

The Concept of Human Rights

“Sollte eine Entscheidung kommen oder sollte es vorher nötig werden, Sie noch einmal zu verhö­ren, werde ich Sie holen lassen. Sind Sie damit einverstanden?”

“Nein, gar nicht,” sagte K., “ich will keine Gnadengeschenke vom Schloß, sondern mein Recht.”

Franz Kafka, *Das Schloss*¹

1.1 PARAMETERS OF ANALYSIS

The concept or idea of a “right” – or, more precisely, a “subjective Right” or “claim right” – is an intricate one.² Moreover, as will be illustrated in the historical reflection below, when dealing with terms such as “*ius*,” “right,” “*Recht*,” “*droit*,” “*derecho*” and so on, it is important to distinguish – as in other areas of analysis – the words themselves from what they designate. What is referred to by “right” or “subjective right” may also be the meaning of many other terms. It can even be expressed without any such terms, through a circumscription or through the implications of an expression that has very different meanings, too. For instance, the statement “My darling!” tenderly referring to a car parked in front of a house can imply a right (and a complex one at that) called “private property.” It can also refer to something quite different if addressed to a human person. In addition, different

¹ “If a decision should arrive or if it should become necessary to interrogate you again first, I shall send for you. Is that all right with you?”

“No, not at all,” said K., “I want no favours from the castle, I want my rights.”

Franz Kafka, *The Castle*, trans. J. A. Underwood (London: Penguin Books, 2019), 67.

² “The notion of a legal right has proved in the history of jurisprudence to be very elusive,” not least because of “the interesting though also strange things that jurists and others have said about rights,” Herbert Lionel Adolphus Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), 162.

normative positions may be all called “rights,” though in different senses: The right to free expression does not mean exactly the same thing as a police officer’s right to fine a traffic offender.

In view of this fact, we need to outline, however roughly, the content of the concept and idea of human rights and other related terms.³ This analysis forms the precondition for any discussion of the further questions that need to be addressed in this inquiry – about the history and justification of human rights and what a theory of moral cognition may (or may not) contribute to this important topic. Otherwise, conceptual vagueness will necessarily lead our investigation astray.

Any discussion of these matters needs to take note of legal human rights practice. There is no good reason to snub this practice as tedious, slightly dusty “law stuff” devoid of deeper theoretical interest. After all, the doctrine of human rights has become a rather sophisticated intellectual edifice, built by thousands of industrious legal hands. Examples include intricate concretizations of the scope of different rights, the doctrine of positive obligations, direct or indirect horizontal effects, the principle of the extraterritorial application of human rights, the concept of interference with rights, the doctrine of proportionality and the idea of weighing and balancing rights and interests. Some of these ideas are relevant for a better understanding of the concept of a subjective right, as the discussion in this chapter will illustrate.

This edifice is not simply a descriptive restatement of the content of positive law. Positive law remains silent on many of these issues. And not only that: Core elements of current human rights law are the products of case law and doctrine. Court decisions are not mindless reproductions of what is stated by positive law but demanding examples of often theory-laden normative arguments that incorporate elements of legal doctrine and develop it further. Positive law on human rights is itself often based on these interwoven jurisprudential and doctrinal developments. It is a shortcoming of some discussions in the field that they fail fully to take account of this body of thought.

1.2 MORAL AND LEGAL RIGHTS

A first, much-discussed question that requires an answer for the purpose at hand is whether there are moral rights alongside legal rights.⁴ A major issue is the supposed

³ There is an important methodological question here: What are we investigating exactly? Or, as Hart put it, what are the criteria for the success or failure of such conceptual work, in his view an exercise of “‘rational reconstruction’ or refinement of concepts in use,” Hart, *Essays on Bentham*, 163 f. As will become clear in the following discussion, from our point of view, it is not just the changing factual *use* of words – in the ordinary or specific jurisprudential sense – that is at issue, nor is it a matter of *definition*. The task is rather the analytical understanding of a distinct idea or concept constitutive of human normative thinking and theory building.

⁴ Cf. e.g. for a review Hart, *Essays on Bentham*, 82, 162 f.

“criterionlessness”⁵ of moral human rights – one cannot identify human rights with sufficient clarity without the determination of their content by positive law. This question was raised in particular at the time of the demise of Natural Law⁶ and has continued to occupy legal reflection ever since. Some scholars regard the ontological status of moral rights as dubious because Natural Law seems the only way to conceptualize nonpositive rights. Natural Law, however, they see as wedded to an outdated metaphysics of normative entities. Consequently, in the view of some theorists, without the basis of Natural Law, the idea of rights beyond positive law has no foundations. Moreover, the idea of rights has appeared to some as being redundant as, in their view, every normatively relevant content can be expressed by moral and legal duties.⁷

Some foundational elements of our contemporary human rights architecture clearly take a stand on these questions. The *Universal Declaration* speaks of the “recognition” (not the creation) of human rights, as do influential constitutional texts that assume the existence of human rights that are not created by law.⁸ The same holds true for much of the philosophical discussion concerned with human rights as ethical norms independent of legal systems. This stance is very much in line with a long tradition of thought about human rights as fundamental legitimate claims of human beings, a tradition that ultimately gave birth to the idea of protecting human rights by legal means in the first place. The many varieties of Natural Law theory form an important part of this tradition. It is possible, however, to assert the existence of moral rights without endorsing the metaphysics of certain conceptions of Natural Law – say, Thomas Aquinas’ idea of Natural Law as a part of an eternal law permeating and determining the structure of the universe (including the content of God’s will)⁹ or other such ideas.

Rights are nothing less than a fundamental element of human beings’ moral world. Any children’s birthday party illustrates the importance of normative incidents such as claims, perhaps to an equal share of the sweets distributed by the birthday child’s parent or the (occasional, thrilling) permission, privilege or liberty to do just as you please – for example, to eat these sweets whenever you want this afternoon (including: all at once, now!).

Human rights create normative positions on the basis of incidents such as claims. As we will discuss in more detail in this chapter, it is an analytical misunderstanding to think that rights can be reduced to duties of others. Importantly, rights empower the rights-holders: They invest them with control over their own lives because

⁵ Hart, *Essays on Bentham*, 82, 90.

⁶ Cf. Bentham’s dictum that a subjective right must be “the child of law” instead of giving it a “spurious parentage” by laying it “at Nature’s door,” Bentham, “Nonsense upon Stilts,” 400.

⁷ Cf. e.g. for discussion Hart, *Essays on Bentham*, 162 f.

⁸ Cf. in Germany Art. 1.2 GG (Basic Law).

⁹ Cf. Thomas Aquinas, *The Summa Theologica*, trans. Fathers of the English Dominican Province (Notre Dame: Christian Classics, 1981), I–II, Q. 91 a. 2.

rights-holders can justifiably demand something of others.¹⁰ As such, for many people rights have long formed part of the foundations of a considered ethical outlook. Moreover, as we will see in our discussion about the justificatory theory of human rights in Part II, it is not an entirely hopeless task to identify those moral rights that are plausibly taken as moral *human rights* – “criterionlessness” is not the ultimate verdict.¹¹

The historical and contemporary positions distinguishing moral and legal rights consequently are entirely on the right track. There are no convincing reasons to deny the existence and importance of moral human rights.

These findings have a very concrete political consequence: They open the door to the principled ethical critique of social practices, structures and institutions that violate human rights in a moral sense. They are also a crucial source for critiquing existing forms of human rights protection in law, identifying their possible shortcomings and developing them further. Moreover, there is good reason to believe that such ethical considerations may play a role in reasonable interpretations of human rights as positive law – many questions raised by positive human rights law are answered convincingly only if guided by the sound principles of a normative theory of human rights.¹²

1.3 THE COMPLEX MAKEUP OF SUBJECTIVE RIGHTS

What is a right? What distinguishes it from an interest in or a wish for something? There is a long, partly neglected tradition of analytical work on the idea and concept of a right, with important contributions by Natural Law theorists like Grotius,¹³ deontic logicians like Leibniz¹⁴ or legal theorists like Bentham.¹⁵ Hohfeld’s

¹⁰ Hart, *Essays on Bentham*, 183: (Legal) rights turn an individual into a “small-scale sovereign” in the area of conduct covered by the right. This observation does not entail implausible tenets of the will theories of rights, cf. on the critique of will theories Leif Weinar, “The Nature of Rights,” *Philosophy & Public Affairs* 33, no. 3 (2005): 223, 238 ff.

¹¹ Which is not Hart’s verdict either. He regards some qualified goods essential to human beings in conjunction with respect for personhood as such a criterion, Hart, *Essays on Bentham*, 95, 103, 189 f.

¹² Cf. Matthias Mahlmann, *Elemente einer ethischen Grundrechtstheorie* (Baden-Baden: Nomos Verlag, 2008).

¹³ Hugo Grotius, *De Iure Belli ac Pacis Libri Tres, Ed. Nova, Vol. I, reproduction of the ed. of 1646 by James Brown Scott* (Washington, DC: Carnegie Institution of Washington, 1913), I, I, IV ff.; I, I, XVII, 2; Jean-Jacques Burlamaqui, *Principes du droit naturel* (Geneva: Barrilot & File, 1747), 81: “Le Droit & l’Obligation sont donc deux termes corrélatifs, comme parlent les Logiciens: l’une de ces idées suppose nécessairement l’autre.”

¹⁴ Gottfried Wilhelm Leibniz, “Aus der Neuen Methode, Jurisprudenz zu lernen und zu lehren (1667),” in Gottfried Wilhelm Leibniz, *Frühe Schriften zum Naturrecht: Lateinisch-deutsch*, trans. Hubertus Busche (Hamburg: Felix Meiner Verlag, 2003), § 16.

¹⁵ Jeremy Bentham, “An Introduction to the Principles of Morals and Legislation,” in *The Collected Works of Jeremy Bentham*, eds. James Henderson Burns and Herbert Lionel Adolphus Hart (Oxford: Oxford University Press, 1996), XVI, 25, n. e; for more details cf. Hart, *Essays on Bentham*, 164 ff.

approach has the great merit of bringing much of what has been discussed in this tradition into a clear conceptual framework. He understands rights not as simple monoliths but as a complex bundle of the normative positions of a bearer or many bearers (or holders) and an addressee or the addressees of a right. These normative positions or incidents include, first, what in standard terminology is interchangeably called a right (in a narrower sense), claim, claim right or subjective right of the rights-holder to an action or forbearance on the one hand and the corresponding duty of the addressee towards the bearer to perform or forbear from the action on the other.¹⁶ If a person has the right to free speech, the bearer has a claim against the addressee not to interfere with the bearer's expression, and the addressee (e.g. the state) has the duty to forbear from interfering. This is a necessary connection. There are no claims without duties, although there are morally good acts that are not normative correlatives of the claims of the patients of the acts – for example, in the case of an action that is supererogatory. Certain duties, however, necessarily imply claims – for instance, the duties of justice imply the claims of the addressees of just acts. This reveals a major analytical deficiency of the idea that rights are a redundant normative category – for many obligations, a normative system of duties is necessarily also a normative system of rights.

Second, the bearers of a large group of rights are permitted but not obliged to use the normative position they hold: They enjoy a privilege to do so or not.¹⁷ The bearers of a right to free speech can express themselves or not, for example. The addressee has no normative claim against the bearers for them to do one or the other – the addressee's position is characterized by a "no-right." A right opens up a normatively protected space within which the bearer can exercise discretion,¹⁸

¹⁶ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, eds. David Campbell and Philip Thomas (Abingdon: Routledge, 2001), 12 f.

¹⁷ Hohfeld, *Fundamental Legal Conceptions*, 14 ff. On "unilateral" privileges, which, unlike "bilateral" privileges, imply only the freedom to do something and not the freedom not to do something, because of an obligation to act, Hart, *Essays on Bentham*, 166, 173; Weinar, "The Nature of Rights," 223, 225 ff. distinguishes single and paired privileges: the former being an exemption from a general duty, such as a police officer's right to break open a door, the latter providing the bearer with discretion – two "entirely independent" functions. A police officer has the privilege, however, not only to break open the door, but also not to break open the door – for example, if the suspect opens it. Only if the officer is under a duty to break open the door (because the suspect does not open it) is the privilege unilateral, in Hart's terms. Similarly, an arrestee has the privilege not only not to speak, but also to speak, cf. on this example Weinar, "The Nature of Rights," 229.

¹⁸ This is the truth of the so-called will theory, cf. Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, Vol. 1 (Berlin: Veit, 1840), § 4; Bernhard Windscheid, *Lehrbuch des Pandektenrechts*, Vol. 1 (Aalen: Scientia Verlag, 1906), § 37; Hart, *Essays on Bentham*, 80 ff. The assumed opposition to the interest theory, cf. Rudolph von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Teil III (Leipzig: Breitkopf und Härtel, 1924), 337 ff., is perhaps the product of an incomplete conception of subjective rights: The protection of autonomy (the free exercise of an individual's will) may be one of the interests such rights serve and is not without limits, which was the core of Jhering's concern with the will theory of rights. On the other hand, freedom of choice is of the essence for a right. For a

defined by the nonexistence of a duty with a content precisely opposite to that of the bearer's privilege.¹⁹ If Serena enjoys, for instance, the privilege of expressing her opinion, she is under no duty not to express her opinion. If she enjoys the privilege of not expressing her opinion, she is under no duty to express her opinion. Standard subjective human rights thus are constituted not only by claims, but also by the privilege to do or not to do something. Other kinds of rights, such as guaranteeing the equality of human beings, are, however, constituted only by claims and duties – the claim to equal treatment or nondiscrimination and the correlated duties of the addressee.

Third, rights can contain but are not the same as normative powers to change one's own or others' normative position, such as the power of a police officer to create the duty of the addressee of an order – say, an unfortunate law professor caught cycling up a sidewalk on a one-way street – to stop and explain his deplorable lack of respect for traffic rules before being fined (severely, as he should know better). Such powers are sometimes also understood as rights. The “right” of a police officer to fine a traffic offender refers to a power in this sense. The expression “the right of the police officer” implies more normative incidents, however, namely claims, duties and privileges: The police officer has a claim against the offender to stop and against bystanders that they will not interfere, and the offender and bystanders have a corresponding duty not to do so. The police officer may have the privilege to fine or not to fine the offender – for example, if the respective law allows for some form of discretion in this respect. If so, the police officer is under no duty to fine or not to fine the offender.

Fourth, the normative ability embodied in a power correlates with the liability of the patient of this exercise of the power.²⁰ It is the opposite of the patient's immunity to such a power, which implies the agent's disability to effect such normative changes.²¹

Bare privileges are conceivable: Their normative force is weak and consists in the possibility of acting or not acting in a certain way without violating the rights of another person.²² At the same time, hindering the exercise of the bare privilege does not violate a normative position of the bearer of the privilege.²³ To say that the normative force of privileges is weak does not mean that they have no practical relevance. There are, for instance, important legal institutions based on such

critique of certain forms of will theories and interest theories, Weinar, “The Nature of Rights,” 238 ff., arguing for a several functions theory, 246 ff., to account for such examples as the right of a judge to sentence a person.

¹⁹ Hohfeld, *Fundamental Legal Conceptions*, 14.

²⁰ Hohfeld, *Fundamental Legal Conceptions*, 21 ff.

²¹ Hohfeld, *Fundamental Legal Conceptions*, 28 ff.

²² Hohfeld, *Fundamental Legal Conceptions*, 16.

²³ Hohfeld, *Fundamental Legal Conceptions*, 16; Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), 46 ff.; Robert Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2010), 144 ff.

normative positions: A classic example would be the ability to appropriate things that are no one's property – an ownerless object or a *res nullius*. That this is an important legal idea may sound less than obvious if we think of the used office chair that somebody has put out on the sidewalk with a “for free” sign attached. Anyone has the privilege to appropriate this chair, a normative position that does not imply a duty on anyone's part not to take the chair first.²⁴ Our perception of the matter may change, however, if we consider other cases. An interesting example stems from the law of the high seas, which ultimately is rooted in the idea of free seas, of *mare liberum*.²⁵ One consequence of this idea is the guarantee of freedom of fishing and thus of access to a key nutritional resource.²⁶ There are some limits to this freedom in international law, including those stemming from sustainable fishing policies²⁷ or the duty not to prevent others from going anywhere on the high seas to fish. However, the freedom of fishing imposes no duty not to fish first where others want to fish too, and thus it implies nothing but the privilege to harvest the fish one is able to find.²⁸

Another example of the practical relevance of this normative idea and at the same time of the possibility of its abuse is the doctrine of *terra nullius* that was applied to entire continents and the millions of people living there in the context of colonialism and imperialism to justify grave injustices, including the atrocity called the “Scramble for Africa.”

Human rights are not bare privileges. The permission to do or not to do something goes along with and is buttressed by a claim of the bearer against the addressee and a respective duty to do or not to do something, depending on the nature of the right. In addition, a legal right is enforced by the institutions and the sanctions of the law. Human or fundamental rights consequently are understood in the contexts discussed in this volume as a cluster of four normative positions: the claims and privileges of the bearer and the duties and no-rights of the addressee.²⁹

Such moral or legal (human) rights can have a power as their content, such as the freedom to contract the power to create contractual obligations – a power that is buttressed by the bearer's privilege to contract or not to contract and the bearer's claims such as the claim not to be prevented from concluding a contract by third parties and the duties of the addressees (e.g. not to interfere with the conclusion of the contract). Another example is the freedom to relinquish ownership (within the

²⁴ A more detailed analysis would account for the factual elements (e.g. the taking of the chair) and the normative consequences of the actions, including possession and property.

²⁵ Hugo Grotius, *Mare Liberum: Sive – De iure quod Batavis competit ad Indicana commercia – Dissertatio* (Amsterdam: Elzevir, 1618).

²⁶ UN General Assembly, *Convention on the Law of the Sea* (UNCLOS), UNTS 1833 (3), December 10, 1982, Art. 87 I e).

²⁷ Art. 116 ff. UNCLOS.

²⁸ Other interesting examples are certain normative positions enjoyed in competition law, Hart, *Essays on Bentham*, 166.

²⁹ For an expression of these relations with the means of deontic logic, cf. e.g. Alexy, *Theorie der Grundrechte*, 171 ff.

limits of other legal norms) traditionally derived from the right to property.³⁰ This normative position can be accompanied by immunities – for example, not to be obligated by contracts unless the agent has agreed. Such powers can be limited not only as regards a change of the normative positions of others, but also as regards a change of one’s own normative position. One may be immune to one’s own powers: The right to bodily integrity includes the right that others do not touch us without our consent. We can waive this claim under certain circumstances – for example, enjoying a caress. We cannot waive it in order to enable a third person to cut off our leg to sell it for profit, at least according to standard human rights morality and law. Many human rights imply some such powers and immunities, too.

The powers, immunities and liabilities create the possibility of layered normative systems, a central feature of morality and law – for instance, expressed in the hierarchy of laws, including constitutions that regulate the powers of a parliament to create new law that in turn establishes the power of a public authority to issue an ordinance.³¹

It is an important finding that rights can be analytically broken down into a well-defined, limited set of normative incidents, and universally so. This invites further reflection on the origin of this logical structure of rights.³²

1.4 THE HOLDERS AND ADDRESSEES OF RIGHTS

The personal scope (that is, the set of bearers or holders) of a right varies according to the right concerned. It can be one single individual who has a specific right – for example, in contractual relations. A class of people, such as the residents or citizens of a country, can enjoy the same rights. In the case of human rights, properly speaking, the bearers of these rights are all human beings, based on no other further characteristic than the humanity of the persons concerned.³³

³⁰ Weinar, “The Nature of Rights,” 231 argues that there are paired powers – the power to waive a right and not to waive a right, for instance. The normative position is more precisely described as a privilege to use the power or not to use the power (a bilateral privilege in Hart’s and a paired privilege in Weinar’s terminology).

³¹ Cf. on second- and third-order powers (and so on) Weinar, “The Nature of Rights,” 230, n. 8; Kar, “Psychological Foundations,” 112: “Consider the constitutional right to contract as an example. This right is easy enough for most people to understand, and so it might be surprising to learn that it in effect gives each member of a state a (fourth order) immunity right to be free from the (third order) power right of the state to limit his or her (second order) power right to contract – which, when exercised, could be used to create new (first order) claim rights against the original holder of the right to contract. Recursive complexities like these are rarely consciously articulated or perceived, but they can operate quite effectively in human unconscious life.” Moreover, the right to contract includes claim rights against the state, not only immunity rights.

³² Cf. for substantial thought about this problem Kar, “Psychological Foundations,” 109 ff.

³³ There is intense discussion about animal rights. Nothing in these remarks has any direct bearing on the question of the normative status animals enjoy and whether they can enjoy rights and, if so, which. This is a question that deserves independent scrutiny. Cf. for a recent case against human superiority Christine Korsgaard, *Fellow Creatures: Our Obligations to the Other Animals* (Oxford: Oxford University Press, 2018), 3 ff., 53 ff.

At this point, some terminological clarification is in order, as the term “human rights” is often used in a wider, generic way that encompasses more than rights in this particular, technical sense of the rights of all human beings – for example, rights to vote that are limited to citizens of a state. This broader usage is found in many contributions to the theory, philosophy and history of human rights. This creates a certain difficulty if we are aiming for terminological precision but at the same time want to avoid terminological pedantry. In the following, the term “human rights” therefore will be used to designate rights in this wider generic sense as long as no greater precision is required. If the need arises, however, the term “human rights” will be used in this narrow, technical sense, too. The text will make clear which meaning is the relevant one in the context in question.

“Fundamental rights” is another term that can help to steer us through the maze of incongruent terminological usage in debates about human rights. However, it, too, first requires clarification. In the following, fundamental rights are understood as encompassing human rights in the narrow sense of the rights of all humans and rights of central importance that are, however, not granted to all persons in legal systems, often for good reason. In these latter cases, the legal situation mirrors the fact that there is no moral right in this respect either. The guarantee of human dignity as a central fundamental right, for instance, is a human right in this technical sense in many legal systems: Everybody under this state’s jurisdiction is the bearer of this right, not just the state’s citizens. This normative position is entirely justified morally because there are no ethically relevant reasons not to protect everyone’s human dignity. The right to vote, by contrast, is universally restricted to citizens or long-term residents of a state or other state-like structures like the EU. There are obvious reasons for this: Voting rights presuppose some kind of long-term relation with a state; tourists not only have no legal right to participate in elections in the countries they visit, they have no moral right either. Nevertheless, the right to vote in such a specific community is of particular importance and thus a fundamental right, though not a (moral or legal) human right in the narrower sense. However, the right to participate in *some* community where one satisfies some minimum requirements (citizenship, long-term residence, etc.) is a human right (in the narrow sense).³⁴ Insofar as the law contains this right (as customary international law arguably does),³⁵ it conforms to the demands of ethics in this respect – for example, because this right is interpreted

³⁴ Cf. Art. 21 UDHR.

³⁵ On a right to democracy, cf. e.g. Sigrid Boysen, “Remnants of a Constitutional Moment: The Right to Democracy in International Law,” in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, eds. Andreas von Arnould, Kerstin von der Decken and Mart Susi (Cambridge: Cambridge University Press, 2020), 465 ff.; Samantha Besson, “The Human Right to Democracy in International Law: Coming to Moral Terms with an Equivocal Legal Practice,” in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric*, eds. Andreas von Arnould, Kerstin von der Decken and Mart Susi (Cambridge: Cambridge University Press, 2020), 481 ff.

as a necessary consequence of the “right to have rights”; that is, the right to be an active part of a human political community.³⁶ Fundamental rights therefore are synonymous with human rights in the wider, generic sense and will be used interchangeably with that term for the sake of linguistic variation.

A right can address a single individual, a plurality of addressees or everybody. In the former two cases, rights are said to be relative, in the latter to be absolute or *erga omnes* rights³⁷ – however, the term “absolute” is used in another context as well, albeit in a different sense, namely that of rights without limitations. We need to distinguish between both senses. Property rights are absolute in the first sense but not in the second: The right to property creates claims towards everybody (e.g. not to dispose of an object owned by someone without the owner’s consent) but can be limited by laws (e.g. the property in a medieval house can be affected by the heritage protection laws of the country in question).

Legal human rights are directed against public authority on the national, supranational and international levels. Depending on the respective system’s level of development, they also have a direct or indirect horizontal effect, thus obligating private persons and legal entities.³⁸ The same practical effects create positive obligations that are widely accepted around the globe,³⁹ with some exceptions.⁴⁰ Given positive obligations based on fundamental rights, public authorities not only have to refrain from violating human rights but are obligated to take measures actively to protect human rights. Such positive obligations have become important tools of human rights protection, not least of the rights of women, and they continue to

³⁶ Arendt, *Origins of Totalitarianism*, 388.

³⁷ In public international law *erga omnes* rights are directed against all states, cf. Barcelona Traction case: International Court of Justice (ICJ), Barcelona Traction, Light and Power Company, Limited, Judgment (Belgium v Spain), Judgement of February 5, 1970, ICJ Reports 1970, 3 para. 33.

³⁸ For an influential example of the direct horizontal effect of human rights norms, cf. the standing case law of the CJEU, for example on the direct horizontal effect of the EU, *Charter of Fundamental Rights of the European Union* (CFR), C 326/02, October 26, 2012, Art. 21, the equality and non-discrimination clause and a human rights norm in the narrow sense, Court of Justice of the European Union (CJEU), Egenberger (C-414/16), Judgement of April 17, 2018, EU:C:2018:257, para. 76; CJEU, Cresco/Achatzi (C-193/17), Judgement of January 22, 2019, EU:C:2019:43, paras. 76 ff. This case law is modelled along the lines of the standing case law on the direct horizontal effect of the fundamental freedoms of EU law, cf. *ibid.* para. 77 with further references to the Court’s jurisprudence. On this traditional question of fundamental rights doctrine, cf. for example Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press, 2006).

³⁹ Cf. the standing case law of the ECtHR since Belgian Linguistic Case, ECtHR, Case “Relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium (Merits), Judgment of July 23, 1968, Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, para. 3; Inter-American Court of Human Rights (IACtHR), Velásquez-Rodríguez v Honduras, Judgement of July 29, 1988, Series C no. 4, paras. 174 ff.

⁴⁰ Notably the US Supreme Court, cf. e.g. US Supreme Court, *DeShaney v Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

develop to meet very important challenges. For instance, they have been extended to the protection against the severe adverse effects of climate change.⁴¹

Moral human rights are directed at private actors. Nigerian peasants, for example, have a moral right that their environment not be destroyed by the actions of powerful individuals or private companies producing oil. Moral rights can obligate public authorities, including the legislature, as well. Though one may not have the legal right to build a minaret in Switzerland as the law stands⁴² (although the case is far from clear), there are plausible grounds to believe that there is a moral right of believers to determine the shape of sacred buildings (within the framework of the general rules, such as building safety), and that this moral right is interfered with illegitimately by the constitutional ban on minarets. Public authorities should be mindful of that – for instance, if the legislature is considering proposals for the reform of the law.

1.5 THE BASIC CONTENT OF HUMAN RIGHTS

Human rights are primarily distinguished from other rights by their specific scope of protection. The content of human rights catalogues varies, and often in crucial details. However, there is a cluster of central positions that constitute the basic elements of fundamental rights protection: Dignity, life and bodily integrity are among these objects of protection, as are liberties constitutive of modern constitutional orders, such as freedom of expression, of religion and belief, of assembly and of the press, or more recently established rights like rights to privacy and data protection. Human rights catalogues protect human equality and demand equal treatment through open-ended equality guarantees and prohibitions of discrimination on at least those grounds that traditionally form the reason for discriminatory treatment, including so-called race and ethnic origin, religion and belief, sex and gender, disability, sexual orientation and, more recently, protected grounds like age.⁴³ Human rights assure solidarity through social rights. In addition, developed codes include other rights derived from the general *telos* of human rights catalogues to serve and protect these core contents, such as political rights and the right to institutions and procedures relevant for the application of rights – for example, to a judicial system, to access to courts and to judicial review, among others. The *Universal Declaration* is a prime example of this.⁴⁴

⁴¹ Bundesverfassungsgericht (German Federal Constitutional Court [BVerfG]), Beschluss des Ersten Senats vom 24. März 2021, Judgement of March 24, 2021, 1 BvR 2656/18.

⁴² Cf. Bundesverfassung (Swiss Federal Constitution [BV]), SR 101, April 18, 1999, Art. 72 para. 3.

⁴³ Cf. e.g. the grounds protected by EU anti-discrimination law, Art. 21 CFR; Council of the European Union, *Council Directive 2000/43/EC*, OJ L 180, 07/19/2000, 22–26, June 29, 2000; Council of the European Union, *Council Directive 2000/78/EC*, OJ L 303, 12/02/2000, 16–22, November 27, 2000.

⁴⁴ Cf. e.g. for social rights, Arts. 22–27 UDHR; for political rights, Art. 21 UDHR; for institutional rights, Arts. 10 and 28 UDHR.

The backbone of human rights' legitimacy is the belief that human beings have worth, that they are not just expendable, ephemeral beings of no relevance compared to the values of a higher order of things. Human *dignity* is the term commonly used to denote this particular value status in international human rights law, in many constitutions and in political ethics.⁴⁵ Human rights are conceptualized as equal rights of human beings equal in worth: Their aim is to create the normatively safeguarded ability for every individual to lead a human life according to their own preferences in a just system of entitlements under conditions of preserved dignity of all. All of this is conceptualized in the terms of rights, as something that human beings can justly demand from others. This is the burden of consideration for others that human beings have to shoulder.

Rights can be an entirely formal category, without the claim to be legitimate and just. But this is not the case for human rights, which are underpinned by the idea that these rights are deeply justified.

As normative categories, human rights intend to affect agents' reasons for action by specifying what is permitted and obligatory and thus what agents ought to do. An important element of the idea of human rights is thus that they have motivational force and cause individual and collective social action.

1.6 CO-POSSIBILITY AND LIMITATIONS OF RIGHTS

One substantial question of importance in debates about the structure of human rights is whether human rights can conflict, and if so, how to resolve such conflicts. One argument states that rights are co-possible without such conflict,⁴⁶ not just because they have been forfeited or waived by one party. That such conflicts of rights do exist seems hard to deny, however. The (moral and legal) right of Jason to live by the commands of his faith may collide with the same (moral and legal) right of a neighbor – for example, when the latter is woken up by loud, religiously edifying music at two o'clock in the morning, played by the former with the aim of proselytizing the wicked unbelievers next door. The same is true for conflicts of rights with public interests, which in many cases are rooted in the rights of people. The owner of a landmark historic building's right to property can collide with the legitimate interest of a community (and arguably the community members' right to cultural heritage that is the reason for this interest) that it not be destroyed, despite the owner's wish to do so to erect something more profitable.⁴⁷

⁴⁵ Cf. Matthias Mahlmann, "Human Dignity and Autonomy in Modern Constitutional Orders," in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and Andrés Sajó (Oxford: Oxford University Press, 2012), 370 ff.

⁴⁶ Cf. Robert Nozick, *Anarchy, State, and Utopia* (Oxford and Malden, MA: Blackwell Publishing, 2008), 166: "Individual rights are co-possible: each person may exercise his rights as he chooses."

⁴⁷ For such considerations in moral philosophy, cf. Griffin, *On Human Rights*, 63 ff., who distinguishes rights/rights, rights/welfare and rights/justice conflicts, the latter concerning, for instance, conflicts of justice-based punishment and the rights of offenders. There are other

The structure of standard human rights law mirrors this state of affairs. The possibility of such collisions forms the basis of a universal feature of modern bills of rights: The formulation of the scope of the right is accompanied by a system of justified limitations of that right, most importantly because of the rights of others and public interests. Human rights catalogues therefore include either rules on such permissible limitations for any single human right⁴⁸ or an overarching horizontal clause on limitations.⁴⁹ If there are no explicit clauses of limitations, the possibility of implicit limitations is adduced from the purpose of a bill of rights: A workable bill of rights cannot reasonably be interpreted as establishing unlimited rights, apart from a specific exception to which we will return, because such rights are impossible in a community of equal persons.⁵⁰

In fact, a large bulk of highly significant legal debates are concerned with this area of the law. The problem in legal practice is not so much whether there is freedom of religion, for example, but how to solve conflicts between this right and other legitimate public concerns, including, of course, the freedom of religion of other rights-holders. The relevant legal question therefore is not whether there are such collisions, but whether there are perhaps *some* exceptional rights that are not open to limitations. One concrete example is the right not to suffer torture, inhuman or degrading treatment (Art. 3 ECHR), which is – in the interpretation of the European Court of Human Rights (ECtHR) – absolute.⁵¹ Another – at least according to standard interpretations of that norm – is the guarantee of human dignity in the German Basic Law.⁵² The same may hold for Art. 1 *Charter of Fundamental*

imaginable concerns (e.g. protection of animals or the environment) that are not reducible to a nonvacuous concept of welfare. Such considerations answer the worry, contra Rawlsian constructivism, that there is no way to determine an optimal set of co-possible rights because there are “multiple nondominated sets of copossible rights,” cf. Onora O’Neill, “Children’s Rights and Children’s Lives,” *Ethics* 98, no. 3 (1988): 445, 455. The answer lies in the principles governing the weighing and balancing of claims in concrete cases and the incremental construction of a concrete system of rights from the results of these exercises. This is the daily work of human rights lawyers (activists, public officials, advocates, judges, etc.).

⁴⁸ Cf. e.g. Art. 2 para. 2, Art. 8 para. 2, Art. 9 para. 2, Art. 10 para. 2, Art. 11 para. 1 ECHR; Art. 2 para. 1, Art. 2 para. 2 sent. 2, Art. 5 para. 2; Art. 5 para. 3 sent. 2, Art. 8 para. 2, Art. 10 para. 2, Art. 11 para. 2, Art. 12 para. 1 sent. 2, Art. 13 paras. 2–5, Art. 13 para. 7, Art. 14 para. 3 GG.

⁴⁹ Cf. Art. 29 para. 9 UDHR, Arts. 52–54 CFR, Art. 36 BV.

⁵⁰ Cf. e.g. on implicit limitations of rights, the standing case law of the German Federal Constitutional Court since BVerfG, Judgement of May 26, 1970, BVerfGE 28, 243 (261).

⁵¹ ECtHR, Gäfgen v Germany, Judgment of June 1, 2010, appl. no. 22978/05, para. 87: “The Court reiterates that Article 3 of the Convention enshrines one of the most fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 §2 even in the event of a public emergency threatening the life of the nation. The Court has confirmed that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned.”

⁵² Cf. Ingo von Münch and Philip Kunig, eds., *Grundgesetz-Kommentar, Band 1* (Munich: C. H. Beck, 2021), Art. 1 para. 17.

Rights of the European Union, which reproduces the wording of the dignity guarantee of the Basic Law.

Two (standard) distinctions may help us to understand more about the basic structure of rights: First, *prescriptive norms* such as “You shall not kill” have to be distinguished from evaluative propositions expressing axiological judgments, such as “Liberty is a supreme value” or, more concretely, “Freedom of speech is a central concern for any democratic society.” Second, *prima facie norms* have to be distinguished from *norms all things considered*. There is a *prima facie* right to freely exercise one’s religion, but there may be no right, all things considered, to exercise one’s religion by playing loud, edifying music at two o’clock in the morning to save one’s unrepentant neighbor from eternal damnation.

These differentiations help us to restate the (influential) distinction between *rules* and *principles* that identifies the former with all-or-nothing prescriptions, which are either applicable or not, and the latter with norms that can collide with other such norms, in which case their respective weight has to be considered to determine the principle to be applied.⁵³

Rules in this sense are thus – to use the terms outlined above – *prescriptive rules all things considered*. This is the reason why they apply in an all-or-nothing fashion. By contrast, the examples of principles in the rules-and-principles theory very often are stated as *prima facie prescriptive rules*, like “Nobody shall profit from their wrong.” A norm such as this is highly abstract and general and its content is thus unspecified, but it is still a prescriptive rule: It prescribes a certain human conduct in abstract and general normative terms.⁵⁴

The disadvantage of the rules-and-principles approach is that it does not account well for the difference between *prima facie* prescriptive rules and evaluative statements. “You shall not lie” is an example of a prescriptive rule with a *prima facie* character, as there are cases (all things considered) where one is permitted or even obliged to lie (e.g. to hide the whereabouts of a victim of domestic violence from the perpetrator). There is no reason to refrain from understanding “You shall not lie” as a rule and to prefer to regard it as a principle in the particular sense of the rules-and-principles approach just because it is not a rule all things considered. Rather, it is a prototype for a rule. For the same reason, it seems artificial to take a norm like Art. 3 ECHR, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment,” as something other than a prescriptive rule. If that is so, there is no

⁵³ Cf. Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1991), 22 ff.; Alexy, *A Theory of Constitutional Rights*, 44 ff.

⁵⁴ The logical form of such a prescriptive rule can be expressed, for instance, by $(x)(Ax \rightarrow OBx)$, where (x) means for all x ; x ranges over addressees of a rule, “ \rightarrow ” is material implication and reads as “if . . . then,” O is the deontic operator for “obligatory” and A and B are descriptive predicates – for example, Ax meaning “ x is a human being” and OBx meaning “ x ought to help others”; of an evaluative statement about any object of evaluation p using the (evaluative) predicate G “(morally) good” by Gp .

structural difference between these rules and the norm “No one shall profit from their wrong” mentioned above and thus no reason to call it a “principle.”

Prescriptive rules regularly have an axiological kernel – for example, that it is unjust to inflict harm and reap advantages from the harm caused as a reward or that torture is unjustifiable. For an analysis of rights, rescuing this axiological content from analytical oblivion can prove useful: Judgments about the value of certain goods – say, free speech – are after all part and parcel of any moral or legal discourse on human rights. Identifying them properly is the precondition for their justification – or critique. And in this respect, the rules-and-principles account suffers from a crucial deficit: Because this approach couches both rules and principles in terms of prescriptive rules – all things considered in the former case, *prima facie* in the latter – the existence and importance of evaluative statements may be overlooked, to the detriment of analytical precision. The distinction between prescriptive rules (*prima facie* and all things considered) and evaluative statements therefore offers analytical tools that are preferable to the rules-and-principles approach and will form the basis of the following discussion.⁵⁵

How does the outlined legal practice of human rights fit with these findings? A three-step process forms the core of this practice, though there are many differences in particular legal systems: first, the determination of the scope of a right; second, the ascertainment of an interference; and third, the justification of the interference, the latter today in many jurisdictions including a proportionality analysis, part of which is a weighing and balancing exercise.

This practice is in line with the analytical approach proposed here, which distinguishes between *prima facie* and all things considered prescriptive rules and axiological propositions: The structure of human rights law – rights with a specific though abstract scope of protection and a regime of justifications – mirrors the step-by-step process of arriving from different *prima facie* norms at a norm all things considered, which finally enables a court or a state official to determine whether a certain act or omission has violated a right (all things considered) or not.

Value judgments can help to render the scope of rights more concrete: The perception that control over personal data is central to personal autonomy, for instance, can lead to an interpretation of privacy rights that gives them a distinct protective scope – for example, including (under certain circumstances) a right to be forgotten. In addition, such value judgments play an important role in weighing and balancing exercises, generating norms all things considered – for instance, by determining the weight of privacy (including a right to be forgotten) in relation to other rights such as economic freedoms in a concrete case.⁵⁶

⁵⁵ It should be noted that in Alexy’s restatement of the approach, the distinction of rules and principles ultimately disappears as both enjoy only a *prima facie* character, cf. Alexy, *A Theory of Fundamental Rights*, 57 ff. The reason for this is that one cannot state all exceptions to a rule, which remains defeasible and is thus not categorically different from a principle.

⁵⁶ CJEU, Case C-131/12, Judgement of May 13, 2014, EU:C:2014:317, para. 92 ff.

Moral reflection about rights will take similar reflective steps if considering a moral right to privacy, for instance. It will try to define the content (or scope) of this right, think about possible kinds of interference with it and discuss its limits and thus the question of which interferences may be justified – for example, in the name of the moral right to economic self-determination (if such a moral right is assumed to exist). In such reflections, the distinctions between prescriptive rules and axiological judgments, between *prima facie* norms and norms all things considered, evidently will play a similar role as in legal arguments.

1.7 RIGHTS AND THE NATURE OF OBLIGATIONS

The nature of obligations has been controversially discussed in the current theory of human rights. This discussion takes its lead from a distinction from the Natural Law tradition that was restated prominently by Kant (who was, however, by no means its author): the distinction between perfect and imperfect obligations. According to Kant, there are perfect and imperfect obligations, both to oneself and to others. Perfect obligations do not allow for considerations of personal inclinations and interests and thus are fully specified, while imperfect obligations allow for such considerations and thus are not fully specified.⁵⁷ Another central (and, for the discussion, often decisive) source is J. S. Mill, who explicitly argued that imperfect duties do not create correlative claims.⁵⁸ Other interesting accounts with different conclusions attract less attention.⁵⁹

Some theorists argue that, in light of this approach, certain kinds of human rights – namely social rights – make no sense, whereas others argue that it is not the idea of social rights but this approach to obligations that is flawed.⁶⁰

⁵⁷ Immanuel Kant, *Metaphysik der Sitten, Akademie Ausgabe*, Vol. VI (Berlin: Georg Reimer, 1914), 390 ff.

⁵⁸ John Stuart Mill, “Utilitarianism,” in *The Collected Works of John Stuart Mill, Vol. X – Essays on Ethics, Religion, and Society*, ed. John M. Robson (Toronto: University of Toronto Press and London: Routledge, 1985), 247.

⁵⁹ Cf. for example for a differentiated discussion of the distinction between perfect and imperfect obligations and rights in a work of considerable importance and much admired by Kant, Moses Mendelssohn, “Jerusalem oder über religiöse Macht und Judentum,” in *Moses Mendelssohn, Gesammelte Schriften. Jubiläumsausgabe, Vol. 8: Schriften zum Judentum II*, ed. Alexander Altmann (Stuttgart and Bad Cannstatt: Frommann-Holzboog, 1983), 99–204, 115 ff.

⁶⁰ Cf. O’Neill, “Children’s Rights”, 445, 447. O’Neill’s argument runs as follows: There are three kinds of obligations: (1) Universal, perfect obligations owed by everybody to everybody else, which specify completely not merely who is bound by the obligation, but to whom the obligation is owed. If such an obligation is fundamental, because they are not derived from any other basic ethical claim, “then the rights that correspond to it are also fundamental rights.” (2) Special, perfect obligations, which are perfect obligations owed to specific persons – for instance, by parents to their children. (3) Not universal, imperfect obligations, which are obligations owed to some but are not fully specified – for instance, duties of charity, the “ordinary acts of kindness and consideration,” O’Neill, “Children’s Rights”, 450. Imperfect obligations are a third category between perfect obligations implying rights and supererogatory

To assess the merits of this debate, it is useful to note that this distinction can be interpreted as being in tune with the structural analysis outlined above: In Kant's case, the way to identify perfect obligations (or rights) is to probe any proposition about possibly existing obligations (and rights) with Kant's "testing device,"⁶¹ the categorical imperative in its formal and material sense. The proposition would pass this test if it implied neither a contradiction nor a maxim that a person could not will to apply universally nor treated a person merely as a means to an end. If the respective norm fulfills these conditions, the determined concrete normative position is – in Kantian terms – a perfect obligation directed towards others.⁶² For instance, to take a contemporary example, the duty to respect the right to be forgotten is a perfect obligation if it passes this test (perhaps under some qualifying conditions). The same holds for the (perfect) right to be forgotten itself. These concrete normative positions (the right to be forgotten and the duty to respect it) would be definite normative positions and thus rights and duties all things considered in the terminology adopted here.

The same result can be achieved by the step-by-step approach to determining the content of *prima facie* rights by defining the scope of the right and identifying the interferences and possible justifications for the interferences in concrete cases. This approach has the advantage of clarifying the sometimes-conflicting norms that have to be included in the normative deliberation, in particular the rights of others, and it facilitates the transparent and differentiated discussion of these rights.⁶³ The normative point of this process and a "testing device" such as the categorical imperative are congruent, however. Both aim to determine a universally justified order of rights.

What about moral obligations to help others and their legal siblings in the form of certain social rights? According to Kant, the duty-bearers enjoys discretion concerning the manner in which to discharge their obligation in this respect, because in this case considerations of their own inclinations are admissible. This does not mean that the interpretation of these obligations by the concrete actors in question need not be reconcilable with the categorical imperative, nor that the duty-bearers could reasonably conclude that there are no such obligations at all.⁶⁴ On the contrary, the actors

acts. O'Neill derives positive (social) rights from the institutionalization of imperfect fundamental obligations, *ibid.* For more critique, see O'Neill, "The Dark Side of Human Rights," 427 ff. (social rights create overly complex regulatory regimes stifling initiative and fostering a culture of self-pity and blame). For a defense of social rights, cf. for instance Griffin, *On Human Rights*, 96 ff.; Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 164 ff.

⁶¹ Cf. John Rawls, *Lectures on the History of Moral Philosophy* (Cambridge, MA: Harvard University Press, 2000), 162 ff.

⁶² And thus a "Pflicht des Rechts," Kant, *Metaphysik der Sitten*, 390.

⁶³ Cf. on alternative views in fundamental rights doctrine, building exceptions into the elements of the right, Mahlmann, *Grundrechtstheorie*, 366; for a defense of the related doctrine of "specificationism," John F. K. Oberdiek, "Specifying Rights Out of Necessity," *Oxford Journal of Legal Studies* 28, no. 1 (2008): 127 ff.

⁶⁴ Kant, *Metaphysik der Sitten*, 390.

are morally obliged to do something in this respect. Consequently, it seems to follow that other persons have the claim that the duty-bearers discharges this obligation in some kind of meaningful way, although the addressees of the obligation do not, of course, have a right to supererogatory action.⁶⁵ Such claims to others' action can become well-defined and concrete all things considered: If children fall into a pool and you can save them at the expense of wet clothes, you are obliged to save them, and the children have the right that you do exactly that. A claim to the proper exercise of discretion about a certain kind of action, sometimes even narrowed down to an obligation to act in one well-defined way (getting the child out of the water), is an entirely well-defined concept – one that is incorporated, by the way, in much detail into the legal practice of several countries' administrative laws.⁶⁶

What does this mean for the understanding of social rights? Is the traditional distinction between different forms of obligations at work here at odds with the idea of social rights as some maintain? Are such rights merely aspirational “manifesto rights?”⁶⁷ Given what just has been said about the nature of obligations towards others and the claims arising from them in Kant's theory and the tradition of which it is part, this is far from obvious. A central issue here is claimability as a precondition for the existence of rights. Claimability implies that there is an identified (or at least identifiable) addressee of a right who is under the duty that the right creates. The existence of an addressee can have a moral and an institutionalized legal meaning. Given that duties are the necessary correlative of claims, there is indeed no right without an addressee in this sense. The specification of such an addressee can vary in terms of concreteness, however. Rights can address specifically identified or generically determined actors. Negative rights are often straightforward cases in this respect: Freedom of speech is a claimable right against a public authority, for instance. Positive rights are more difficult: If Serena collapses on the high street, she has a right to be helped by any bystander or anyone else in a position to help. This takes on practical importance in the debate about the existence of social rights. Here, too, the case can be straightforward,

⁶⁵ Kant's remarks about this are ambiguous. On the one hand, he emphasizes that imperfect obligations do not create the permission for exceptions to the demands of duty (which seems to imply claims), Kant, *Metaphysik der Sitten*, 390, but he argues that lack of respect violates a claim (*Anspruch*) of others, whereas violations of duties of love (*Liebespflichten*) show a lack of virtue (*Untugend*), Kant, *Metaphysik der Sitten*, 464. That there are no claims to supererogatory acts is uncontroversial.

⁶⁶ Cf. for instance *Verwaltungsverfahrensgesetz* (German Law on Administrative Procedure [VwVfG]), May 25, 1976, § 40 and the doctrine of control of administrative discretion, Hartmut Mauer and Christian Waldhoff, *Allgemeines Verwaltungsrecht* (Munich: C. H. Beck, 2020), 139 ff. For Switzerland, *Verwaltungsverfahrensgesetz* (Swiss Law on Administrative Procedure [VwVG]), SR 172.021, December 20, 1968, Art. 49; Ulrich Häfelin, Georg Müller and Felix Uhlmann, *Allgemeines Verwaltungsrecht*, 8th edition (Zürich: Dike, 2020), 237 ff.

⁶⁷ Joel Feinberg and Jan Narveson, “The Nature and Value of Rights,” *The Journal of Value Inquiry* 4 (1970): 243, 255.

when legal social rights are addressed to a public authority, demanding some kind of identifiable action, although the public authority often enjoys discretion on how to discharge its responsibility.⁶⁸ In the political and moral spheres, the addressees of such rights are often generically identified. It makes sense to say that human beings suffering from hunger in the Global South have a moral right to international solidarity, though the addressees of this right are only vaguely defined. A reasonable interpretation of such a right implies a duty of relevant public authorities, both national and international, and of individual citizens – from financial donations to relief organizations to political efforts to improve the economic architecture of the international community.⁶⁹ These may be somewhat amorphous rights and duties, but they are still reasonably called such because they demand – entirely in line with Kant’s argument – action and identify violations of these rights, such as a total lack of action and concern for the plight of the poor. Such rights thus are not normatively empty or merely vaguely aspirational, as they imply identifiable normative commands and are felt to constitute such commands by many people around the world, sometimes even strongly so.⁷⁰

Even if this were not the case, there is no reason to redefine the concept of rights to accommodate social rights – they are rights if their nature can be properly understood in the terms of the features of rights outlined above (as argued here); otherwise, they are not.

1.8 THE PEREMPTORY NATURE OF RIGHTS

These findings are helpful in a further respect, namely in understanding the sense in which one can speak of rights as trumps, to use a popular

⁶⁸ In the debates about the right to water and the nature of states’ obligations, it is debated in particular whether the right demands reasonable efforts, maximum use of available resources and/or guarantee of a minimum core of water access, cf. e.g. South African Constitutional Court, *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (October 8, 2009), para. 9 ff., finding that a minimum provision (of twenty liters of water per person) met the standard of reasonableness derived from the Constitution of the Republic of South Africa, December 10, 1996, Art. 27 para. 1b; UN Human Rights Council, *Progressive Realization of the Human Rights to Water and Sanitation: Report of the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation*, A/HRC/45/10, July 8, 2020.

⁶⁹ Cf. on the question whether claimability is an existence condition of a right, Griffin, *On Human Rights*, 110: “The acceptable requirement of claimability is that the duty-bearer be specifiable, not that they exist. It is possible, in certain states of the world, for the duty to fall on specifiable bearers but for no one actually to meet the specification. Even then, there would still be a point in publicly announcing and justifying the description of the duty-bearer, if there might eventually be some.”

⁷⁰ There is nothing strange about thinking that everybody has a claim to “ordinary acts of kindness and consideration,” in particular children, to use O’Neill’s example (n. 57), though the addressees have discretion as to how they realize these duties. For a defense of the view that imperfect obligations imply duties, cf. for instance Amartya Sen, “Elements of a Theory of Human Rights,” *Philosophy & Public Affairs* 32, no. 4 (2004): 338 ff.

metaphor – that is, as normative positions that decisively exclude other normative considerations.⁷¹

In light of what has been said earlier in this chapter, rights are trumps in this sense in concrete cases if there is a moral or legal right with a specific content and the weighing and balancing of this right with other rights or normatively relevant considerations and the values implied lead to the conclusion that this right takes precedence over these other normative considerations in the concrete case at hand. This includes arguments concerning rights of others, the common good or social welfare as a possible source of limitations of rights.

The value of a human person and the rights attached to this value form a central concern in this context. After all, one foundational tenet of human rights is a person's value, their intrinsic worth, which means that the individual cannot be disregarded in the context of the justification of particular rights and the concretization of their content in the specific case at hand, not the least in weighing and balancing exercises.⁷² As a result, there are certain protected individual goods where numbers do not count.

This can be illustrated by an example that is probably uncontroversial because it concerns the socially irrelevant issue of personal taste: Even if 100,000 people find a tie with a Swiss cow pattern abominable, this gives them no (moral, let alone legal) right to forbid someone else who does like it to wear this tie. There is no right not to be exposed to bad taste, although questions may arise even in this respect – for instance, if the cow were a holy animal in some belief system and a certain religious outlook resents their depiction on fashion items. Other standard examples exemplify the same point on a more serious level: Even saving the lives of five patients does not justify cutting open Peter, who is another healthy patient, to use his organs for this purpose.⁷³ The ultimate justification of this prohibition to use others as organ banks depends on the justification of the supreme value of individual human beings or, in contemporary human rights language, their dignity, a matter of significant difficulty, which will be discussed in Part II as part of our attempt to provide a plausible justificatory theory of human rights.

It may be necessary to qualify this principle for some extreme emergency situations, and not only from the perspective of consequentialism, but also from the point

⁷¹ Cf. Dworkin, *Taking Rights Seriously*, XI; Griffin, *On Human Rights*, 20. Nozick, *Anarchy, State and Utopia*, 28, argues for rights as “side constraints.”

⁷² This is a traditional critique of utilitarianism, which is no “respector of persons,” Hart, *Essays on Bentham*, 97f.; Rawls, *A Theory of Justice*, 3.

⁷³ Or, to use J. S. Mill's famous formulation: “If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind,” John Stuart Mill, “On Liberty,” in *The Collected Works of John Stuart Mill, Vol. XVIII – Essays on Politics and Society Part I*, ed. John M. Robson (Toronto: University of Toronto Press and London: Routledge, 2008), 229, which leads to interesting questions about the complex normative content of Mill's utilitarianism.

of view of (threshold) deontology. Winning the war against Nazi Germany most probably involved acts in which people with no responsibility for the unleashed aggression and crimes of Nazi Germany were killed (say, a resistance fighter in a bombing raid against a German city). This does not mean that there was any morally preferable alternative to the military defeat of Nazi Germany. There is no hidden contradiction here between the normative principles implied in this account, in particular the worth of individual persons. Such emergency situations are situated on a very particular plane and involve the question of how to act when the available path means doing not good, but simply as little harm as possible, given circumstances in which only tragic choices are on offer.

1.9 GROUP RIGHTS

The matter of group rights is another question relevant for an analytical theory of rights. Here, the background consists not only of conceptual questions, but also of intrinsically political issues concerning the decent and just treatment of minorities and other collective entities regarded as embodying cultures or nations.

Do groups have rights in more than a metaphorical sense? It is useful to remember that artificial entities called “legal persons” form a standard tool used by legal systems to organize a normative order. These entities can enjoy rights, a fact that is uncontroversial. There has been a long debate on what these entities are, in particular whether they are real or fictitious. However, they serve a well-defined practical purpose. Such legal persons can be formed of large groups of persons, such as the legal person of a state or the legal person of the international organization called the EU. This tool offers many ways of accommodating the need to include certain groups of people in a wider political order, allowing, for instance, some kind of self-rule that considerably reduces the practical problems posed by group rights.

Groups as such, however, are ultimately not real entities beyond the individuals that form them at any given moment in time. If all lovers of rowing (regrettably) switched their interest to darts, there would be no group of rowing enthusiasts as such left. There are social structures with a certain degree of permanence that are usually thought to stay unchanged even if the members change, such as a rowing club or the Swiss Army. These entities are, however, dependent on the continuing social actions of their members that create and maintain them. If the members of the rowing club decide to dissolve the club, no right of the club is violated – it simply ceases to exist, both as a legal entity and as a *fait social*, to use Durkheim’s terminology. The same would hold for the Swiss Army if the Swiss citizens decided they would be better off without it. This is true for any group, including cultures and nations. If their members give up certain cultures – for instance, the militaristic culture of pre-1945 Germany (with good reason in this case) – no right of a group as such is interfered with. What may remain are abstract ideas, like the “essence of

rowing” or the “content of pre-1945 German militarism,” but no entity that reasonably could be regarded as possessing rights. Rights, therefore, are bound to individuals. Group rights that are more than political rhetoric or slogans are derivative constructs that serve, if they are to be legitimate, the rights of individual persons to autonomous self-determination, in particular through and by a body politic and other forms of meaningful representation, and to the freedom to search for self-fulfillment in joint activities with others.⁷⁴ The politics behind the debate about the right to self-determination, which features prominently in international human rights law, illustrate the importance and controversial nature of these analytical findings. One core question is whether the right to self-determination is a tool to realize the rights of individuals or is independent of this purpose.⁷⁵ In particular, this point becomes relevant if the rights of individuals collide with (supposed) group rights – for example, the rights of women with group rights enforcing patriarchal group traditions. It strengthens the case of the rights of the individual considerably, because if group rights – properly understood as the rights of a plurality of persons – themselves have the purpose of bolstering individual rights, then the rights of groups as such cannot be turned into political weapons against the rights of individuals. We are simply moving onto the familiar terrain of conflicting rights and the necessity of their reconciliation.

1.10 ETHICS, LEGAL HERMENEUTICS AND JUSTIFICATION

A final remark on the relation of moral rights and legal rights: Kelsen famously attempted to rid the law of nonlegal influences, particularly ethical ones, not least

⁷⁴ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 207 ff., argues that a single person cannot have a right to national self-determination, while a specific group of persons can. He, too, argues (along the lines of his interest theory of rights, which we will discuss in detail in Part II) that individual interests motivate this right. These interests are interests of individuals as members of a group concerning public goods – for instance, in a shared culture. Only as the interests of individuals in a group do these interests have sufficient weight to impose duties on others. Cf. for related arguments Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995), ch. 3, among many others. For some critical remarks, cf. for instance Griffin, *On Human Rights*, 256 ff. There are many goods that can only be enjoyed in a group because they only emerge as a group activity – for instance, rowing an eight in a boat race. It is obvious that one person does not have the right to row an eight because it depends on others who wish to do so, too. This does not imply, however, that the “eight” as such enjoys rights. Similarly, a single individual has no right to national self-determination, only a plurality of persons forming the respective body politic. The fact that there are goods that are the products of group activities is no argument for the existence of rights of these groups in their own right. Rather, it is an (important) argument for those individual rights that enable human beings to form such groups and engage in activities with others (e.g. to row an eight) and, in the political sphere, of a plurality of persons to decide their own fate themselves in political processes, instead of being dominated by colonial powers, for example. Similar considerations hold for other important concerns, such as the preservation of indigenous cultural heritage, languages, etc.

⁷⁵ Cf. Chapter 2.

because ethics are regarded as intrinsically contentious, subjective and thus detrimental to the law's political goal of establishing an authoritative order based – in a democracy – on common, not subjective grounds.⁷⁶ This attempt cannot succeed. A realistic legal hermeneutic teaches us that legal rights are not wholly independent of the understanding of moral rights.⁷⁷ It will hardly be possible to delineate the scope of many important fundamental rights without recourse to an elementary account of what the particular right in question and fundamental rights in general are about. Open-textured norms such as human rights require interpretation and concretization. Interpretation will necessarily – whether explicitly or implicitly, knowingly or unknowingly – draw upon such more or less reflexive theories of fundamental rights that have an ethical dimension, among others.⁷⁸ Whatever one thinks of the jurisprudence of the ECtHR on the absolute prohibition of torture and its interpretation of Art. 3 ECHR in this respect, the argument for or against this understanding will include, whether one wants it to or not, intricate ethical arguments about the absolute or relative value of human life, the existence and scope of human dignity and the competing importance of other values – for example, the rights of third parties in cases where torture is used not for repressive means but to prevent harm to other persons, as in the leading case of the ECtHR on the matter.⁷⁹ None of this is stated in the positive law, but it is the result of its interpretation in the light of rich normative background assumptions.

In addition, and crucially, a catalogue of fundamental rights cannot be justified without ethical considerations, as these are the ultimate sources of normative justification. There is no bill of human rights that does not claim the justness of the rights it guarantees. Consequently, there can be no escape from ethics if we want to engage seriously with the law, and with human rights law in particular.

In light of these observations, it does not seem entirely outlandish to assume that a background theory of human rights is very useful for the project of interpreting existing human rights, determining their meaning in greater detail in the face of old and new challenges, developing the current ethics and law of human rights, evaluating their relation to any existing body of social rules, including the

⁷⁶ Hans Kelsen, *Reine Rechtslehre* (Vienna: Deuticke, 1960). On the discussions on exclusive and inclusive positivists, cf. Wilfrid J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994); Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2001); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 49 f.

⁷⁷ Cf. Matthias Mahlmann, *Grundrechtstheorie*; Alexy, *A Theory of Constitutional Rights*. Dworkin recently has argued that law should be conceptualized as a subbranch of (political) morality, cf. Dworkin, *Justice for Hedgehogs*, 405.

⁷⁸ Cf. Matthias Mahlmann, "The Dictatorship of the Obscure? Values and the Secular Adjudication of Fundamental Rights," in *Constitutional Topography: Values and Constitutions*, eds. András Sajó and Renáta Uitz (The Hague: Eleven International Publishing, 2010), 343 ff.

⁷⁹ ECtHR, *Gäfgen v Germany*, Judgment of June 1, 2010, appl. no. 22978/05.

heterogenous set of norms referred to as ‘traditional values’,⁸⁰ critically assessing the status quo and addressing the important question of whether all rights that are protected as human rights in law are in fact legitimately regarded as human rights.⁸¹ None of this calls the distinction of law and morality into question: Legal reflection and court decisions are not constraint-free intellectual enterprises. Legal doctrine is developed on the basis of a given body of positive law with the aim of influencing or even determining the action of norm-applying authorities, in particular authoritative court decisions. These decisions themselves, more or less openly discursive depending on the legal system, interpret the law of the land on the basis of positive law as it stands and are bound by said positive law. Not every well-justified normative position of human rights theory can therefore be interpreted into the body of human rights law, given its fragmented and limited scope.

These remarks are cursory, of course, and have left out many qualifications of rights, especially those of developed legal systems. But they suffice for the limited purpose at hand.

1.11 WHAT ARE WE TALKING ABOUT?

To sum up: Human rights are a subclass of subjective or claim rights. They are constituted by a set of normative incidents: claims, duties, privileges and no-rights. Claims, and duties, privileges and no-rights are necessarily correlated. Powers can form part of the content of these rights, which may protect the holder through immunities, too. The rights-holders are either all human beings or a subclass of all

⁸⁰ Cf. on this debate, including the Human Rights Council resolutions on human rights and traditional values, Christopher McCrudden, “Human Rights and Traditional Values,” in *Law’s Ethical, Global and Theoretical Contexts*, eds. Upendra Baxi, Christopher McCrudden and Abdul Paliwala (Cambridge: Cambridge University Press, 2015), 38–72, drawing attention to the ambiguous nature of what is discussed as ‘traditional values’ – they can violate human rights or offer new progressive interpretations.

⁸¹ Cf. e.g. Griffin, *On Human Rights*, 26: “[H]aving agreement only on a list of human rights, and not on any reasons behind it, has major drawbacks. A greater measure of convergence on the justification of the list might produce more wholehearted promotion of human rights, fewer disagreement over their content, fewer disputes about priorities between them, and more rational and more uniform resolution of their conflicts – all much to be desired.” Similarly, Samantha Besson, “Justifications,” in *International Human Rights Law*, 3rd edition, eds. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2018), 23 f. On the view that the problem of indeterminacy shows the ultimately political nature of legal decision-making in the framework of structural biases, see Marti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, reissue with a new epilogue (Cambridge: Cambridge University Press, 2005), 67, 601. Koskeniemi refers, however, to the importance of inclusion and rights – evidently itself a normative stance with a claim to justification, cf. Marti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 516: “International law’s energy and hope lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded.”

persons – for instance, the citizens of a state. In the former case, they are human rights in the narrow, proper sense. The term “human rights” understood in a wider sense is used to designate both cases, as is the term “fundamental rights.” In the following, it will be clear from the context which class of rights the term “human rights” refers to.

Human rights can be moral or legal. In both cases, they can be addressed to private persons, legal entities and public authorities. Their basic content is related to a limited class of goods, in particular life, bodily integrity, freedom, equality and nondiscrimination, access to the material provisions necessary for human existence and respect for human worth. A useful structural theory of rights distinguishes between *prima facie* rights and rights all things considered as a subclass of general and abstract prescriptive rules on the one hand and axiological statements ascertaining the value of something (e.g. of freedom) on the other. The current legal structure of human rights law mirrors this distinction. Rights are trumps if – all things considered – they invest a rights-holder with a definite claim to something and impose a corresponding duty on the addressee. The traditional distinction between perfect and imperfect obligations chimes with this analysis and does not provide any argument to deny the existence of social rights: There is no reason stemming from the analysis of the structure of rights – including the claimability of rights – that would speak against understanding social rights as proper rights. In particular, social rights create identifiable meaningful duties of the addressees. Group rights create no structurally different class of human rights as they are best understood as being reducible to the rights of individuals. Moral and legal rights need to be distinguished. The theory of moral rights can, however, enrich the interpretation of human rights and is necessary for their justification. The separation of ethics and law consequently does not mean that the ethical understanding of rights is irrelevant for the legal theory of rights.