, not only going beyond Eurocentric perspectives, but also including other sources than canonical texts. There have been some hints that such a broader perspective would only strengthen the points made so far, as the discussions about indigenous cultures and the rich normative tools of antiquity show.

Our review of historical thought on rights included very different examples – varying in form, in their metaphysical and religious background, in their concrete conclusions as to central topics and in their anthropological assumptions, theories of society and understanding of human history. Euripides' poetic reflection about rights (quite evidently) differs in many important ways from Leibniz's metaphysical perfectionism. These distinctions should not be glossed over in some kind of romantic tale about the triumphant march of human rights, implying that they were already conceived in full in the very early stages of human reflection. They were not, and this almost trivial point has been repeatedly underlined.

Frequently, these reflections had no political influence – they were political hopes, aspirations, often mere desperate dreams that did little to better the conditions of human beings. They included many instances of minority positions, even singular views of outsiders, entirely marginalized in their social environment. Euripides did not simply adopt the consensual positions of his era, as Aristophanes' derision shows. The theories of the Spanish Scholastics remain impressive despite their flaws and inconsistencies, but the reality in America was decided by the sword and the greed for gold and land. Las Casas was a total anomaly, not only in his own time, but also in subsequent centuries that happily embraced the racist ideology of conquest. Unsurprisingly, the Inquisition banned some of his works after his death. Sometimes major powers were moved to protect certain rights for certain moments in the historical trajectory, but only for a limited time, as evident in the Roman Emperor's protection of freedom of religion in the *Edict of Milan*, which ultimately yielded to religious intolerance.

The rights discussed were often limited to certain groups of persons, whether because of the aristocratic stratification of society, as in the case of the *Magna Carta*, or because the set of legitimate bearers was thought to be limited on other grounds – excluding women, for instance. Another challenge proved to be that the concept of "human beings" or "humanity" expanded as human cultures on different continents encountered one another. These developments posed the question of inclusion (and exclusion) anew.

A further important observation is that the starting point of reflections about rights is one thing, the concrete conclusions drawn from these reflections quite another. One may agree that human beings have a right to freedom but disagree substantially about what this actually means in specific cases. Yet another question is whether any of the insights drawn determine concrete action, as opposed to other motives such as individual interests. One position in Natural Law theory, reaffirmed throughout the centuries, was that there are no natural slaves. This did not prevent some of the theorists from justifying slavery on other grounds (e.g. as legitimate captives in war) or from becoming commercially involved in the slave trade themselves, like Locke, who most probably was motivated by financial interest and not by deep philosophical principles to do so.

Moreover, events of the historical proportions of the conquest of America gave rise to profound and honest critique based on the rights of indigenous Americans on the one hand, but on the other hand led to arguments that could be abused to justify imperialist policies by the back door – for example, the rights to free movement and commerce to justify some of the violence committed by the Spanish *conquistadores*. Other historical examples show that the use of rights-based arguments for political purposes that seek to empty these rights of their meaning is far from a recent invention.

Today, human rights are widely regarded as connected with democracy. Many of the theories discussed, however, were developed in the context of monarchical orders. Some theories challenged these orders – albeit sometimes half-heartedly – on the basis of rights, but not necessarily so. Leibniz's theory offers an interesting account of the role that subjective rights can play in a conservative concept of politics that legitimizes monarchy. Leibniz was an adherent of Europe's stratified order that ultimately was to be overcome by the developments sparked off by the eighteenth-century democratic revolutions. This does not mean that his conception of rights was meaningless: Asserting the inalienable "freedom of rational souls" considerably limits the actions of others, including political powers, as illustrated by Leibniz's measured but significant critique of slavery.

The constraints of religion are likewise important. In the examples discussed, Christianity obviously is particularly significant, although, for instance, the Herero's cult of their ancestors raises interesting questions as to their social fabric, too. The limits of the cosmopolitanism of Natural Law theories form a recurrent theme of this review. The ambivalent effects of the Christian background of some accounts and

the consequences of these effects for persons of other faiths are important issues here. While a cosmopolitan theory based on a particular religious perspective certainly is not sufficiently inclusive from the point of view of a critical human rights theory, it nevertheless is of interest for a history of human rights. This is because such theories based on a particular religious outlook assert the normative relevance of some common properties of all human beings, creating a moral community that is not limited to specific societies – a doctrine that proved to have wide-ranging consequences once religious and other biases were transcended.

Religious beliefs were important in other respects, too. Even a radical critic like Las Casas, for example, felt compelled to accommodate the papal bull legitimizing the subjugation and exploitation of America in his (nevertheless critical) doctrine. Thinking beyond the Christian systems of institutions was beyond even his reach, faithful believer that he was.

Notwithstanding these many limitations, inconsistencies, cultural and religious biases, incorporated injustices, racist distortions and apologetic abuses among other problems, we should not overly quickly dismiss these theories and ideas as irrelevant for the history of human rights simply because they come from a different time and a different cultural, social and religious context. This would not do justice to the important contributions to the idea of human rights that can be detected in this history despite all of their flaws. Human rights history is not an all-or-nothing issue – many normative phenomena below the threshold of human rights as stated in modern constitutions or international law are highly significant if one wants to understand the deeper roots of the human rights idea. There is, after all, a line that runs through these debates. This line is made up of: first, the *concept of a right as a specific set of correlated normative incidents*, often explicitly identified in a sophisticated analysis such as that developed over the centuries in Natural Law; and second, the *particular content of such rights*, securing existential concerns such as life, bodily integrity, liberty and equality as fundamental entitlements of human beings.

As to the first point: Given the amount of evidence reviewed, it is clear that the normative category of a subjective right is no recent invention. The historical record shows that this category played an important role as a building block of normative systems in very different historical and cultural settings. There is ample evidence showing that this category does in fact (contrary to some historical reconstructions) form part of early normative orders, including those of antiquity about which we have reliable information and of indigenous societies that may give us some hints about the normative elements of even earlier forms of life. The cultural narcissism of some studies claiming that the European or Western tradition has a monopoly on the idea of rights needs to be overcome once and for all.

As to the second point: Demands for respect for life, bodily integrity, liberty and equality are likewise not prerogatives of Europeans since the eighteenth century, as the Herero example or the rich normative reflection of the poets and thinkers of Greek antiquity vividly illustrate. Brushing aside the many centuries of reflection

about rights related to existential concerns of human beings would not do justice to those remarkable thoughts of the past.

A failure to take this history seriously into consideration when discussing contemporary human rights would not do justice to the many victims of this history, either. Their voices are heard faintly at best in many historical accounts. We know what Columbus thought when he discovered human beings he was able to easily exploit. We do not know what his victims thought of his arrival, even though this knowledge would be crucial for understanding this fateful historical event. The least one can do, given this situation, is to pay very close attention to those testimonies we have.

3.6.3 *Rights and Models of History*

These broader perspectives of the slow emergence of human rights sit well with our previous findings about the development of human rights following their explicit statement in the eighteenth century as revolutionary principles of political reorganization. There is no simple, continuous, linear, progressive trajectory from the idea's inception to universal acceptance – neither before nor after the idea of human rights flew its flag visibly on the philosophical and political barricades of the eighteenth century.

There is no teleology, no comforting "this had to happen" to be detected in this process. And certainly there is no "all's well that ends well" fanfare appropriate today – not only because we do not know whether this history will indeed end well, but also because of what was (and continues to be) done to so many victims along the way, the unjustified, wanton, avoidable suffering that cannot be redeemed by a bright human rights future, the metaphysical kitsch of teleological theories of history aside.

These results show that the remarks made above (in Chapter 2) about the different theories of history were useful: The history of human rights is neither one of simple linear progress, nor one of disconnected events without an overarching meaning. Rather, it is a history of recurrent attempts made in various diverse cultural and social contexts to secure the most important goods of human beings with the normative tool of rights, sometimes informed by predecessors, sometimes not, sometimes with long-lasting constructive influence, sometimes entirely forgotten, sometimes resounding through history, sometimes nothing more than the desperate whisper of the victims of injustice.

These complex findings underline another point highlighted in the discussion about the models of history guiding research on human rights: It is crucial to be self-critical about one's implied anthropological assumptions. A naive adoption of the blank-slate theory, for instance, might lead historical research to overlook the intricate normative world (including a richly textured inner world) of indigenous human beings, wrongly taking them and their cultures to be "primitive." More interesting problems may be hidden here than is widely assumed.

3.6.4 A *Key Finding: The Long Way from Moral Intuitions to Explicit Rights*

Our historical review leads us to an analytical point about the genesis of the human rights idea as an explicit ethical, political and ultimately legal concept. This point is of crucial importance for our argument. As we have just underlined, human rights do not come in an all-or-nothing fashion. There are many possible intermediary stages between the (hypothetical) possibility that there is neither the normative category of "rights" nor ideas about claims to bodily integrity, liberty, equality or respect in a given cultural context on the one hand, and fully developed beliefs that human beings enjoy the now-canonical human rights of codes such as the *Universal Declaration* as moral or even enforceable legal rights on the other.

If one tries to reconstruct the steps necessary to develop an idea of human rights in light of these findings, the following picture emerges: The most basic first step on the long road to the formulation of an explicit, critically reflected idea of human rights appears to be a moral intuition with a specific, claim-related content which is not arbitrary and in this sense principled, although not necessarily based on explicit ethical principles. This is an important observation which will be analyzed below in Chapter 8. Second, according to this moral judgment, a person – for instance, Creusa – first perceives herself as having a claim that is of qualified concern to her life, and second perceives somebody else as being under a duty to act in certain ways demanded by this claim. Third, according to this moral evaluation, it is often the case that she can decide herself whether or not to do something that is within the material scope of the perceived claim, the other party having no right that she do the one or the other. In other cases, she simply enjoys an entitlement – for instance, that her bodily integrity is respected.

One example is Creusa's intuition, first, that she should remain unmolested by Apollo; second, that he is under a duty to restrain himself; and third, that she has the privilege to decide herself about whether or not to have an intimate encounter with him. It is crucial that there is such a claim, not just an interest or a wish – this is the decisive step into the realm of normativity and rights.

Intuitions about such claims, duties and privileges can concern many different things, including trivial matters. For the history of human rights, only very particular contents of claims, duties or privileges are relevant. In Creusa's case, for example, her bodily integrity and personal self-determination certainly qualify in this respect. If claims cross this threshold, they are potentially relevant for the history of human rights.

As this claim and the correlative duty are normative incidents, some normative principles must be involved that give rise to the complex normative position a right defines for its holder and addressee. Justice was of central importance for the justification of rights in more than just one epoch – Athenagoras' speech in defense of equal political rights in Syracuse in the face of the Athenian attack is just one example.

Such justice-based claims to important personal goods by individual persons in particular circumstances do not already constitute human rights, however. Several more steps need to be taken to transform these individual moral judgments about legitimate individual claims towards specific other persons into human rights. These steps are quite demanding in more than one sense.

The first step is the *generalization* of the *abstractly determined ethical content* of specific claims. The material scope of human rights is not just about the claim of W to X against Y under the specific circumstances Z – Creusa's claim not to be raped by Apollo in the holy cave – but to respect (in this example) the bodily integrity and autonomy of women under any circumstances. Another step (historically perhaps the most difficult one) is *universalization* – the inclusion of all human beings in a right's personal scope. This step rests upon two major presuppositions: first, that the same rights-conferring reasons apply to all human beings – for instance, because they all share some rights-conferring properties; and second, that (roughly) the same goods are of particular importance for all human beings. Both presuppositions evidently require substantiation, seeing as they remain controversial even today.

As we have seen, such moral claims can remain implicit, as in Creusa's case. The idea of human rights, having defined their content in abstract terms, generalizing and universalizing them, now renders them *explicit*, another step with far-reaching consequences. It presupposes various conditions that are neither individual nor culturally and historically trivial. First of all, it requires a reflective stance towards moral intuitions, taking one's own individual moral judgments as the possible object of critical scrutiny, improvement and change. Impartial moral reasoning, adopting the point of view of an "impartial spectator," is the aim.[204] Ethical reflection needs to abstract from the personal interests and wishes of a particular agent and determine in explicit terms what claims anybody may have under normative principles such as justice. We can call this the *objectification* of human rights content.

Finally, human rights, derived from the generalized, universalized and objectified abstract core content of moral intuitions made explicit, can be conceptualized and institutionalized as *law*. The historically most important form of this conceptualization and institutionalization is, as we have seen, the protection of human rights in the legal systems of concrete political communities, a foundational idea of modern rights-based constitutionalism. In the twentieth century, humanity even made the audacious attempt to do something that never had been tried before: to erect a system of the legal complementary protection of human rights by international law on a global scale, including mechanisms of enforcement that are meant to be (and sometimes are) effective.

We do not maintain that these steps follow a consecutive historical order, nor that they describe stages in the development of individuals, let alone of humanity as a whole. There is no parallelism of ontogeny and phylogeny. Rather, these steps are

[204] Adam Smith, *The Theory of Moral Sentiments* (New York: Prometheus Books, 2000), 19 ff.

theoretical constructs, a kind of ideal-typical description of the preconditions of the genesis of the human rights idea. The historical record, however, elucidates that in reality such intermediary steps were taken in many different forms – on a road that not only was long, but also needed to be paved while it was already being traveled, without clear directions on which way to go.

3.6.5 *How to Miss the Point of Human Rights: Some Lessons from the Past*

The historical record teaches another lesson. It illustrates the central *obstacles* that may prevent the development of the idea of human rights. These obstacles arise at every level of this idea's evolution.

As we have seen, rights are often limited to certain groups of people or as to the specific content they protect. The *Magna Carta* implied that only parts of the population of the Kingdom of England were entitled to certain important goods – for example, not to be arrested without legal grounds. The same goes for the *Virginia Charter* (1615) or the *Bill of Rights* (1688/1689). Widening the personal scope to include more groups of persons through a process of personal universalization requires the overcoming of religious, social, cultural and ethnic boundaries, as well as the age-old dividing line of gender. The preceding remarks have made the huge historical steps involved sufficiently clear. There are other challenges as well, likewise of no small scope. One example is the need to reformulate the concept of humanity because of encounters with other cultures, expanding it to the entire globe. That these encounters would result in an inclusive concept of humanity was far from obvious, given that they were accompanied by the rise of extremely powerful ideologies very alien to the idea of human rights, as the uncanny attraction of racism and its political manifestations exemplify.

These processes are accompanied by the struggle to further define the material scope of the rights protected – a separate and equally difficult task, full of further obstacles. There are theories of rights that are meaningful even though certain rights that reasonably seem to fall under human rights are not included – for instance, equal political rights do not form part of the set of rights defended by Leibniz. This illustrates the importance of the question of which rights exactly are to be protected as human rights. If good reasons are found to secure a particular right, the next (no less complex) question arises: What precisely is the scope of the rights guaranteed – what does habeas corpus, for instance, mean exactly? This is a question that haunts lawyers, courts[205] and ethicists to the present day.

[205] Cf. for instance the question of whether the procedures for review of the detainees' status provided by the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, are an adequate and effective substitute for habeas corpus, which the US Supreme Court denied in a landmark case, Boumediene v Bush, 553 U.S. 723 (2008).

In this respect, the guarantees of certain rights catalogues limited to certain persons have often spearheaded the development of the material content of human rights. The right to be arrested only under some form of rule of law under the *Magna Carta* was not a human right. But within the framework of *the Magna Carta*'s limited personal scope, the content of a right was developed that later was vindicated for all human beings,[206] illustrating that "the historic value of any single pronouncement affirming the rights of man as against authority is not dependent upon the degree of its completeness."[207] Even in the opinion of its most ardent supporters, freedom of religion for a long time excluded atheists[208] – until they finally were included in its personal scope and enjoyed the protection of a right initially designed for religious believers.

This process is of great importance. The exclusion of certain marginalized groups can be the precondition to establishing a certain claim as a right. The peasants of England could not claim habeas corpus under the rule of law in 1215 – the noblemen could. Many believed that atheists could not claim freedom of religion while believers could, because otherwise the moral structure of society would be subverted. These personally selective rights form a first crack in the wall of the unlimited power and privilege of certain persons or social institutions. Moreover, the exclusion of often large swathes of the population gives rise to questions with subversive power: What is the reason for this exclusion? Why do they enjoy this right and not us? The impossibility of providing good, principled answers to these questions turned out to be the seed of those revolutions that built the modern world of rights. *The privileges for a few spearhead the rights for all* – this has been a central theme of the history of human rights to the present day.

Another key obstacle to the development of human rights is their challenge to the distribution of power in social orders. Any expansion of the content of rights reduces somebody's power and privilege – the power to determine what is said in a community, which criticism is allowed, what the ruler can do to their subjects

[206] Cf. Holt, *Magna Carta*, 46: "The history of Magna Carta is the history not only of a document but also of an argument. The history of the document is a history of repeated re-interpretation. But the history of the argument is a history of a continuous element of political thinking. In this light there is no inherent reason why an assertion of law originally conceived in aristocratic interests should not be applied on a wider scale. If we can seek truth in Aristotle, we can seek it also in Magna Carta. The class and political interests involved in each stage of the Charter's history are one aspect of it; the principles it asserted, implied or assumed another. Approached as political theory it sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law. If the matter is left in broad terms of sovereign authority on the one hand and the suject's right on the other, this was the legal issue at stake in the fight against John, against Charles I and in the resistance of the American colonists to George III."

[207] Cf. Lauterpacht, *The International Bill of the Rights of Man*, 58, commenting on the meaning of the *Magna Carta* for the development of human rights. Cf. on the expansion of the meaning and scope of application of central provisions, n. 119.

[208] Cf. John Locke, *A Letter Concerning Toleration*, ed. James Tully (Indianapolis, IN: Hackett, 1983), 51; Mendelssohn, "Jerusalem," 130 f.

and ultimately even whether these rulers may lose their positions because the ruled claim the right to rule themselves. These rights reshape the social fabric, directly or indirectly challenging social and economic power. This does not require sophisticated social rights or doctrinal instruments such as direct or indirect horizontal effects of rights between private parties. If one grants freedom of speech, freedom of association and freedom of assembly, one empowers unions to start renegotiating the distribution of wealth in a society, for instance, and women to unite to challenge patriarchy. If people are entitled to education irrespective of their skin color, the outcome quickly undermines ideas of racial superiority. If women cannot be treated disadvantageously because of their gender in labor law, this subverts discriminatory structures of domination in the workplace.

A further impediment is that, as indicated above, human rights as an explicit idea presuppose something like detached reflection, transcending merely personal perspectives and interests. They demand a readiness to be bound by the conclusions drawn from reflecting upon normative questions and to act accordingly – exacting demands for creatures such as human beings. The fact that the results of this thinking took a very long time to be formulated clearly, elevated to political demands and institutionalized in the law, finally even on the global level, is another unsurprising feature of the development of human rights. Human beings live in lifeworlds full of prejudice, narrow-mindedness, ignorance, resentment, egoism and aggression. The pursuit of domination, power and material advantage is a significant historical factor. In history, social structures that maintain power and privilege define entire epochs. Developing an idea like human rights in this framework evidently is an arduous task – not least because many competing theories deny that human rights really serve justified ends well, a matter we will discuss in Chapter 4.

The history of human rights is thus not just a smooth ride to paradise. It is worth remembering the many incremental steps, the dead-end roads taken, the errors and the striking thoughts formulated on the way. Furthermore, debates on human rights are far from over: Questions concerning the personal and material scope of human rights arise to the present day, as illustrated by current theories about the legitimate bearers and content of human rights that, in the opinion of some, do not include certain groups of human beings such as infants,[209] or do not in fact encompass certain content, such as the right to democratic self-government,[210] which in the eyes of others is central to the idea of human rights.[211]

3.6.6 *Not from Nowhere*

These findings are very useful in determining what exactly we are talking about when addressing the topic of human rights. They illustrate that the idea of human rights was not formulated explicitly in all cultures since the beginning of time but is

[209] Griffin, *On Human Rights*, 95.
[210] Griffin, *On Human Rights*, 242 ff.
[211] Habermas, *Faktizität und Geltung*, 156.

no creation *ex nihilo* of ingenious eighteenth-century thinking either, let alone a ephemeral partisan concept of the second half of the twentieth century, stemming from, say, Amnesty International (admirable as they are),[212] the Carter administration[213] or Catholic personalism.[214] Rather, the building blocks of this idea have been long in the making. Casting these ideas as a recent invention of modern, perhaps even twentieth-century normative ingenuity misses important dimensions of the history of human rights and does not do justice to the great contributions of the past of more than one cultural tradition.

The development of the idea of human rights is embedded in the wider history of thought about justice, goodness and the right political order. From a very early stage onwards, these debates concerned not only what is objectively right, as some have maintained, but also the justified claims that human beings have. The history of the search for equality, liberty, solidarity and human worth speaks against simplistic accounts – for example, that antiquity (which antiquity?) had no concept of a subjective right or of human equality and dignity. The historical record is highly fragmented, not only because of the destructive forces of history, but also because very many human beings were prevented from contributing to its records, which already should caution us against drawing one-dimensional conclusions. Moreover, even the sources we have show a differentiated picture – there were voices for equality and voices against, and even statements such as this have to be carefully nuanced for each individual case. Plato and Aristotle were no champions of democratic egalitarianism. But shelving their complex thought as irrelevant for the history of the idea of human equality would be ill-advised, too, given their contribution to the theory of justice and its relation to rights, as we have seen.

All of these debates were couched in a great variety of intellectual contexts – Plato's theory of ideas, Aristotle's concept of forms, the metaphysics of religiously framed Natural Law, the rational deductions *more geometrico*, the perfectionist Natural Law of Leibniz and the *a priori* principles of practical reason in Kant's thought, for example.

The history of human rights thus is full of complications and of "continuity *and* discontinuity."[215] But, as we have seen, many traces of the idea of human rights can be discovered in history, in the thought and art of many cultures, as well as in the backyards

[212] Cf. Moyn, *The Last Utopia*, 3 ff.: "The drama of human rights, then, is that they emerged in the 1970s seemingly from nowhere."

[213] Cf. Moyn, *The Last Utopia*, 217: "During the Carter administration, to which it clearly owed its newfound public role, the human rights movement generally treated government as an ally."

[214] Moyn, "Personalism," 85 ff.

[215] Cf. Christopher McCrudden, "Human Rights Histories," *Oxford Journal of Legal Studies* 35, no. 1 (2015): 181 (emphasis in original), Moyn, "Continuing Perplexities of Human Rights," 96 ff. admits this. He defends his view with the remark that he is interested in conceptual history, not the history of an idea, ibid. 98. This is not what his historical account is about: It traces not just the use of terms (if that is what is meant by conceptual history as opposed to a history of ideas), but what he takes as the emergence of an apolitical, moralist and impoverished utopia. On problems of some kinds of conceptual history Orford, *International Law*, 299 ff.

of history, where dwell those who are forgotten and downtrodden but still show, in acts of rebellion and daily uprightness, what rights, albeit denied, are truly theirs.

This winding course of human rights history is to be expected, because human history itself is a long journey towards human self-understanding, a meandering, often-tragic course with early advances and epochs of regress, slowly fathoming humans' most important concerns and vulnerabilities, finally forming a concept of humanity itself that is not biased and fragmented by ideologies of exclusion based on sex, skin color, cultural origin and the like as the basis of ethical thought.

The roots of human rights in history thus are deep. They are not the monopoly of just one culture, one system of thought, one religion or one political agenda. The idea of human rights draws on the best traditions of human thought, on the defense of human equality, liberty, solidarity and human worth. For this idea to see the light of day, human thinking needed to shed the fetters of prejudice, resentment and concern for comfortable privilege and to breathe life into the hope for equal respect for all. Human rights do not make up the totality of justice, but they are an important element of what a just order may be.

To be sure, human rights have been and indeed currently are abused for political purposes. This seems to be the fate of any great human idea. But the idea itself is not necessarily delegitimized by its abuse by its political foes. Human rights as embodied in law are equally not just the innocent offspring of beautiful moral minds. They are the product of many political forces, including ones that were sometimes far from any serious attachment to the idea of human rights. Again, this comes as no surprise in light of the way human institutions are formed in history. But human rights are not necessarily contaminated by these origins if they are otherwise justified. If we overlook this, we fail to provide "a historically convincing account of the normative power of the human rights idea,"[216] and thus we neglect a crucial element of human rights history.

Seen in historical perspective, *human rights are the late child of ethical concerns at the core of the human life form*. This finding considerably raises the bar for any theory seeking to address the relation between human rights and the human mind. The task is not to say something meaningful about a political whim of a generation or an ideological artifact of the post-1945 intellectual culture of the West. If it is to succeed, this account needs to contribute to the understanding of nothing less than a central, enduring element of human beings' deepest moral and legal aspirations, an element that often fails tragically, at irredeemable human cost.

3.7 THE CHARISMA OF HUMAN RIGHTS: WHERE FROM?

The interesting lessons of the history of ideas thus raise questions that differ significantly from those discussed by current historical human rights revisionism. These questions already suggested themselves during our reflection on the lessons of

[216] McCrudden, "Human Rights Histories," 203.

the more recent history of human rights and can be put like this: Why did the moral intuitions related to the core building blocks of the explicit human rights idea and the principles underlying it emerge in quite different historical and cultural contexts? Why is the human rights idea prospering today, not least at a grassroots level, despite its many political (and academic) foes? Why was it not just one idea among others, but a notion that exerted a fascination like few before it? Why did it capture the moral, political and legal imagination of human beings around the globe and from all walks of life, prompting committed political and even revolutionary action that still rightly is heralded as a proud chapter in the self-liberation of human beings? Why does this tradition continue in the attempts of very many people, who often are far removed from academic discourses, to secure justified claims of human beings against suppression and contempt? Why does it appear as one example in human history that nourishes the hope that this species may be capable of something better than folly, superfluous harm and mishap? What are the deeper reasons for this fact?

The history of the idea of human rights is not a history of cultural developments without human subjects. On the contrary, in crucial respects it is the history of inquiring, fallible human beings who developed certain ideas, enlarged their scope, ironed out inconsistencies, established new connections to other beliefs that appeared insightful, made explicit what before was only tacitly implied and through these labors of thought and passion for understanding forged the concepts that finally became reliable foundations upon which to build something new through political action. It is the history of great insights that are lost and rediscovered, transformed and finally grow into an almost self-evident part of a human way of living. These insights can seem secure for some time until doubt sets in again and the destructive forces of failing to comprehend, of ignoring or, to use Benjamin's phrase, of "Penelope's work of forgetting"[217] what already has been understood take their toll – forces that can make people turn their back upon what earlier generations won at very high cost, occasionally even with a bored shrug of their shoulders and a contemptuous grin.

As we have seen, this picture also appears to aptly describe the more recent developments after the explicit proclamation of human rights on the world stage in the age of revolutionary constitutionalism. Our historical review showed that the human rights idea has its true source in a particular position, in an ethically calibrated political and ultimately legal substantial stance about whether human beings enjoy fundamental rights, what these rights are and how they relate to other concerns of human beings and the social communities in which they live. This stance convinced very many people around the globe, including governmental actors. It enjoyed great influence for some periods of time, but also was eclipsed,

[217] "*Penelopewerk des Vergessens*," Walter Benjamin, "Zum Bilde Prousts," in Walter Benjamin, *Gesammelte Schriften*, Vol. II-1, eds. Rolf Tiedemann and Hermann Schweppenhäuser (Frankfurt am Main: Suhrkamp, 1992), 351.

as we have seen. This was the case not only for obvious political reasons, such as the rise of new forms of authoritarianism after the end of colonialism, but also because of other factors as well, as exemplified by recent theoretical human rights skepticism.

What is the source of the attraction, the "charisma" of human rights, to adopt a term used by Max Weber in the context of his (skeptical) discussion of the rise of human rights?[218] What led human beings to politically declare rights to liberty, equality, solidarity and respect for equal human worth the basic conditions for any legitimate human political order? Why did they turn these rights into law, finally embarking on the ambitious project of extending the realm legally secured by these rights to all human beings, protecting them preferably by the means of national legal orders, but with international law and international institutions as residual safeguards?

In the end, human rights are nothing less than a powerful *yes* to human existence, a *yes* to the worth of every person being more important than other concerns, a *yes* to the respect for human beings as the minimum condition for a decent human life. Why did the idea of human rights convince sufficient numbers of people? It appeals to the best in human beings, to their sense of justice, to their concern for the well-being of others, to their respect for their moral status and the shared humanity of all. Usually such appeals die away unheard. Why was it, then, successful to a remarkable degree, despite all of its evident shortcomings? Why did the seasoned projects of domination, of secured privilege for some and contempt for others, fail to win the day (at least for now)? Given the course of human history, there is ample reason to be astonished about this course of affairs, as this history allows no illusions about the necessarily victorious force of justice and goodness and its relative strength in comparison to other baser pastimes of humanity. The fact that something as noble as the idea of human rights could be formed, survive and even prosper might thus be cause for considerable bewilderment.

One possible reason for the success of human rights is the "peculiarly compulsionless compulsion of the better argument," to borrow a famous phrase.[219] From this perspective, the partial victories of the human rights idea and its underlying principles first in the realm of thought and then as political projects and legal institutions are, despite all epistemic differences, due to some of the same factors that led to the acceptance of the theory of gravity or the Darwinian theory of evolution and their successors in scientific theory building. Of course, arguments in physics or the theory of evolution convince on different grounds than arguments in ethics or legal thought. However, there is a common denominator in one respect. In all of these cases, the reason for the "charisma" of these ideas is that they are well

[218] Max Weber, *Wirtschaft und Gesellschaft – Herrschaft*, in *Max Weber Gesamtausgabe*, Vol. I/22-4, eds. Hanke Edith and Kroll Thomas (Tübingen: Mohr Siebeck, 2005), 678 f.

[219] Jürgen Habermas, *Theorie des kommunikativen Handelns*, Vol. 1 (Frankfurt am Main: Suhrkamp, 1981), 47: "*eigentümlich zwanglose Zwang des besseren Arguments.*"

justified and because of this have the power to convince, sometimes slowly, sometimes by leaps and bounds.

To be sure, good reasons hardly have been a strong force in history. But we should not underestimate their subversive power either. After all, the attraction of some arguments has slowly altered our views about the structure of the universe and matter, or about our origins in natural history. These were hardly small intellectual labors. Consequently, there is nothing strange in assuming that the same can happen in the process of chiseling out the politically effective and legally enforceable ideas from the bedrock material of some basic moral intuitions of what justice and moral decency command.

The precondition for this perspective is the assumption not only of good justificatory *reasons* for the legitimacy of human rights, but also of the existence of a *capacity of moral understanding that in principle is shared by all human beings*. It is exercising this capacity that leads to insights about rights when human beings reflect impartially on their existential situation within a community of others like themselves and on what the human condition might normatively demand.

To explore such perspectives and to assert, first, that there are good arguments for human rights; second, that all human beings enjoy the ability to understand their point; and third, that the conviction of the justifiedness of human rights has been and continues to be a relevant, sometimes even decisive historical and political factor determining human political action leads in no way to a surprising or strange conclusion. It is rather the fundamental assumption underpinning many lines of thought in human history, not only of obvious cases such as Natural Law theory and the theory of moral understanding of the Enlightenment. It is the hidden working hypothesis of contemporary human rights culture, of literally millions of people, despite the importance of various relativisms for academic and some political debate. The foundational assumption of the human rights movement after all is that human rights make sense for everyone. The whole project starts from the idea that all human beings are endowed with "reason and conscience" and thus are capable of understanding that there are human rights for themselves and others, irrespective of culture, upbringing, gender, skin color and the like. The human rights project represents optimism about the possibility of common human insight. Despite its many obstacles – not least powerful ideologies, incited hatred and the cultivation of moral parochialism in some intellectual quarters – this project considers it possible that humans can come to understand that such rights are justified and that they are worth the effort, passion and sacrifice required to make them living things.

Thus, the true answer to the challenge of historical human rights skepticism is not to prove the universal historical presence of human rights in human history. This proof is neither possible nor necessary. The true answer to the historical and, as an intended consequence, normative relativizing of human rights is to reassert the strength of the reasons, first, for the validity of human rights and, second, for

assuming the reality of a fundamental and universal faculty of human beings for moral cognition that provides everyone with epistemic access to the idea of human rights. To avoid any misunderstanding: The existence of a capacity of practical cognition is not the criterion for the truth of the propositions perceived as true. The fact that empirically human beings judge something to be true or justified is no reason to assume that it is in fact true or justified. This capacity only creates the cognitive possibility of *understanding* what is justified on whatever grounds there are for this justification, as we will see in the following chapters.

According to this fundamental assumption of modern human rights culture, this human faculty of moral insight is not just the privilege of some philosopher-kings, of some special people, of a particular culture, class or religion. It is not the privilege of white people or of men, nor is it the privilege of just one time. As we have seen, the history of the idea and practice of human rights is the history of constantly renewed approaches to this great idea in very different forms and in very different historical, social, cultural and religious contexts, approaches that often are implicit and always are fragmentary, tentative and imperfect. Our own time is no more than another chapter in this history. We can be sure that other times will discern and perhaps wonder about the limits of our present understanding and practice of fundamental rights, as there is no reason to assume that we – unlike all who came before us – are able to grasp fully something that is so difficult to develop and even harder to fill with real life.

The history of human rights consequently puts two questions on the table. First, are human rights justifiable, and if so, how? Second, how are we to understand the thesis of universal epistemic access to the idea of human rights? In other words: What are the conditions for the epistemological plausibility of such a theory of justification? What kind of theory of practical cognition and of the kind of objects that cognition in this field is concerned with does the justification of human rights presuppose?

Historical or even historicist accounts of human rights thus offer no escape from the theory of the justification of human rights and their psychological, epistemological and ontological aspects. On the contrary, a review of the history of human rights and, in this context, of the merits of historical human rights revisionism leads to the question of the relationship between human thought and the idea of human rights. More precisely, it raises the questions of whether these good arguments for human rights do indeed exist and of whether the idea of a universal faculty of moral insight – of practical reason or a sense of justice, if you will – that is shared by all human beings and provides justified insight into these matters makes any sense for contemporary thought.[220]

[220] That this is not obvious is illustrated by Habermas' remark that subjective reason is "*zerbrochen*," shattered into pieces, Habermas, *Faktizität und Geltung*, 17, applicable to the practical reason of subjects, too.

The precondition for answering these questions is a theory of the justification of human rights beyond the particular political or religious strategies that hoped to use the idea of human rights for their purposes. Only once the problem of justification has been clarified can we ask whether a certain structure of the human mind has any importance for the project of justification, not least to delegitimize it, as is claimed by various quite influential theories of the human moral mind to be discussed below. This question needs to be taken very seriously, as it challenges the idea of a potentially shared human understanding of human rights more radically than other forms of human rights critique, such as the various forms of relativist perspectivism discussed today.[221]

These results of the history of human rights constitute a crucial benchmark for assessing the merits of any psychological or neuroscientific theory of human rights. This theory has to be able to account for the *cognitive preconditions of the possibility of the historical trajectory and its immense complexity*. Given the historical analysis and what it tells us about the making of the human rights idea, thus far it seems implausible that human rights intuitions are either a simple given of human cognition, despite what influential contemporary theories maintain, or that human beings are merely moral blank slates.

This brings us to a very important finding. In order to develop something like a theory of moral cognition relevant for human rights, we consequently need to take a different route. The most promising points of departure are *the fundamental intuitions about claims to goods (e.g. the ability to speak one's mind, so cherished by Polynices and Jocasta), correlated with duties and often accompanied by privileges, based on justice and moral obligations towards others that seem to be the root for what has become the explicit idea of human rights, now institutionalized as law*.

These findings prove the need to reconstruct some elements of human rights history for the cognitive interests of our inquiry. The discussion has shown that a historical account such as this is not a mere digression for a theory of human rights that is willing to confront the challenges of psychology, neuroscience and the theory of mind. On the contrary, history is crucial if we are properly to determine the object of research and the key theoretical questions that such a theory needs to answer.

A fundamental lesson thus is that *studying the genealogy of human rights is a necessary condition but in itself is not sufficient to understand the ascent and current reality of human rights*. The argument for the cross-cultural origins of contemporary human rights discussed above is important. But even if matters were different, the case of human rights would not be settled. Even if this idea were of purely European (or Indian or African) origin, the question would still remain: How convincing is this

[221] On perspectivism cf. Nietzsche, *Jenseits von Gut und Böse*, 12. Historical revisionism is not necessarily wedded to perspectivism: It could claim that human beings do share a fundamental perspective on the world through time that did not, however, produce a concept of human rights until the 1970s.

idea of human rights after all? Are there reasons relevant for all human beings or are there not? Are all human beings able to understand these reasons, as all human beings are able (in principle) to grasp the arguments for the theory of gravity, even though not many of them are born in Woolsthorpe-by-Colsterworth in Lincolnshire, like Newton? In order to understand human rights and their role in history, it seems that we have to turn to the grounds of their justification and the sources of moral cognition in the still largely unfathomed human mind.