

## A Castle of Sand?

Man darf nicht vergessen, daß am Anfang dieses Krieges, der nicht 1939, sondern 1933 begann, die Abschaffung der Menschenrechte stand. “Die Menschenrechte sind abgeschafft”, verkündete damals Dr. Goebbels im Berliner Sportpalast, und zehntausend blöde arme Teufel brüllten ihren kläglich-widersinnigen Beifall. Es war eine geschichtliche Proklamation, die prinzipielle Grundlage für alles, was Nazi-Deutschland heute den Völkern, einschließlich des eignen Volkes, zufügt . . .<sup>1</sup>

Thomas Mann, *BBC radio address*, January 1942

Ob die anderen Völker in Wohlstand leben oder ob sie verrecken vor Hunger, das interessiert mich nur soweit, als wir sie als Sklaven für unsere Kultur brauchen, anders interessiert mich das nicht. Ob bei dem Bau eines Panzergrabens 10.000 russische Weiber an Entkräftung umfallen oder nicht, interessiert mich nur insoweit, als der Panzergraben für Deutschland fertig wird. . . . Das ist das, was ich dieser SS einimpfen möchte und – wie ich glaube – eingepflicht habe, als eines der heiligsten Gesetze der Zukunft: Unsere Sorge, unsere Pflicht, ist unser Volk und unser Blut; Dafür haben wir zu sorgen und zu denken, zu arbeiten und zu kämpfen, und für nichts anderes. Alles andere kann uns gleichgültig sein.<sup>2</sup>

Heinrich Himmler, *Posener Rede*, 4 October 1943

<sup>1</sup> “One must not forget that the abolishment of human rights marked the beginning of the war, which started not 1939 but 1933. ‘Human rights are abolished,’ proclaimed Dr. Goebbels in the Berlin Sportpalast, and ten thousand poor stupid devils roared their deplorably absurd approval. It was a historical proclamation, the fundamental basis for all that Nazi Germany is now doing to the peoples, including its own people” (translation M. Hiley).

<sup>2</sup> “Whether the other *Völker* are prosperous or starving to death only interests me to the extent that we require them as slaves for our culture, it does not interest me in any other way. Whether 10,000 Russian women keel over from exhaustion or not when building an antitank ditch interests me only insofar as the antitank ditch is completed for Germany. . . . This is what I want to inculcate and – I believe – have inculcated in this SS, as one of the most sacred laws of the future: our concern, our duty is our *Volk* and our blood. That is what we must care, think, work, and fight for, and nothing else. Nothing else need matter to us” (translation M. Hiley).

By every civilized and peaceful method we must strive for the rights which the world accords to men . . .

W. E. B. Du Bois, *The Soul of Black Folk*

## 5.1 THE SOURCES OF HUMAN GOODS

### 5.1.1 *No Foothold for Rights?*

Our discussion of affirmative theories of human rights has clarified many of the aspects that a theory of the justification of human rights needs to address. Our review has shown that, in one way or another, the theory of human rights needs to determine the sources of the goods to be protected by human rights, outline the political theory of human rights and identify the normative principles that generate human rights. Our initial assessment to this effect in the last chapter proved to be correct. Accordingly, we will address these topics – goods protected, political theory, normative principles – each in turn. The question to be dealt with first is: Which goods are justifiably protected by the normative instrument of human rights?

The goods that rights protect are defined by the material scope of rights. This seems clear enough at first view: The right to free speech protects the freedom to express oneself as one pleases, freedom of religion the ability to pursue one's own spiritual path in both thought and deed. However, it is important to note that such abstract definitions of the scope of rights leave many questions unanswered. The practice of fundamental rights law illustrates this vividly: The *prima facie* scope of these rights already is often unclear, failing to determine, for example, whether hate speech is part of the content protected by free speech rights or not. The different legal traditions are divided regarding this issue, as the different approaches in Europe and the USA show. In addition, the meaning of rights and thus the definition of the goods protected are not set in stone; they are shaped and refined daily in the sphere of law by the work of thousands of lawyers, by court decisions, by legislative acts and by public deliberation about new normative challenges.

In this context, it should be noted that if we seek to understand the full meaning of a right in a given legal framework, it is not enough just to look at the scope of this right as guaranteed in the respective catalogue of rights. The *system of limitations* is important as well. For instance, in German constitutional law there is no right derived from freedom of faith (which is a human right in the technical sense) not to be exposed to religious symbols of others – an important matter where the constitutionality of wearing, for example, a hijab as a teacher in state schools is concerned.<sup>3</sup> Only in this concrete sense is freedom of religion protected all things considered.

<sup>3</sup> Cf. BVerfG, Judgement of January 27, 2015, BVerfGE 138, 296.

To take another example illustrating why limitations matter greatly for the scope of rights: In some systems, there is a residual right protecting any kind of exercise of human freedom, which in German constitutional law includes riding one's horse in a forest, to use this famous case from German law.<sup>4</sup> However, this does not mean that any kind of use of freedom is protected – quite to the contrary, as interferences with this right are easily justified by reasonable considerations of common goods or rights of others. Riding on prohibited paths is not a trump of German equestrians.

Including a right in a human rights catalogue thus is just one step along the road determining this right's scope of protection in concrete cases. A further crucial step is the system of limitations. In order to determine the proper content of such a system of limitations, it is necessary to consider the weight of other rights and other concerns. These considerations themselves need to be informed by criteria determining the importance of the rights and common concerns at issue for human life and society. The theory of goods is therefore relevant when determining the proper limitations of human rights, too.

The same kind of issues can arise in moral reflection if we turn our attention to concrete questions of human rights protection.

Leaving these necessary qualifications aside for a moment, it is easy to identify some core elements of what human rights protect. In particular, we said, these include the inalienable worth of human beings (called their dignity), their physical and mental integrity, a set of specific liberties, equal treatment and – controversially – the means for their physical subsistence and, more ambitiously, the material preconditions for a dignified life secured by social rights.

Is this a good start to a list of goods worthy of protection for *all* human beings, irrespective of gender, cultural and social background, skin color and ethnic origin, age, religion or belief, sexual orientation or any other of the myriad differences between human beings? Is it a useful first step towards a more detailed account of what is justifiably protected by human rights? How can we cross the apparent gap between these abstract goods and the concrete questions to be answered in law and applied ethics? What are the deeper reasons for including these goods in the human rights catalogues of greatest practical relevance (with the exception of social rights, which are more selectively found in positive law)? How culturally and historically relative are these concerns? How malleable are human beings in this respect? Can the reasons for including certain goods in human rights catalogues help to solve the problems posed by recent approaches seeking to expand the reach of human rights? What about privacy in the digital age, for instance? To take a concrete example: The right to be forgotten – does this make sense?<sup>5</sup>

<sup>4</sup> Cf. BVerfG, Judgement of June 6, 1989, BVerfGE 80, 137.

<sup>5</sup> Cf. CJEU, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Judgement of May 13, 2014, C-131/12, and from national constitutional law BVerfGE, Judgement of November 6, 2019, BVerfGE 152, 152 ff.

One promising way to determine how a human good becomes a suitable object of protection by human rights is to look first at clear cases. Why is there little controversy about certain liberties – for instance, as suitable objects of protection? One interesting fact about the drafting of the *Universal Declaration* is that a whole range of rights were pretty much beyond doubt. The ultimate abstentions did not stem from opposition to the whole rights catalogue. They were motivated instead by the nonacceptance of certain rights, not least freedom of religion, not of human rights as such.

The freedom of the person from unjustified detention, for example, is a classical human right – in the words of Art. 9 *Universal Declaration*, the right not to “be subjected to arbitrary arrest, detention or exile.” This right is an archetypal element of the development of rights and its foundational documents such as the *Magna Carta*. The human good protected is personal liberty, the freedom not to have to stay in a certain confined place due to incarceration or being banned from a certain territory if there is no sufficient reason for this. In addition, this right protects related goods of which an agent is deprived if in custody or exile. It protects a central precondition of the many uses of liberty and the free development of the individual. The question to be answered in more concrete terms is, then: How are we to justify the selection of certain goods as suitable for protection by human rights without succumbing to cultural bias and parochial perspectives?

The central rationale of human rights is to protect those goods that are of particular, even existential importance for all human beings. This implies that a good such as not being subjected to arbitrary arrest does not protect mere personal preferences that vary from person to person. This is not a theoretically innocent move but is based on very substantial assumptions: Human rights presuppose that there are certain objects that are valuable to *all* human beings. Consequently, the goods that are candidates for protection by human rights somehow need to be plausibly related to what is intrinsically human and transcend merely adventitious needs dependent on individual idiosyncrasies. In this first sense, they are objective.<sup>6</sup> Such goods also are objective in the second sense that they are regarded as worthy of protection even if an individual disagrees: Freedom from arbitrary arrest is justifiably also protected for those who deny its value – for example, the advocates of an authoritarian police state. These assumptions only make sense if the further precondition that these goods must be of approximately equal value for all human beings is met: Freedom from arbitrary arrest must mean roughly the same for person A as for person B. Importantly, there is a diachronic element, too: Human rights attempt to capture more than the fads of a particular group at a certain transient moment in time. They aspire to be relevant for long stretches of time, if not in detail, then at least in their main normative tenets: Freedom from arbitrary arrest was of considerable worth in 1215 not only for the nobility, and it remains

<sup>6</sup> Griffin, *On Human Rights*, 88 f.: Needs must be characteristic of human life generally.

valuable today. This is also true for human rights' most fundamental principles: The guarantee of human dignity in human rights ethics and law has no expiration date. This stance clearly does not mean to imply that there is no cultural change.<sup>7</sup> The underlying assumption is rather that whatever change takes place unfolds legitimately only under the condition that the goods protected by human rights are preserved. Whatever the cultural evolution of certain groups or humanity in general brings, not being arbitrarily detained, for instance, will be a condition of its normative legitimacy.

In sum, the theory of human goods presupposes *idealization*, in the technical sense of abstraction from difference, not in the sense of making something better than it actually is, nor in the sense of denying difference and particularity. This move is necessary in many scientific fields – a predication about the functioning of human kidneys abstracts from the differences between individual human kidneys without denying that these differences exist. For the purpose at hand – say, some nephrological thesis – these differences are simply not relevant. For the purpose of human rights, the fact that freedom from arbitrary detention is of substantial value for both person X and person Y is relevant, not other facts that distinguish X and Y. There are various such goods. In real life, they are interrelated in many ways, and their enjoyment is full of trade-offs.<sup>8</sup>

Accordingly, it is not an accidental, historically contingent convergence of preferences of human beings at a particular time that is at issue, but the idea that there is something in the human condition that persists over time, something in the existential makeup or – to use the most traditional, albeit rather controversial term – the *nature* of human beings that makes these goods valuable to all of them.

This presupposition that certain goods are valuable to all human beings because of their particular *human condition*, *existential makeup* or *nature* points to a difficult step that a theory of the justification of human rights has to take: It appears that no theory of these human goods protected by human rights is possible without a *substantive anthropology*. Human rights protect the goods not of any being but of

<sup>7</sup> There is a discussion about Stone Age human rights. Is not a point of view that understands human rights as not entirely relative wedded to such an idea? The answer to this question can be derived from what has been said so far: Evidently, there was no explicit formulation of human rights in year 27,000 BCE. It is quite another matter whether there were not moral intuitions that formed part of the building blocks identified so far of the later human rights idea and its predecessors in the history of thought. Cultural and technological innovation forms a second layer of historical development. As already highlighted, you need a press to start thinking about a right to freedom of the press. Furthermore, there is nothing outlandish about something being justified when it has not been made explicit that it is justified. In 27,000 BCE, people presumably had no idea that the Earth was round. Nor did they presumably think that in a right-angled triangle the square of the hypotenuse is equal to the sum of the squares of the other two sides. This does not mean that it is not justified to hold that the Earth had this shape or that Pythagoras' theorem was correct at that time and that human beings, in principle, could know it.

<sup>8</sup> Cf. in a similar vein Tasioulas, "Foundations," 52.

human beings, irrespective of personal differences. Therefore, we need to determine what makes a human being *human*.

How can there be a justification of the importance of liberty and self-determination for human rights, for instance, without the assumption that human beings are made in such a way that liberty and self-determination are of great worth to them, and that arbitrary detention, for instance, holds little attraction for them?

Is this kind of substantive anthropology possible at all, however? If not, the project of human rights rests on shaky foundations. Unfortunately for the case for human rights, very influential lines of thought cast doubt on precisely this possibility. Human beings' ability to leave the bounds of nature behind and to create a second world of culture is a central theme in the history of ideas, and rightly so. According to influential theories, some of which we already have recalled, this ability includes their own nature: Human nature is not stable and fixed but is constantly changed and recreated throughout history. As Marx formulated paradigmatically in his theses on Feuerbach, human nature is the ensemble of all social relations.<sup>9</sup> Nietzsche considered human beings to be "*nicht festgestellte Tiere*," animals without a fixed nature.<sup>10</sup> Formerly openly fascist anthropologists such as Gehlen, who remained influential after 1945, held that humans are deficient beings (*Mängelwesen*) that need to be formed by powerful institutions.<sup>11</sup> Rorty talked about humans as "protean beings."<sup>12</sup> At a certain stage in his thinking, Foucault held that humans' self-conceptions are nothing but faces drawn in the sand by social forces, sketches that will be obliterated by future social change.<sup>13</sup>

From this perspective, a supposedly fixed "human condition" is thus in fact dependent on the social and not least economic structures that create the characteristics of the humans of a given age in their own image, the capitalist society the *egoistic bourgeois*, the panoptical society of domination the socially adapted *subject of modern society*, a subject that has internalized the epistemic structures of its own subjugation or in colonialism the ideologies of the *colon*.

Some of these theories have contributed greatly to our understanding of the historical and social contingency of elements of human lifeworlds that are indeed far from natural. Whatever one may think of the capitalist economy – or, more precisely, of its many very different conceptions from Manchester capitalism to the social market economy – it is certainly the product of history and political choices. The ways of living developed within this framework, be they a life guided by

<sup>9</sup> Karl Marx, "Thesen über Feuerbach," in *Marx-Engels-Werke*, Vol. 3 (Berlin: Dietz Verlag, 1975), 6th thesis.

<sup>10</sup> Friedrich Nietzsche, *Jenseits von Gut und Böse*, aphorism 62.

<sup>11</sup> Arnold Gehlen, *Der Mensch, seine Natur und seine Stellung in der Welt* (Berlin: Junker und Dünhaupt, 1940), 59, 64, 453 ff, 709 ff. Gehlen deleted the explicit reference to Nazi ideology in later editions of the book.

<sup>12</sup> Rorty, "Human Rights," 115.

<sup>13</sup> Foucault, *Les mots et les choses*, 398.

something like the “spirit of capitalism” described by Weber or forms of consumerism, are equally contingent. The critique of racism has been fostered considerably by the denial of any racial differences in human nature. The critique of the false naturalization of historically contingent forms of life is thus hugely important.

It is quite another matter, however, to assume that there is no such thing as an identifiable existential makeup of human beings – a human nature, if you will. It is important to note that doubts about a shared set of human characteristics concern not the physical makeup or even all mental properties but only particular psychological properties of human beings and the consequences of these properties in human thought, emotion and action. Nobody holds that the intricate functions of the human body – say, upright posture – are the product of the ensemble of human social relations. Upright posture (a cognitively demanding faculty) is not interpreted as a product of capitalism, for example. Nor does anyone hold that the specific makeup of visual cognition – say, the ability to interpret certain visual experiences as permanent solid bodies located in three-dimensional space – is historically contingent. The fact that there is a human nature in these physical and cognitive areas is thus uncontroversial. The question is, rather, whether and in which sense this human nature extends to such sublime desires as the longing for freedom and respect.

No demonstrably true insights exist in this area. The question of what human beings are ultimately like is too complex for this. The best one can do is review the plausibility of the arguments that speak for and against the assumptions implied by human rights about certain shared human properties, such as the desire for self-determination, and their importance for the design of rights.

Before one can even start to consider this line of thought, one has to take seriously the possibility that something like a human nature extending to the cognitive domain actually exists. As we just have seen, there are many areas of cognition where this kind of human nature is not seriously doubted, such as visual cognition. Some discussions of human nature appear to overlook this. In addition, it is a standard thesis of hardheaded, empirical, evidence-based paleoanthropology that a specific cognitive endowment of human beings exists – as in any other hominid species. This does not imply that anything of relevance to the search for the foundations of human rights forms part of this endowment. It simply means that human beings are not blank slates. These findings will be discussed in Part III of this study.

Even if these theories are not sufficient to make the case for the substantive anthropology underlying the human rights project, they do show that there is nothing *a priori* wrong about such a theory. It is simply a matter of the evidence that can be adduced for certain assumptions (e.g. that human beings are made up in such a way that self-determination is of value to them) in contrast to other assumptions (e.g. that authoritarian orders suit human beings’ depraved nature best).

Evidence *against* the idea of a natural human inclination to liberty can be seen in the many authoritarian systems that persisted over long periods of time. Orders of

freedom are the historical exception, not the rule. Influential voices have consequently concluded that human beings are actually not made for freedom at all – that, quite to the contrary, being ruled by superiors fulfills their deepest needs.<sup>14</sup> Accordingly, such ideas infuse the ideologies of very many repressive orders of past and present, from the Christian Inquisition to communist party oligarchies and other forms of dictatorship, or, another option, they are used to support the thesis that subjection means profound suffering for the subjected today but did not in the past because those past cultures were different.

There are some strong arguments that cast such conclusions into doubt, however. The history of human rights already lends less support to them than some thinkers tend to assume. As our historical review showed, the perception of what rights human beings enjoy and who is actually entitled to these rights has developed and changed significantly. The repeatedly discussed problem of the slow and gradual inclusion of all human beings in the personal scope of rights is a vivid example. But there is an interesting strand of continuity as well, in particular as to life, physical integrity, vulnerability to degradation, liberty and equality. As far as the kind of rights and their material scope are concerned, the formulation of some core rights has remained remarkably constant over long stretches of time, in spite of the major social transformations taking place. The *Virginia Bill of Rights* basically speaks a normative language that as far as core rights are concerned is clearly related to the language of the *European Charter of Fundamental Rights*, a recent example of a full human rights catalogue. Why the *Magna Carta* secured certain rights for the freemen of England is no riddle, nor are the concerns of the *Edict of Milan*. As our little journey deeper into history and farther afield, including indigenous peoples, showed, it is not at all clear that the concerns embodied in these documents do not resonate with the feelings and ideas of human beings of other times and places, too, although these people were in no way close to expressing them in the form of explicit human rights as we know them. After all, what, for instance, Yahling Dahbo experienced when the slaveholder came to her at night does not seem wholly mysterious.

A range of reasons speak for the protection of freedom. The theory of liberal rights importantly underlines the instrumental value of freedom. Freedom of expression is regarded as the catalyst of truth and better political decisions, for instance. The free exchange of ideas helps to identify better arguments and preferable political action. Human rights have more than just this instrumental value, however. Liberty is of intrinsic value as well. Human rights norms and institutions go to great lengths to secure the enjoyment of liberty. This only makes sense under the assumption that liberty holds particular importance as a political good.

One striking feature of human history that lends support to this assumption is the persistent struggle for self-determination. It is simply not true that history shows that

<sup>14</sup> For a version of this thought, cf. Nietzsche, *Jenseits von Gut und Böse*, aphorisms 188, 199 on the need of humans for obedience.



human beings have no deep desire for freedom. On the contrary, the longing for freedom has been one of history's crucial moving forces. Unsurprisingly, in our historical review we encountered many examples taken from theory, political life and art that reflected this longing, from the mourning of the women of Troy forced into slavery and sexual exploitation to the fight of the "freedom-loving" Herero, to quote the term used by the German general staff. Where are the credible counter-examples showing with equal force that human beings prefer to be enslaved, raped or subdued?

To be sure, as Wilhelm von Humboldt observed, after a long tradition of subjugation human beings sometimes first have to learn to feel their chains before they can try to shake them off.<sup>15</sup> "Habits of submission make men as well as women servile-minded. . . . Custom hardens human beings to any kind of degradation, by deadening the part of their nature which would resist it," commented Harriet Taylor Mill, discussing the argument that women were, in fact, not seeking for liberty.<sup>16</sup> But once such obstacles have been overcome, the promise of freedom has proven to be quite irresistible. The liberation of women in the last centuries, as far as it has been achieved, and the fight to abolish slavery bear witness to this, as do the many other attempts of human beings throughout history to gain that freedom. How different are future human beings imagined to be? Can any argument be discerned to suggest that, given some future historical development, the subjugation of women and their sexual exploitation or enslavement will with good reason come to be regarded as properly mirroring the human condition of women and those groups of people selected for slavery? Are such thoughts not rather revenants of the totalitarian dream that it is possible to create natural slaves through indoctrination and force, a dream whose consequences it hopefully is needless to recall?

Nor should these huge social struggles lead one to forget the importance of freedom and self-determination in the personal sphere. Not many people enjoy being deprived of making their own choices in their private lives. Children already fight to assert their own will (any parent having faced the task of dressing children for bad weather knows the intensity of this struggle, seeing that denim jackets are so much cooler than raincoats).

All in all, such observations seem to lend substantial support to the idea that the "freedom-loving" Herero were perhaps more representative of the deep desires of other human beings than is sometimes assumed.

When human rights imply that freedom is an important good for human beings, they consequently draw on anthropological assumptions that are more plausible than the competing thesis that human beings are made up in such a way that

<sup>15</sup> Wilhelm von Humboldt, "Ideen zu einem Versuch, die Gränzen der Wirksamkeit des Staates zu bestimmen," in *Wilhelm von Humboldt, Werke, Vol. I: Schriften zur Anthropologie und Geschichte*, eds. Andreas Filtner and Klaus Giel (Darmstadt: Wissenschaftliche Buchgesellschaft, 2002), 218.

<sup>16</sup> Taylor Mill, "Enfranchisement of Women," 70.

self-determination has no meaning for them. Nevertheless, this is not a self-evident truth, as repeatedly underlined. Human beings could be very different. There are many organisms with a different makeup for which certain things are not valuable. For ants, for example, the problem of self-determination does not arise, admirable creatures though they are. For human beings, however, this problem does arise. Bees do not have a problem with monarchies, human beings do. Human rights thus necessarily imply *a substantive empirical falsifiable assumption about the kind of creature human beings are*. They posit a certain degree of sameness in the makeup of human beings as well. Human beings undoubtedly put the freedom to determine themselves to use in an infinite variety of ways. As far as the value of the ability for self-determination is concerned, however, human beings are made of roughly the same stuff. Underlining this is particularly important given the long history of anthropologies of inequality – for example, of racist or misogynist ilk.

A further task of our inquiry into the sources of human goods is to determine the grounds for the necessary selectivity of the goods protected. Formulating assumptions such as the importance of self-determination about human beings' ways of life does not, after all, entail any denial of their many other sides. There is a very plausible case that part of what makes up human beings is their inclination to greed, to aggression, to cruelty, to enjoy and strive for domination. A theory of human goods must therefore evaluate those objects for which human beings strive in order to determine those that justifiably deserve protection. What are the criteria that determine selection among such different inclinations? Are some elements of human nature supposedly more "natural" than others? How could this be?

These questions need an answer, and not only for inclinations such as aggression and the like. It may be granted, for instance, that freedom is a basic human good because of human beings' particular makeup. But why is it legitimate to satisfy this particular desire? Why is it not advisable to extirpate this longing for freedom as hubris and wicked lust? These questions relate to problems that have been discussed ever since antiquity. Is something valuable because it is desired, or is it desired because it is valuable?<sup>17</sup> If the former – why not satisfy the desire for domination? If the latter, we next face the issue: What are the criteria determining whether something is valuable (apart from being desired), and where do they stem from? What does this mean for the place that various desires have in a theory of human goods – from innocent pastimes like the urge to count the blades of grass in different lawns<sup>18</sup> or to make the collection of matchbox pictures the center of one's life<sup>19</sup> to

<sup>17</sup> Plato, Republic, 505c; Aristotle, "Metaphysics," in Aristotle, *Metaphysics, X–XIV, Oeconomica, Magna Moralia*, ed. George Patrick Goold, Loeb Classical Library 287 (Cambridge, MA: Harvard University Press, 1990), 1072a 29.

<sup>18</sup> Cf. Rawls, *Theory of Justice*, 432, introduced in the context of the "Aristotelian principle" that human beings desire things for their own sake; Griffin, *On Human Rights*, 112, proposing a life-enhancing function as a criterion for evaluation.

<sup>19</sup> Dworkin, *Justice for Hedgehogs*, 257.

sadism? In addition, one needs to clarify what value judgments are in the first place. Are they expressions of subjective desires (which would take us back to square one) or acts of cognition? If acts of cognition – cognition of what?

Two kinds of criteria are relevant for selecting some of the things human beings strive for as human goods plausibly protected by rights.<sup>20</sup> First are *normative standards*, the third issue of a human rights theory identified above, to which we will turn in Section 5.6. The fact that such principles exist and censor some human desires seems obvious: The desire to inflict cruelty on others, for instance, cannot be protected because it unjustifiably harms others. Moral judgments of this kind are clearly more than the expressions of idiosyncratic tastes and desires as they are able to censor and direct choices about the pursuit of such tastes and desires. As there ultimately is no convincing reason to assume that they refer to some objective, mind-independent order of value either, they seem to be of a third, *sui generis* kind. Part III of this study will investigate why that is so and what this could plausibly mean.

Second, there is the old question of *eudaimonia* or what makes a life worth living. Arguments worthy of serious consideration suggest that the life of powerful dictators, despite applauding acolytes, bowing satraps and free rein for their desires and wishes, is less attractive than it might seem. The apparent normative constraints on the permissible fulfillment of desires may thus turn out to be one of the things that actually constitutes quality of life because of the importance of moral integrity, and this has to be factored into a convincing theory of human goods. After all, the goods ultimately protected by human rights are not just individual freedom, for example, but a *just* system of freedom for all.

Moreover, it is useful to look at goods in themselves, such as freedom, for instance, in comparison to the lures of submission, under the condition that no needs or interests of others are diminished. One reason to prefer freedom even from a purely individual standpoint is its sheer attractiveness as a way of life. Preferring subjugation to liberty is like preferring a damp, dark, soiled dungeon to a clear, crisp day with bright sunlight and fresh air. A second reason is liberty's intrinsic value as something that can be reconciled with the dignity of autonomous human beings, something that the fascination with self-subjugation or even self-annihilation is not, even though the strange force of the latter was able to captivate the destructive mass movements of the twentieth century.

<sup>20</sup> A theory of rational desires, that is, of desires upheld after reflection, as in Richard Brandt, *A Theory of the Good and the Right* (Oxford: Clarendon Press, 1979), 10, is not sufficient to answer this question, as the example of the persistent sadist shows. As Griffin, *On Human Rights*, 112 ff. rightly argues: The standard must get stronger, reach a level of appropriateness, of getting something right, *ibid.* He argues, with reference to Wittgenstein and Davidson, that the form of life constituted by language provides guidance: "Certain values are part of the necessary conditions for our language, which sets for us the bounds of intelligibility," *ibid.* 113. Part III of this study will investigate what other kinds of parameters of thought might exist.

Such judgments about the eudemonistic value of certain actions and ways of life are more than mere expressions of personal tastes and desires. They ascribe value to certain forms of life and form critical yardsticks by attempting to capture something relevant to any human pursuit of happiness.<sup>21</sup> Neither in their case nor in the case of moral judgments is there any good reason to assume that they refer to some objective, mind-independent order of value.<sup>22</sup> This does not mean that they cannot be debated. Aesthetic judgments plausibly do not refer to an objective order of beauty either. This does not mean, however, that Caravaggio's *Adoration of the Shepherds* of 1609 cannot be argued to be aesthetically superior to the drawing of an elephant produced by a struggling theoretician of human rights to the amusement of his daughter, who at the age of five was already more artistically able than he.

Critical reflection thus does not lack guidance when weighing the respective merits of gratifying some rather than others of the many passions and desires springing in the labyrinthine depths of the human self.

### 5.1.2 *The Anthropology of Human Rights and the Thresholds of Inclusion*

Human rights ultimately are not about abstract notions such as freedom, but about concrete liberties. Including freedom of speech or religion in a catalogue of human rights means that one assumes that these particular liberties are of key importance for human life. This is not an *a priori* truth but requires arguments in its support. The long and painful history of the attempts to secure human rights manifests this clearly. After all, great minds argued powerfully against these very rights – Augustine, for instance, against freedom of faith, following his change of opinion in this respect. But such reasons do exist – for example, that the possibility to express oneself or to hold and live by certain religious beliefs is important for human beings to flourish. The rich theory and doctrine on such rights spell these arguments out, and often compellingly so.

<sup>21</sup> This conclusion is drawn by various theories of human rights, without, however, always distinguishing between normative and other eudemonistic reasons, cf. Griffin, *On Human Rights*, 115: "To see anything as making life better, we must see it as an instance of something generally intelligible as valuable and, furthermore, as valuable for any normal human being. Deliberation about human interests ends up, I think, with a list of values. I am less concerned with precisely what is on the list than I am with the conclusion that deliberation ends with a general profile of values, a chart of the various high points that human life can rise to."

<sup>22</sup> There are many approaches to this question, in an Aristotelian, Humean or Kantian mode, for instance. For a recent answer, a variant of a "perception model," see Griffin, *On Human Rights*, 119 f.: "So I think that we may conclude that judgements about human interests can be correct or incorrect. They report deliverances of a sensitivity to certain things going on in the world, namely, interests being met or not met. These interests are part of *human* nature, and not just human nature as seen by society. These judgements seem to be correct or incorrect, not, say, in the way that conclusions in mathematics can be, but rather true or false in the way that statements of natural fact can be" (emphasis in original).

The same seems to be true for other tenets of human rights, including the experience of the intrinsic value of life, the desire for respect as equals, the importance of equal treatment for human beings or – particularly controversially – the material preconditions of their lives such as food, water, shelter and so forth.

In light of the conclusion reached above that some kind of tentative substantive anthropology is possible, these goods protected by human rights are reasonably regarded as of equal objective value in the double sense outlined earlier: They are plausibly understood as goods of all human beings, independently of the opinion of possible dissenters. For the same reason, they are regarded not only as valuable, but as *equally* valuable for all human beings. There is nothing suspiciously paternalistic about this kind of claim to objectivity: Every moral principle and legal rule faces some kind of dissent – the prohibition of theft, for example, on a daily basis – without an overly paternalistic attitude of the community towards the autonomy of thieves casting the legitimacy of this norm into doubt. The legitimacy of norms would only be called into question if there were good reasons for this critique.

Moreover, identifying such goods is not an easy task if one is aware of the danger (already highlighted above) of parochial perspectives, of a repressive essentializing of human beings and of skewed, perhaps even racist or misogynist anthropological assumptions. In this regard, any thesis is fallible and in need of repeated critical scrutiny in which dissenters can make their case. This scrutiny is a crucial source of moral and legal progress. As human rights at their core are about respect for individuals, self-determination and freedom, not least of expression, their very point demands the freedom of every human being to engage in a better, more inclusive, less prejudiced understanding of what the proper goods of protection are. No one has an epistemic or political prerogative to authoritatively determine the content of the pivotal human goods worthy of protection by human rights, let alone any entitlement to imperialistically enforce certain visions. What counts are the reasons adduced, and there is nothing paternalistic about compelling reasons. In procedural terms, in the world of political decision-making and law-giving, this has to be spelled out in democratic, participatory and deliberative forms of determining the content of human rights – demands that the practice of human rights on a national, supranational and international level often fails to meet.

Theories of goods justifiably protected by human rights need to identify a threshold criterion to determine which of the human goods that constitute possible objects of protection are important enough to qualify as the possible content of human rights. This criterion needs not to be so narrow as to make human rights meaningless in too many areas of human life, nor so expansive as to cause an inflationary use of these rights.<sup>23</sup> There is no criterion that does not leave some kind of gray area in which debate is possible. Such a criterion implies the ascertainment

<sup>23</sup> Cf. Chapter 4. The question is how to determine this criterion. Cf. also Griffin, *On Human Rights*, 88 ff.: Human rights should not include anything needed to avoid ailment or

of the weight of such a good. This weight needs to be determined by considering the role this good plays in the context of a human life, embedded in certain cultural and social circumstances. This already underlines the importance of the second central tenet of the justification of human rights to be discussed: the political theory of human rights. Such judgments involve demanding considerations that evidently are highly controversial. Debating these questions is an important part of the slow development of human rights. However, neither the difficulty of such assessments nor the danger of very subjective approaches to these issues has prevented a consensus from developing about the significance of some rights. The fact that freedom of speech, belief and conscience are important liberties is hardly in doubt. The reason for this is that these liberties create the scope for human activities that both as history and as daily practices play a crucial role in a flourishing life.

The importance of such a threshold condition does not mean that human rights need to be limited to some kind of *minimalist conception* of their reach. Conceptions of human rights can be generous. They can (and should) protect the *maximum of a good* if this is compatible with the rights of others, as we already have seen. If the exercise of a freedom can be reconciled with binding normative principles, there is a *prima facie* right to the exercise of this freedom. After all, a foundational principle of an ethics of freedom is that whatever is not forbidden is allowed. This principle is even acknowledged as a principle of international law.<sup>24</sup> In this context, the distinction between the *type* of good protected and the different *tokens* of the good is important. Expressing one's opinion about the question of whether or not the goal scored by X was offside or not is not an existential concern (at least once one has had a chance to cool down following the end of the game). Nevertheless, this expression would be protected by many legal systems guaranteeing free speech, and rightly so. A government biased in favor of some soccer team (owned by the president, perhaps) would thus violate free speech if it prevented spectators from drawing the public's attention to unjustified goals.

This notwithstanding, a proper differentiation of the importance of various kinds of claims is required if we are not to call every morally defensible claim a human right. The *type* of good protected (freedom of expression) must be of qualified concern, though not every *token* of this good is of great importance (voicing opinions about offside goals).

Yet another element of the threshold criterion for human rights is relevant historical experience that human beings are in substantial danger of being deprived of these goods by others, not least political institutions such as states. Freedom of religion and freedom of speech are archetypal human rights because it happens to

malfunction. Otherwise, human rights would be in danger to become implausibly lavish. Avoiding harm is overly capacious, too.

<sup>24</sup> ICJ, The Case of the S. S. Lotus, Judgement of September 7, 1927, P.C.I.J. (ser. A) (No. 10 Sept. 7).

be the case that human beings have a strong inclination to impose what they believe on others and to silence their particular voices. The prohibition of slavery is a *ius cogens* norm of international human rights because human beings have found it surprisingly easy to think that others of their kind are made or justifiably used (unlike themselves) to serve.

### 5.1.3 Needs, Interests and Capabilities

This account of the sources of goods protected by human rights helps to clarify some of the problems we identified when discussing theories of needs, interests and capabilities.

As underlined in our discussion of need and interest theories, it is misleading to identify certain versions of such theories with all possible approaches that take needs and interests seriously. The above analysis has shown that human needs are important to specify the content of human rights. Bodily integrity is a human need. The protection of liberty in its various forms by human rights is based on the human need to have scope for actions that are determined by one's own decisions, thoughts, feelings and identity. Whether one prefers to call these sources of strong longings needs or interests is more a question of terminology than of substantive content. Specific rights can be derived from such needs. It may be odd to say that there is a *need* for freedom of the press. That depends, of course, on the understanding of needs in this context. In any case, there is certainly an *interest* in free journalism. It is hard to understand this interest if one does not assume that human beings have a strong desire – a need, if you will – to understand and determine themselves politically on the grounds of insights, and that this political self-understanding and self-determination constitute ends that freedom of the press intends to serve. The ultimate justification of needs and interests thus rests on assumptions of this kind about the particular human condition and the ensuing preconditions for a flourishing life.

The capability approach is very important for ensuring that rights do not remain abstract and do not shoot wide of human beings' real lives under concrete social circumstances. An abstract right to education means little if a society is structured in such a way that girls have no real opportunity to avail themselves of this right – for example, because they are taught to aspire to other ends than education, such as serving the male members of their family.<sup>25</sup>

The identification of the relevant capabilities presupposes that there are criteria for selecting the goods to be brought to life by the idea of capabilities. Such selection criteria ultimately must rely on some kind of substantial theory about the human condition and the deeper needs and interests derived from it.

<sup>25</sup> Sen, *Idea of Justice*, 257.

5.1.4 *Contours of a Form of Life*

In a sense, therefore, epoch-making catalogues of human rights like the *Universal Declaration* embody a (defeasible) hypothesis about what constitutes central human goods derived from empirically grounded anthropological assumptions – a hypothesis that is not based on divine revelation, a metaphysical order of perfection, tradition or the teleology of history but on a sober, fallible assessment of basic human historical experience. This assessment is spelled out in the terms of concrete ethical and legal norms. In a full theory of human goods protected by human rights, one consequently needs to engage in detail with such provisions and what they protect exactly, given the system of limitations. Moreover, the next topic of this inquiry, a political theory of rights, has to be factored into such an account. That this is a demanding task is illustrated by the very substantial work carried out in philosophy and legal doctrine, not to forget case law, to determine the content and purpose of specific norms. One needs only to think about the vast amount of work on freedom of speech or freedom of religion and conscience to get a sense of this debate's level of sophistication.

The full theory that is slowly emerging through this work, detailing what the proper objects of protection by human rights may be, is not a simple technical matter. Quite the contrary. The goods that human rights protect are a mirror image of what makes human beings human. They are the reflection in the mirror of ethics and law of the contours of a form of life drawn by the fine pen of historical expressions of the species' most delicate characteristics, contours that define its particular *human* mode of being.

The image emerging, sometimes not clearly visible in the crude looking glass of ethical principles and legal rules, is of a being with subtle longings for respect, moral integrity and freedom, a being full of play that is creative and an inexhaustible wellspring of fresh thoughts and sentiments, seeking a deep understanding of its experience of itself and the world it inhabits, its efforts proving that it is capable of both far-reaching insight and profound error. The mirrored outlines hint at a being looking for meaning in its life, a meaning that is not easily ascertained in an ever-perplexing world, if it is discernible at all; a being looking for and unleashing beauty; a being that is communicative, needing and seeking intimate partnership and community; a being that cares for others, directed by moral principles of justice and other-regarding concern, with a vulnerable body and inner self and constantly forced to secure its precarious survival in a world not made for and unconcerned with its existence, bliss and suffering.

The need to protect every human being against their own kind (and sometimes the distress they bring about themselves) by the means of rights adds further important facets to this picture: This being is also violent, greedy and thirsty for power and domination, superficial and vulgar, selfish, callous and cruel, self-righteous and full of contempt for others. "Man delights not me," Prince Hamlet says, and in doing so has not only melancholic bile but some good arguments on his side.



The fact that human beings are so mixed in kind that the protection of human rights seems reasonable is a contingent fact of their existence. Human beings could be different. There is no hidden or open teleology at play. It is perfectly possible to imagine beings that, for instance, possess consciousness or other higher mental faculties, like human beings, but feel no desire to express their thoughts and feelings, as they are happy to converse with themselves. To protect the freedom of expression of such beings would make no particular sense. Alternatively, human beings could be infinitely malleable, as totalitarian systems imagine them to be. A life of serfdom would then be as appropriate for such a creature as a life with fundamental liberties – after a little bit of reeducation, perhaps, to overcome old habits. But there is no reason to think that human beings are like this, as we already have seen and will find confirmed by some of the findings to follow below.

This directs our attention to an insight of some importance, which we will flesh out in greater detail now: Human rights are bound to and dependent on the human mode of existence and the human lifeworld. *Human rights mark a space of decency defined by human critical thought committed to obligatory moral principles when reflecting on the nature of the human condition and what is valuable in a human life.* They are thus a fragile thing, transient, guaranteed by nothing but a delicate web of justificatory reasons and their precarious command over human thought and passions.

## 5.2 BETTER OFF WITHOUT RIGHTS?

### 5.2.1 *The Limited Reach of Rights*

The preceding remarks have provided an outline for the first existence condition of human rights: sufficiently weighty goods as objects of protection, though not every use of such rights needs to be of particularly qualified importance. Not all such sufficiently weighty goods worthy of protection are proper objects of human rights, however. One very evident further existence condition of human rights is that the respective good can in fact be secured by the means of rights. As already mentioned, the principle *ultra posse nemo obligatur* sets an obvious limit. A right to be loved consequently serves as a metaphor for an important human concern, not as the statement of an existing entitlement in the literal sense. This metaphor is not without import – it underlines the significance of being loved and, importantly, the fact that there is no one unworthy of this noblest of affections one can entertain towards another person.

There are other examples. There can be no human right to be happy, because it is beyond the capabilities of other persons and indeed agents themselves to make somebody (including themselves) happy. Happiness is too elusive a gift to become a claim on others; although, once again, metaphorically it makes perfect sense to

speak of a human being's right to be happy – meaning, for instance, that happy their life should be. For related reasons, there is no right to sex either, to take an example from the current debate about incels, their misogynistic thoughts and violent acts.<sup>26</sup>

Problems like these can be resolved in a pretty straightforward way. More difficult is the question of whether human rights are the proper means for realizing certain human goods that at least in principle could be the objects of rights. This question arises because many influential voices in the fields of political and legal theory deny that human rights contribute to the realization of human goods, or they maintain that they even prevent the achievement of this end. These arguments are of evident moral and legal relevance. If the case has been made that human rights are useless or even harmful, there is no conceivable argument that still would speak for their justification in ethics and law. Tools to foster human goods that turn out to be useless or harmful are not normatively justified.

Any theory of human rights consequently includes a *theoretical stance on the historical, social and political conditions of the realization of human goods*. Freedom of speech guaranteed as a right, for instance, presupposes the idea that the free exchange of ideas and views does in fact enhance the flourishing of individuals and a community. Dictatorial authoritarianism, on the contrary, presupposes that only narrowly circumscribed expression – say as regards the addressees or the topics permitted (or both) – benefits a community and ultimately the individuals (if its doctrine is not just some cynical ideological device of subjugation). Freedom of faith presupposes that it is not in people's true interest that all religions but the "One True Faith" have to be suppressed. Again, this is not a trivial assumption. Centuries of violent persecution of believers of other faiths and the intellectual defense of this persecution attest how difficult it is to grant this freedom. After all, from the point of view of certain religious creeds, letting those who follow other faiths have their way means that the infidels will go to hell and on the way are allowed to perform all kinds of forbidden, wicked, even blasphemous acts.

The more profoundly one engages with the justification of concrete details of the scope of rights, the more important this aspect of a theory of human rights becomes, because the more arguments are needed to show that a particular framing or interpretation of human rights does in fact serve the ends that human rights are there to foster. One may agree that free speech is important for a rationally governed society – but what about the prohibition of hate speech? Does it really promote social civility, or does it gratuitously curtail an important liberty? If the former – in which form? Does the exclusion of Holocaust denial from the protection by free speech guarantees increase respect for human beings of whatever group, or does it stifle historical debate? Is the answer the same in Germany as in Switzerland? Consequently, the next question to which we will turn is: What could a convincing political theory of human rights look like?

<sup>26</sup> Amia Srinivasan, *The Right to Sex* (London: Bloomsbury, 2021), 73 ff.

5.2.2 *Politics beyond Normativity?*

Our review of justificatory theories of human rights already showed that *functionalist theories* do not provide a good account of human rights as they miss their point, which is to provide a normatively grounded yardstick for the legitimate aims a society can pursue. Human rights are not functional tools to achieve a social purpose determined without recourse to normative principles. Rather, human rights themselves determine the justified purposes of social action. They define what is or is not functional for the operation of society because they play a key role in setting the aims that social organization is to serve. In light of the human rights idea, societies are not there just to reproduce themselves in whatever form; instead, societies are to be organized in a way that respects the worth, liberty and equality of human beings.

Other political theory options are not convincing either. Human rights cannot be reconstructed as a form of *political aestheticism*, for instance.<sup>27</sup> Orders of human rights aim at more than just some kind of aesthetically attractive form of life. They are not an element of political *dandyism*<sup>28</sup> but express a specific, sufficiently well-defined normative standpoint. Human rights therefore also are not a form of *existential decisionism*, which views all normative standards as rooted in a fundamental decision by individuals or collectives to pursue a certain way of life. No prior normative reasons guide such decisions. In this view, normative orders are thus a kind of political *creatio ex nihilo*, a creation from nothing that defines the future political being of a community, including the normative parameters that bind it.<sup>29</sup> Contrary to this perspective, human rights are wedded to the claim that their validity is based not on mere contingent political commitments created by foundational political decisions without normative grounds, but rather on compelling normative reasons. Norm-independent existential political decisions are not the ultimate source of human rights; rather, human rights are decisive normative reasons that must guide all such fundamental political decisions, in particular those of a *pouvoir constituant*. This is exactly the political role they played in the process of constitution-making around the world and in the development of the international architecture of human rights: They were reasons that guided the kind of political order that was designed – from the drafting of the *Universal Declaration* to the South African Constitution after the end of the apartheid regime.

Functionalism, political aestheticism and political existentialism thus are not helpful approaches to the idea of human rights. One needs to look elsewhere for

<sup>27</sup> Cf. Nietzsche's assessment of the aesthetic value of the doomed moral culture of equality, fading away like a beautiful note, Nietzsche, *Jenseits von Gut und Böse*, aphorism 255.

<sup>28</sup> Cf. Albert Camus, "L'homme révolté," in Albert Camus, *Œuvres complètes Vol. III: 1949–1956*, ed. Raymond Gay-Crosier (Paris: Gallimard, 2008), 101 ff.

<sup>29</sup> Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot, 1928), 75 f.; Carl Schmitt, *Die Diktatur* (Berlin: Duncker & Humblot, 1928), 42.

theoretical guidance. The first step in doing so is to examine a whole battery of theoretical approaches that deny that human rights serve the good of humanity.

### 5.3 THE CRITIQUE OF RIGHTS

#### 5.3.1 *The Benefits of Authoritarianism*

Human rights diffuse power. They create a protected space for the activity of human beings and set limits to what public power is allowed to do. One important counterargument to at least some such rights claims that an illiberal, hierarchical order is ultimately to people's benefit. This argument has been articulated throughout the ages in various forms and has exerted significant political influence.

One example is Plato's critique of democratic rights, a group of rights that certainly belongs in the history of human rights, as we have seen. Plato's argument was not an attempt to shield the privileges of certain classes, including his own. Rather, it derived from the belief that the authoritarian order he envisaged, which had a functional conception of justice as its lodestar, allocating rights and duties in society according to the best service a person could provide for the community, promoted the best of the polis – and not only of the collective, but of all its members, too.<sup>30</sup>

A further proponent of this idea from a different epoch is Leibniz. He argued, as we have seen, that people have inalienable rights to life, the protection of personal integrity and liberty. However, he thought that natural law spoke against equal political rights. For Leibniz, the criterion of distribution under Aristotelian principles of justice was the capability to rule. He made the factual assumption that monarchs and aristocrats are better suited to ruling than other people. In addition, he argued that popular assemblies are as prone to engage in arbitrary rule as single rulers. Consequently, it seemed most likely to him that the rule of reason would be achieved by the traditional political ruling class of the *ancien régime*.<sup>31</sup> Hegel's metaphysics of constitutional monarchies is yet another example of a vision of political organization that includes authoritarian elements and skepticism about rights.<sup>32</sup>

The idea of benign authoritarian rule has held practical significance in more recent politics, too (e.g. in state socialist systems with a party-led bureaucracy) and continues to be a relevant category today – for example, underpinning the political systems of Singapore or China.

<sup>30</sup> Cf. Plato, Republic, 465e ff. on the happiness of the guardians.

<sup>31</sup> Cf. Leibniz's comments on Locke's *Second Treatise*, Leibniz, "Letter to Thomas Burnett of Kemney, 2 February 1700," 380; Leibniz, "Letter to Thomas Burnett of Kemney, July 18, 1701," 284.

<sup>32</sup> Cf. for instance G. W. F. Hegel's critique of democratic popular sovereignty, Hegel, *Grundlinien der Philosophie des Rechts*, § 279 and his design of a legitimate constitutional monarchy, §§ 260 ff.

Various issues arise here. One is the plausibility of the assessment of the beneficial effects of authoritarian rule. There is ample historical evidence to show that democracies in which a significant portion of the population have political rights may take decisions that are not conducive to the common good – for example, to engage in the Peloponnesian War. It seems hard to argue, however, that there is any substantial historical evidence that the lack of rights leads to the well-being of human beings to a comparatively larger degree than in systems where such rights are recognized. In this context, a crucial question to ask is what “well-being” actually means and whether the respect for the rights of an individual possibly forms part of it. Here, again, the classical argument is important that a life within the framework of respected rights – both of the agent and of others – is an essential element of true human flourishing. Theories that argue for the benefits of social organization without rights thus remain unconvincing: They miss the very point of rights and their significance for a human life worth living.

### 5.3.2 *Human Rights: Ineffective Ethical and Legal Balderdash?*

Human rights have been institutionalized on a national, regional and – to a certain limited degree – international level. This naturally has given rise to the question of whether they do in fact contribute to achieving the ends they are supposed to serve.

In recent years, various commentators have claimed that human rights lack this effectiveness: They either are of no use in reaching the aims for which they are made, in particular reducing violence and repression and fostering liberty, or are even detrimental to this task.<sup>33</sup> Others have disputed these findings, not least on methodological grounds.<sup>34</sup> The latter point is of some importance, because it underlines the fact that it is exceedingly difficult to say anything about the effectiveness of human rights that is valid by the usual standards of the social sciences. Besides other specific methodological problems, human rights cover a potentially vast area of social life. Human rights catalogues vary considerably. In addition, human rights, as has been emphasized, cannot be reduced to international human rights. Therefore, any analysis of the effects of human rights would also need to include the effects of national constitutional rights protection. The mechanisms

<sup>33</sup> Cf. for example Jack Landman Goldsmith and Eric Andrew Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Eric Andrew Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014); Emilie M. Hafner-Burton and Kiyoteru Tsutsui, “Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most,” *Journal of Peace Research* 44 (2007): 407 ff., arguing that “human rights laws are most effective in stable or consolidating democracies or in states with strong civil society activism,” but they fail to make a difference in repressive regimes, *ibid.* 407.

<sup>34</sup> Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), highlighting in particular the constraining role of international treaties; Sikkink, *Evidence*, 139 ff.

used to implement human rights are equally heterogeneous, ranging from a fully developed constitutional review to a very weak supervisory mechanism, as in many areas of international human rights law. The same right can have quite different regulatory effects in different social areas – freedom of religion may robustly protect a majority religion against encroachment by the state but be less effective at protecting a minority religion.

A further exemplary problem needs to be mentioned: Because of the complexity of the issues with which human rights are concerned, there are many independent (intervening) variables that influence the effects of any legal regulation. The radical change almost worldwide of the understanding of the meaning of rights to privacy, personal autonomy, equality and human dignity for the permissible regulation of same-sex intimate relations, for example, has occurred while the legal texts of the relevant norms remained unchanged for the most part. This cannot be explained without reference to the development of the background social morality, its political ramifications and the attitudinal changes of decision-makers, including judges. Saying that these norms were ineffective before this change is as reductionist as claiming that they now are the only engine of social change. The truth is that a multifaceted interaction of many factors – legal, social, ethical, political – in the end leads to such progress. This complexity renders self-confident arguments about the effects of human rights highly dubious.

Given this wide range of application, the heterogeneous multiplicity of implementation mechanisms, the different spheres of protection and other relevant independent variables to be considered when determining the causation of given social phenomena regulated by human rights, it may be possible to say something meaningful about the effects of a certain right of a particular legal system as to a certain issue – for example, the effects of freedom of religion as a human right guaranteed by the *German Basic Law* on the regulation of vestimentary symbols in public services and its application by state authorities concerning the wearing of Islamic headscarves in schools in Germany – but not about the effects of human rights in general across issues, societies and regulatory regimes.<sup>35</sup>

Furthermore, given this rather obvious problem, one needs to ask whether the argument of the ineffectiveness of human rights is in fact a tactic pursuing the political aim to delegitimize human rights, an argument that stems not from a genuine concern for effective human rights protection but from a political agenda hostile to their rule.

<sup>35</sup> This skepticism about the reach of existing studies encompasses some studies that assert the positive effects of human rights, which contain important findings but are often not particularly fine-grained. The dependent variables determined by human rights as the independent variable are sometimes very general and may even tend to become something like the general well-being of the members of society. Cf. as an example the complex example of undernourishment and the many factors that may influence it, Sikkink, *Evidence*, 147 ff.

An abundance of examples illustrates the failure of the various systems of the protection of human rights. It is very important to stay painfully aware of this in order to avoid an overly romantic view of human rights. However, it is wrong to ascribe these failures solely to the human rights systems in their different variants, concepts, conceptions and institutions. This would miss the very point of human rights, which is to confront power. This power is not that of some friendly agent waiting to be convinced by the idea of human rights and swayed by a critical state report it could safely ignore, but power that has no respect for the values protected by human rights and thus for the task performed by these norms. Human rights confront authoritarianism, dictatorship, suppression, violence, torture and murder, sometimes of the worst kind. It is no surprise at all that human rights often are rendered ineffective by the might of the forces working against them, which have included the most powerful political agents in history.

Both the constitutional and, increasingly, some of the regional and international systems of human rights protection show that human rights can be highly effective. They have changed many people's lives for the better, although they certainly have not established a paradise of complete and utter justice.<sup>36</sup>

In any case, the argument based on ineffectiveness has limited force. If it were plausible, the consequence would be to try to increase the effectivity of human rights, not to abolish the project altogether.

All of this mainly concerns human rights as legal rights. The assertion that human rights as moral principles are entirely ineffective seems equally hard to defend, given the far-reaching beneficial effects this idea continues to have as a critical check on ideologies of unrestrained power.

### 5.3.3 *Human Rights as Means of Economic Disempowerment*

Marxist theory, both traditional and contemporary, provides a classical critique of human rights. Its main claim is that fundamental rights are part of the superstructure of capitalist economies and societies. Property rights and the freedom to contract are understood as paradigmatic rights illustrating the truth of this thesis: Private property and the ability to enter freely into a contract are preconditions for the capitalist mode of production. However, these rights do not set human beings free but through the cunning of the capitalist economy enslave them to this mode of production. The thinkers of the Enlightenment proclaimed rights that they thought embodied the realm of reason, when in fact they were unable to transcend the

<sup>36</sup> One would be hard pressed to name any study that denies the positive effects of, say, the bills of rights of US, German or Swiss constitutional law or doubts the substantial positive effects of the ECHR system. Criticism is mostly directed at international, universal human rights law, which is not, as repeatedly underlined, the whole of human rights law, nor was it ever meant to be its main pillar. Interestingly, Posner, *Twilight*, 139 does not count the ECtHR as an international institution protecting human rights.

limited perspectives of their century, its mode of production and their own class consciousness.<sup>37</sup>

There are reasons for this argument, and they are found not only in nineteenth-century forms of capitalism. Rights to private property can be used to defend by legal means a particular economic power structure – the one established by the existing unequal distribution of wealth, for instance. Marxists have not been the only ones to make this point. To this day, it remains important to reflect critically upon the question of whether or not a particular human rights order serves its purpose of fostering the goods of all members of society or not. It is wrong, however, to assume that all human rights necessarily protect an unequal distribution of power and property. Many human rights cannot be reduced to such a function. To begin with, human dignity as the idea of regarding human beings as ends-in-themselves is one of the normative starting points for criticizing structures of exploitation – a point that Marx himself and other prominent Marxists did not to miss.<sup>38</sup> Liberal rights, freedom of opinion, freedom of the press and other forms of communication and of assembly are (among other reasons for their importance) the preconditions for any political transformation in a society, including any economic reform. Equality guarantees are a tool to maintain or establish a decent level of equity in a society and fend off discrimination. Social rights are far from able to alleviate all social injustice and suffering in the world but can play an important role in taking some steps in that direction. For example, a human right to minimum living conditions

<sup>37</sup> Friedrich Engels, “Die Entwicklung des Sozialismus von der Utopie zur Wissenschaft,” in *Marx-Engels-Werke*, Vol. 19, ed. Ludwig Arnold (Berlin: Dietz Verlag, 1987), 189–201: “The great men, who in France prepared the public mind for the oncoming revolution, stood forth themselves as extreme revolutionists. They recognized no external authority of whatever sort. Religion, theories of nature, society, political institutions, all were submitted to ruthless criticism. Everything was summoned before the judgment-seat of reason, there to justify or, contrariwise, give up its existence. Reason was set up as the only standard. Those were the days when, as Hegel put it, the world was placed upon its head; first, in the sense that man’s head, and the maxims evolved from thought, claimed to be the foundation for all actions and social adjustments; secondly, in the further sense that the reality which stood in contradiction to those maxims was, in fact, turned upside down. All former social and State institutions, all notions that had come down from ancient days, were pitched into the lumber-room as being against reason. The world, it was claimed, had thitherto allowed itself to be led entirely by prejudices; all the past deserved only pity and contempt. Only then did the light of day, the reign of reason break forth. Thenceforth, superstition, injustice, privilege and oppression were to be superseded by eternal truth, eternal justice, and the nature-born equality and inalienable rights of man. Today we know that that reign of reason was nothing else than the idealized reign of the capitalist class; that that eternal justice found its realization in capitalist law; that that equality reduced itself to the capitalist’s phrase: ‘equality before the statute’; that one of the essential rights of man proclaimed was – capitalist property; and that the reign of reason, the social contract of Rousseau, did and could only come into existence as a capitalistic, democratic republic. Like all their predecessors, the great thinkers of the eighteenth century were unable to leap the barriers with which their own age hemmed them in.” Translation: Friedrich Engels, *Socialism: Utopian and Scientific*, trans. Edward Aveling (London: Swan Sonnenschein & Co., 1892).

<sup>38</sup> Cf. Bloch, *Naturrecht und menschliche Würde*.



secured by a social state is an important asset, and in some legal orders is even anchored in such a core right as human dignity.

Human beings live not on bread alone. Their free self-determination in the many dimensions of human life is a good, too, as is the freedom to live according to one's faith or secular convictions in a community where nobody has to fear for life and limb and in which human beings find the respect they deserve. Some of the best Marxist thought on human rights has (ultimately) underlined the importance of this dimension of social reform.<sup>39</sup>

Reductionist economic theories thus fail to convince. This also is true for a modern variant, which – though not necessarily within the framework of Marxist theory – posits a hypothetical connection between human rights and the rise of neoliberalism.<sup>40</sup> This connection does not exist if neoliberalism is taken to refer to economic policies that disregard the interests of the poor, foster inequality, limit the freedom of the greater part of society through economic hardship and serve the material interest of a few within an instrumentalized, laissez-faire, free-market ideology. Human rights do not establish a just economic order as such, but they are a precondition for the political possibility of achieving this end and already enshrine certain principles that create a framework for decent economic policy, as just underlined. None of this is linked to neoliberalism. Unsurprisingly, various regimes of the Global South applied what are widely regarded as neoliberal policies while at the same time showing no respect for human rights.<sup>41</sup>

### 5.3.4 *Human Rights as the Handmaidens of Power and the Prospects of Postcolonial Worldmaking*

Another theory weds human rights to political power in the sense of a whole set of structures of domination, including epistemic patterns of subjugation in the “*vaste dispositif*” of a “*société panoptique*,” in which the “*episteme*” contributes to the subject's internalization of the power relations that enslave them, to use Foucault's terms.<sup>42</sup> In postmodern thought, this can be connected to deep-seated structures of force, including the performative force of language: From this perspective, the meaning of expressions is fixed by subtle or visible forms of force.<sup>43</sup> Certain ideas

<sup>39</sup> Bloch, *Naturrecht und menschliche Würde*, arguing for extending the concern of Marxist thinking to securing human beings the respect that they deserve.

<sup>40</sup> Cf. for the argument that the supposed blindness of human rights to issues of material equality prevents them from abetting neoliberalism, Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018), 173 ff., 218.

<sup>41</sup> Sikkink, *Evidence*, 38 ff. Moyn, *Not Enough*, 173 ff. does not deny this but fails to fully acknowledge the role of human rights in enabling egalitarian policies and preventing abuses – including, importantly, by progressive movements, as discussed below.

<sup>42</sup> Michel Foucault, *Surveiller et punir* (Paris: Gallimard, 1975), 349 ff.

<sup>43</sup> Derrida, “Force of Law,” 3–67; cf. for comments Matthias Mahlmann, “Law and Force: 20th Century Radical Legal Philosophy, Post-Modernism and the Foundations of Law,” *Res Publica* 9, no. 1 (2003): 19–37.

conquer human beings' thought through the same mechanism of subtle and not-so-subtle compulsion, not by better arguments – which is hardly surprising, because from this deconstructivist perspective there is no such thing as a “better” argument. Human rights are sometimes even associated with great evils: In their generality and universality, it is argued, they disregard the individuality and otherness of every human being and thus come dangerously close to totalitarian ideologies of contempt for human beings.<sup>44</sup>

In some (but importantly not all) postcolonial theories, human rights are linked in particular to continuing structures of colonial domination. It is claimed that human rights perpetuate these structures both politically and epistemologically because they universalize colonial perspectives and overlook other “epistemologies of the South.”<sup>45</sup>

There is an important point here: As in the case of the economic instrumentalization of human rights, any theory of human rights needs to stay mindful of the degree to which it may lend itself to abuse by power. It is also true that the limited, fragile and imperfect order of international human rights exists alongside economic, political, legal and military structures of the domination of powers of the Global North over many states of the Global South. The hypothesis of an intrinsic connection between rights and power is quite another thing, however. Human rights are central tools for criticizing authoritarian orders or power in democratic societies. Political freedoms and the protection of life and bodily integrity are assets for political movements that challenge illegitimate political power. For instance, to the political opposition or dissidents it matters greatly whether they have the means to defend themselves against torture, arbitrary arrest, censorship and other seasoned means of repression or not.

It thus is no accident that the underestimation of the importance of these rights by certain analyses of the period following World War II, not least from the radical left, some of which even postulate the dawn of authoritarianism in constitutional states, is widely perceived as a political shortcoming. As Foucault rightly observed in this context, there is the risk of exaggerating the critique and failing to properly distinguish different forms of state power. The failure to make such differentiations was

<sup>44</sup> Derrida, “Force of Law,” 59 ff.

<sup>45</sup> Cf. for instance Tony Evans, *The Politics of Human Rights: A Global Perspective* (London: Pluto Press, 2005); Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002); David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004); Boaventura de Sousa Santos, *Epistemologies of the South: Justice Against Epistemicide* (Boulder, CO: Paradigm Publishers, 2014); Nelson Maldonado Torres, “On the Coloniality of Human Rights,” in *The Pluriverse of Human Rights: The Diversity of Struggles for Dignity*, eds. Boaventura de Sousa Santos and Bruno Sena Martins (New York: Routledge, 2021): “[T]he very Western modernity that has generated the hegemonic discourse of the ‘Rights of Man’ is also the global episteme that generated the view of colonial ontological differences among human beings.”

one of the root causes leading to the tragedy of 1970s left-wing terrorism in Western democracies. In addition, Foucault (like many others) rediscovered the importance of rights, even wedding the idea of critique to such rights in the tradition of “natural law,” as he states explicitly in his later work.<sup>46</sup>

As our historical review suggested, universal human rights were in no way a project of the ruling groups of European history. They were used as tools to liberate radically suppressed, even enslaved people. Major developments in the institutionalization of human rights were due to the committed work of persons from the Global South. For significant stretches of time, human rights were the instruments used to wrest power from colonial elites and attack systems such as South African apartheid, and thus they were part and parcel of the political project of the democratic and liberty-preserving movements of decolonization and their contribution to a kind of worldmaking beyond the color line that aimed to free human beings from global structures of domination.<sup>47</sup> In addition, the movement towards delegitimizing these rights was advanced powerfully by authoritarian regimes that intended to free themselves from the burden these rights imposed on them.

It is unclear how this historical trajectory can be reconciled with the thesis that modes of thought of the kind hypothesized in “epistemologies of the South” would arrive at entirely different normative principles than those embodied in human rights. Why would this be plausible, when the idea of human rights owes so much to the creative thinking and political determination of people from the Global South? And what would it even mean in concrete terms to design rights according to the “epistemologies of the South”? That taking the life of a dissident by state force is legitimate according to these epistemologies? That censorship is entirely justified due to the epistemic makeup of people from the Global South? That homosexual people are to be treated disadvantageously in comparison to heterosexuals, perhaps even stoned to death, as has been justified recently with reference to local traditions?<sup>48</sup> That racist discrimination, torture and rape are okay? As such conclusions are entirely out of the question, the question at issue here remains what exactly the better alternative to human rights might be. Sometimes, reference is made to a stronger emphasis on community values in, for example, African conceptions of human rights to render the difference from “Western” human rights more concrete. This does not question the idea of human rights as such, however. It asks the entirely legitimate question of how individual claims, the rights of others and communal

<sup>46</sup> Michel Foucault, *Qu'est-ce que la critique? Suivi de La culture de soi* (Paris: Librairie Philosophique Vrin, 2015), 38.

<sup>47</sup> Du Bois, *The Souls of Black Folk*, 5, 17, 33: “[T]he problem of the 20th century is the problem of the color-line.” For a reconstruction of some of these aspirations in the process of decolonization, which included references to human rights, from George Padmore to Nkrumah and Eric Williams, cf. Getachew, *Worldmaking after Empire*, 70, 94, 126. On her analysis of the place of human rights in a postcolonial cosmopolitanism, *ibid.* 33 f., cf. the discussion below.

<sup>48</sup> Embassy of Brunei Darussalam, *Letter to European Parliament*, REF: KBBB 33/2019, April 23, 2019.

interests can be reconciled. This is a classical question *within human rights doctrine* solved by the system of justification of interferences in human rights, in particular by proportionality analyses and the weighing and balancing of competing interests. Incidentally, this includes the doctrine of property, which can be constructed in a way that leaves ample scope for the consideration of community interests.<sup>49</sup> Seen in this light, the matter then turns from supposedly profoundly different ways of understanding justice to questions of the convincing and of course continuously controversial concrete construction of human rights not least as positive law, with all of the political and ethical implications such constructions necessarily entail. It comes as no surprise, then, that documents such as the *African Charter of Human Rights* or the bill of rights of the Constitution of South Africa contain original content that nevertheless rests comfortably within the framework of the universal human rights project.

Other proposals for alternative norms that differ from human rights in any meaningful sense either remain exceedingly vague<sup>50</sup> or implicitly restate the importance of those rights they profess to transcend.<sup>51</sup> There is simply no body of norms in sight that would offer a preferable alternative to the differentiated body of human rights in ethics and law.

Controversies about such questions are not decided simply by the superior power of one side of the debate, as in some epistemological theory. Power can intimidate opponents, bend their thinking to its yoke and make them its

<sup>49</sup> Cf. for some remarks on the legal philosophy and doctrine of property, Matthias Mahlmann, "Autonomie, Gleichheit und Eigentum," *Zeitschrift für Schweizerisches Recht* 140, no. 4 (2021): 377 ff.

<sup>50</sup> Mark Goodale, *Anthropology and the Law: A Critical Introduction* (New York: New York University Press, 2017), quoting Eduardo Kohn, asks, for instance: "So what does a 'living-future logic of a thinking forest' point to for the future of law?" relating this to the "*cosmovisiones*" of epistemologies of the South.

<sup>51</sup> A good example is the claim (e.g. the one mentioned above, Torres, "Coloniality", n. 45) that the Western world that produced the idea also erected a false hierarchical ontological order of human beings. This claim evidently demands and defends human equality – a core idea of the human rights project. So either this critique is colonial itself or the human rights project is already pursuing what this criticism normatively implies. Moreover, it is more than deplorable that such accounts entirely neglect the struggles from below involved in human rights history, trying to overcome human inequality, and overlook the inegalitarianism existing in the South. Another example is Mutua's argument that ultimately endorses human rights. He does not criticize human rights as such but a certain conception of human rights, which in his view neglects in particular the importance of community and people's rights, Mutua, *Human Rights*, 71 ff. This is an important topic of debate, but not one that puts the idea of human rights as such into question – as Mutua's reliance on this idea underlines. Evans, *The Politics of Human Rights*, 142, criticizes human rights policies in the framework of a political analysis of neoliberal globalization, but also demands "a political agenda that expresses a genuine concern for human rights and human dignity." One may also wonder what the normative core of the demand to treat refugees "humanely" actually is and whether it boils down to something else than the human rights of refugees (rhetoric aside), cf. Kennedy, *The Dark Side*, 352.

hypocritical servants or simply silence them. But it is a category error to mistake *being convinced by arguments* for *being compelled to accept a position by force*. One cannot be convinced by force, a seasoned argument of great importance in the struggle against religious intolerance. “One can enter a church without wanting to, one can walk towards the altar without wanting to, one can accept the sacrament without wanting to, but believe you cannot but willingly,” Augustine observed aptly, although later in his life he pursued policies at odds with this insight.<sup>52</sup> The same holds true for becoming convinced of a proposition. Convincing presupposes argument and free assent, not force. This is the analytical shortcoming of theories that dissolve reason-giving into the force to subdue others, in however subtle a form. This theory of the constitutive role of violence in the formation of normative convictions can have very dangerous political consequences, a fact that presumably is obvious. It is not good news for human communities if it is seriously maintained that central political, legal and ethical questions cannot be solved or at least promoted by arguments and reasons but only by force. The fact that the Nazis could send a person who resisted their regime to the guillotine did not make their positions right, and it is crucially important to stay aware of this fact.

There is thus no compelling case for the claim that human rights are necessarily instruments of domination, both in practical politics and in the “*epistemes*” of society, the systems of human beings’ political, ethical and legal beliefs. There is no reason to think that the promotion of human rights necessarily unwillingly serves the interest of the powerful, whether colonial or not, although human rights may be abused for this purpose. The critique of accounts of human rights as camouflaged instruments of power leads to a clearer perception of the emancipating force of human rights based on reasons accessible to all.

### 5.3.5 *Feminist Critiques and Restatements of Human Rights*

There is not just one form of feminism. On the contrary, feminist discussions are as controversial and even acrimonious as other areas of theory-building. Traditionally, a distinction is made between different waves of feminist reflections about ethics and law: A first wave claimed the equal rights of different genders, a second emphasized difference, including the unity of normative standards applicable<sup>53</sup> to different

<sup>52</sup> “*Intrare quisquam ecclesiam potest nolens, accedere ad altare potest nolens, accipere Sacramentum potest nolens: credere non potest nisi volens,*” Augustinus, “In Joannis Evangelium,” in *Patrologia cursus completus, series latina, tomus XXXV* (Paris: Jacques-Paul Migne, 1845), 1379, 1607.

<sup>53</sup> Cf. for instance the debate about ethics of justice and ethics of care, after Carol Gilligan’s critique of Lawrence Kohlberg’s theory of ontogenetic moral development, Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge, MA: Harvard University Press, 1982).

genders, and a third questioned the sense of binary gender categories in general.<sup>54</sup> In recent years, further perspectives have broadened the picture, importantly, for instance, concerning intersectionality, including, among other factors, skin color (“race,” to use English-language terminology) and religion.<sup>55</sup>

In some of these debates, skepticism about human rights has been voiced, in particular concerning whether the idea of human rights is dependent on a concept of humanity that in fact mirrors male perspectives and thus forms an unsuitable tool to foster the liberation of women.<sup>56</sup>

The understanding of human rights as an ethical, political and legal concept has profited significantly from these debates, which have informed and driven forward the protection of equal treatment and freedom from discrimination in law, among others. It is a misunderstanding to assume that human rights cannot accommodate the respect for human difference, including nonbinary gender difference. On the contrary, there is an increasingly sophisticated set of legal tools to fight discrimination and foster the respect for the equality of human beings.<sup>57</sup> Accordingly, as mentioned in the historical review, women’s issues were important early elements of the international struggle for human rights – just as they were on the national level. The core areas of protection, such as freedom and self-determination, are significant for all human beings, whatever their gender might be – as Polish, American and Argentinian women’s struggle for reproductive autonomy in recent years has shown yet again.

These findings already indicate the main lesson drawn from the history and practice of human rights, a lesson emphasized by many feminist scholars and activists: Nothing in the idea of human rights is hostile to the justified aim to include gender perspectives in ethics and law. This is true both of the normative foundations of human rights, as will be discussed below, and of the concrete normative content of these rights. The task therefore is to purge human rights of

<sup>54</sup> Cf. respectively Wollstonecraft, *Vindication*, Introduction: “[T]he first object of laudable ambition is to obtain a character as a human being, regardless of the distinction of sex”; Susan Moller Okin, *Women in Western Political Thought* (Princeton, NJ: Princeton University Press, 1979); Judith Butler, *Undoing Gender* (New York: Routledge, 2004); Judith Butler, *Gender Trouble* (New York: Routledge, 1990). Referring to waves should not be understood, however, as implying that later waves superseded earlier ones. Nussbaum, for instance, emphasizes universalistic, egalitarian perspectives, cf. Martha Nussbaum, *Women and Human Development: The Capability Approach* (Cambridge: Cambridge University Press, 2000), 34 ff., including “central human functional capabilities,” 78 ff.

<sup>55</sup> Kimberlé Crenshaw, “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,” *The University of Chicago Legal Forum* (Vol. 1989): 139–67.

<sup>56</sup> Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), 238: “In the liberal state, the rule of law – neutral, abstract, elevated, pervasive – both institutionalizes the power of men over women and institutionalizes power in its male form.”

<sup>57</sup> Cf. for an overview of international human rights law Daniel Moeckli, “Equality and Non-discrimination,” in *International Human Rights Law*, 3rd edition, eds. Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (Oxford: Oxford University Press, 2018), 148–64.

the many surviving remnants of patriarchal traditions and ideology, not to politically and theoretically subvert the concept of human rights itself.<sup>58</sup>

### 5.3.6 Human Rights Curtailing Democracy and Sovereignty

Fundamental rights have an antimajoritarian edge. There are occasions when a human right will trump even a democratically taken decision. Various laws that criminalized consensual homosexual intimate relations, for instance, were created democratically and nevertheless were struck down by courts entrusted with protecting fundamental rights. There are many examples of such forms of judicial review in international law as well – for instance, in the system of the ECHR.<sup>59</sup>

It is argued that this limitation of democracy is either illegitimate or at least bad policy. Unfettered political self-determination should take priority over human rights and their enforcement by courts or other institutions, it is claimed. In this context, the power of courts, both domestic<sup>60</sup> and international,<sup>61</sup> to strike down legislation is an issue. What is the source of this power?

There is more than one way to solve this problem. One important point is to formulate a properly differentiated account of the relation between democracy and human rights. Human rights are not an irrelevant by-product of democracy; rather, they are essential for its architecture and functioning. There can be no democracy without the protection of fundamental rights. This is true not only for political rights, including electoral rights, which are the precondition of any democratic decision-making. It also is true for liberties like freedom of speech, freedom of the press and freedom of assembly. Democracies need decisions that are the product of sometimes important interpretations of human existence and of what human life and human community are about. Freedoms of religion, of conscience, of science and art create the possibility of a lifeworld where such opinions can be formed,

<sup>58</sup> Cf. as examples from the debate the passionate defense not only of fundamental rights, but also of fundamental rights *protected by judicial review*, Susanne Baer, “Who Cares? A Defence of Judicial Review,” *Journal of the British Academy* 8 (2020): 75–104. On the unconditional reciprocal recognition of others embodied in human rights, Elisabeth Holzleithner, “Feministische Menschenrechtskritik,” *Zeitschrift für Menschenrechte* 1 (2016): 110–20, 118. Beate Rudolf, “Menschenrechte und Geschlecht – eine Diskursgeschichte,” in *Menschenrechte und Geschlecht*, ed. Ulrike Lembke (Baden-Baden: Nomos, 2014), 24–50. For an immanent and universal theory of human rights, Brooke A. Ackerly, *Universal Human Rights in a World of Difference* (Cambridge: Cambridge University Press, 2008). Cf. on the debate Diana Tietjens Meyers, “Feminist Philosophy of Human Rights,” in *The Oxford Handbook of Feminist Philosophy*, eds. Kim Q. Hall and Ásta (Oxford: Oxford University Press, 2021), 462–83.

<sup>59</sup> The judgments of the ECtHR do not nullify laws but create obligations of state parties to abide by the decisions of the court, Art. 46 para. 1 ECHR, which often leads to changes of laws.

<sup>60</sup> Cf. for instance Dworkin, *Justice for Hedgehogs*, 395 ff.

<sup>61</sup> Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014).

interrogated, revived and reformulated and therefore constitute an equally vital element of democracy. The procedures of democracy need to be protected, which implies elements of the rule of law that have a bearing on questions of human rights, including the right to a judicial review of decisions made by public authorities. Moreover, if democrats have to fear for life and limb because of their political activities, the democracy at issue is very limited indeed. The right to life is therefore equally important for democracy, as is the prohibition of torture and other guarantees – for example, habeas corpus.

Rights may thus limit democratic decision-making in certain instances, but their rule serves to protect democracy in the long run. This is essential, because democracy is not just about one majority decision at a given moment of time but is a system of political self-government in which it is possible to exercise political autonomy continuously over a long period of time.

Ideally, courts are created with democratic credentials themselves, whether direct or indirect. The point of courts is that the democratic political process establishes an institution that is functionally independent of concrete majorities and can thus serve as a check on the decision-making of shifting majorities in certain well-qualified respects. Courts with such a function form part of the idea of constitutional entrenchment – the democratic creation of antimajoritarian checks on the decisions of everyday democratic life. Organizing such a system with a claim to legitimacy and securing its credible operation, not least on the international plane, involves many difficulties. However, the claim that no such sufficiently legitimate system can be imagined seems hard to maintain, given the existing practice of institutions that serve these functions quite successfully.

Another point should be considered. Democratic self-determination and sovereignty do not mean arbitrary power unfettered by normative principles. They mean the exercise of political autonomy within the bounds and limits of legitimate norms. This is how they have been conceptualized for a very long time in various domains of thought, and convincingly so: There is no right to determine oneself by enslaving a minority, for instance. Political self-determination has to respect the normative limits drawn by justified normative principles, in particular by the legitimate rights of individuals as equal, autonomous persons.<sup>62</sup>

<sup>62</sup> Schmitt famously states that sovereign is who determines the course of affairs in the state of exception, Carl Schmitt, *Politische Theologie* (Berlin: Duncker & Humblot, 1934), 11: “Souverän ist, wer über den Ausnahmezustand entscheidet”; Carl Schmitt, *Diktatur*, 18 [194], influencing many current debates, cf. for instance Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998). This theory dissolves the normative concept of sovereignty into brute power, unconvincingly, cf. for instance Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen: Scientia Verlag, 1928), 6 ff.; similarly, Beitz, *Idea of Human Rights*, 22, for whom sovereignty is a creation of international law: “In this perspective, the significance of the declaration at the time of its adoption was not so much to pose a challenge to the principle of domestic jurisdiction as to advance a larger project of redescribing it.”



Human rights are therefore deeply interwoven with the normative architecture of democracy and the legitimate exercise of sovereignty. There is no argument against human rights from the perspective of democracy and political self-determination, only one that strengthens their cause.

### 5.3.7 *The Wrong Politics of Human Rights*

Another strand of human rights criticism argues that human rights are bad politics. While human rights are not denied to be a legitimate concern, critics maintain that a focus on human rights has detrimental political effects. It is argued that human rights politics are powerless against inequality,<sup>63</sup> crowd out other concerns, fail to acknowledge the costs of human rights or pursue a narrow concept of human emancipation. Human rights are understood as individualistic, atomistic and insufficiently oriented towards community.

These criticisms are arguably true for certain versions of human rights politics, although it is not as easy to name serious human rights actors both within and beyond the legal sphere that promote human rights as a *passpartout* to all political problems, are unconcerned about the problematic aspects of (legal) human rights or celebrate the egoistic individual free of all community concerns.

In any case, there is certainly no reason why human rights should not be reconcilable with or even profoundly supportive of other political aims. For instance, human rights have done a great deal for human equality – from racial desegregation to the liberation of women. As already indicated, they created a space within which to develop and implement new political visions by protecting those liberties and other goods that are the precondition for any transformative political thought, including the survival of the thinker. A legitimate conception of human rights includes the concerns of other human beings in its architecture, as we will see in a moment. Furthermore, our historical review showed that, from the very beginning, the rights of human beings were closely associated with questions of social justice, which are, thus, not only a concern of recent debate. Today, human rights contribute to the task of promoting social justice in very concrete ways, not least through social rights that work and are effective in more than one legal system.

To be sure, there are wrong politics of human rights. But there is no reason why the struggle for human rights must be bad politics.

### 5.3.8 *The Aporia of Human Rights*

Hannah Arendt famously advanced a critique of human rights that hinges on the thesis that there is an *aporia* of human rights. Human rights are proclaimed to be rights of crucial importance and are thought of as the rights that human beings enjoy

<sup>63</sup> Moyn, *Not Enough*, 173 ff.; Sikink, *Evidence*, 35, 236.

solely by virtue of their humanity. As ethical ideas and legal institutions, however, they are unable to protect human beings when it matters most. In times of acute crisis and danger, nobody has the slightest respect for the naked humanity of human beings. This became all too apparent when the Nazis launched their full-scale attack on human dignity: The supposedly sacred idea of human rights had no practical traction and remained an empty promise, an object of bitter ridicule in light of the hopes connected with it and the suffering with which these hopes were repaid.<sup>64</sup> The core lesson of this experience is to understand the importance of the “right to have rights,” Arendt argues. This means that human beings need to be entitled to belong to the group of morally relevant beings. This status is achieved by being part of a political community,<sup>65</sup> which is the place where human beings achieve their humanity in active life, led in a common sphere created by the exchange of ideas and other ways of human interaction that constitute humans’ humanity.<sup>66</sup>

Arendt doubtlessly makes an important point here. The experience of the Third Reich shows vividly that human rights as an ethical and political idea will not necessarily be able to prevail against powerful political foes. On the contrary, any appeal to these standards can be shrugged off with disdain as no more than foolish babble as long as the regime’s battalions are advancing victoriously and its police apparatus is functioning well. As our historical review showed, the first steps towards a kind of legal protection by human rights proved no obstacle to the conquering German armies in World War II and the machinery of Nazi terror. This experience is very important. It shows the possibility of merciless, unremitting, outspoken, proudly posturing contempt for central elements of those ideas for which human rights stand – a contempt *with a mass basis in society*. The awareness of this possibility acts as an excellent antidote to the illusion that there is anything natural and self-evident about even the smallest partial victory in the struggle for human rights.

In addition, Arendt’s critique of human rights inspired by these observations, which is perhaps more serious and important than any other, directs the analysis of human rights to a crucial point that is relevant for their justification. It underlines the significance of the protection of human rights at the state level. Without such safeguards, there can be no meaningful protection of human rights. As highlighted in the historical review, the drafters of the *Universal Declaration* recognized this fact and included it in the architecture of international human rights that they envisaged. The protection of human rights at the state level has been a baseline of their legal implementation ever since then.

Two elements of the evolved human rights system are important to bear in mind when evaluating Arendt’s critique, however. The first is that national systems can incorporate and seriously protect human rights in the narrow sense – that is, the rights

<sup>64</sup> Arendt, *Origins of Totalitarianism*, 349 ff.

<sup>65</sup> Arendt, *Origins of Totalitarianism*, 388.

<sup>66</sup> Hannah Arendt, *The Human Condition* (Chicago, IL: University of Chicago Press, 1958).

of all human beings under the jurisdiction of the respective state, independent of their nationality or residence status. It is not just humanity that can protect human rights, as Arendt formulated. The ranks of the protectors of human rights have been swelled by the legal orders of particular states. This is a crucial development. It shows that a considerable number of states have learned to have more respect for human beings' naked humanity than past political actors, and that they have even institutionalized this attitude. As explained above, this is also the case for supranational legal regimes, as the *European Charter of Fundamental Rights* illustrates. Regional systems of public international law also have expanded the reach of rights, in particular within the framework of the extraterritorial application of human rights.<sup>67</sup>

Moreover, Arendt's critique contains certain ambiguities, perhaps even self-contradictions, because it acknowledges the possibility that societies can evolve to such a degree that humanity as a whole, not only individual states, becomes able to guarantee human rights.<sup>68</sup> This questions the necessary link between the inclusion in concrete communities and the right to have rights that forms the core of Arendt's critical argument.

This leads to the second significant point: The international system of protection has changed since Arendt's critique was formulated. While the current system has its weaknesses, it is certainly better than nothing. States adapt their behavior to human rights standards, some kind of redress for past violations is offered and individuals are saved from human rights violations by this system. In addition, legal means are not the only or even the predominant way of enforcing human rights. Political instruments count a great deal, too.

These two developments – the protection of human rights as the rights of all humans, not just of the members of the respective communities, and the denser protection of human rights on the international level – manifest an evolution of the human rights system that was scarcely on the horizon when Arendt formulated the critique of the *aporia* of human rights. These two developments provide practical proof that belonging to a national community is not a necessary precondition for enjoying human rights. Human beings have taken a step beyond this limitation, or, more precisely, they have picked up some threads of the rich heritage of meaningful universalism in past thought and practice and hold them in their hands – though they may let them fall at any time. Arendt's critique therefore had a kind of traction in the past it now no longer possesses.

This notwithstanding, the thesis of the aporetic structure of human rights leaves us with an important question: What is the justification of the right to have rights? Or is there none, because this right begs the question of what the justification of the right to have the right to have rights (and so forth) is? Are we trapped in an infinite regress? The task is therefore to show plausibly that there is a point in the

<sup>67</sup> Cf. for an overview the Introduction and Chapter 2.

<sup>68</sup> Arendt, *Origins of Totalitarianism*, 390.

justification of human rights where, to use a famous metaphor, the spade is turned<sup>69</sup> because it is impossible to dig deeper. One idea is that the core of the right to have rights is human dignity – the ultimate worth of every individual human being, which, under the condition of valid, universally obligatory rights-generating normative principles, entitles every individual human being to enjoy a protected space for the pursuit of happiness, secured by rights. Whether human dignity and such normative principles (yet to be specified in more detail) solve the problem of the justification of the right to have rights is one of the questions to be addressed in the following. For now, let us simply record that political theory's various attacks on the idea of human rights are not very convincing. This further encourages us to ask what the point is of identifying a selected set of rights as ethical and legal concerns of particular weight and of buttressing these rights through powerful legal institutions.

## 5.4 THE POLITICAL CASE FOR HUMAN RIGHTS

### 5.4.1 *The Political Theory of Entrenchment*

A useful approach to answering this question of why one should identify a particular set of rights and take them as particularly weighty ethical and legal concerns is to reflect on the *usefulness of legal entrenchment*. It is no accident that the political idea of human rights is wedded to the political theory and practice of constitutionalism and its basic idea, which is to isolate certain foundational norms from the general political process that these norms frame.<sup>70</sup> This means defending a two-tier system of political organization: Human rights create a framework for the everyday labors of politics, including antagonistic political pursuits concerning the many issues controversial in society. They can even to a certain degree accommodate those political forces that aim to leave a political system based on human rights behind. There are certainly legitimate limits to this accommodation. No majority has the right to enslave a minority, and no majority can enjoy the right to deprive others of their right to pursue their vision of the right and the good in the future, nor has any majority the right to deprive others of their rights to life and liberty. But within these limits, much is possible: In many systems, freedom of speech rightly includes the freedom to think aloud about the merits of abandoning this very freedom.

This kind of second-order entrenchment serves a very important function: It creates the scope for an open political process, which is necessary because political perfection is not ready at hand, political insight is not easy to achieve and human political pursuits – despite the very best intentions and careful self-reflective

<sup>69</sup> Wittgenstein, "Philosophische Untersuchungen," 217.

<sup>70</sup> András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017), 41 ff.

thinking – continue to be fallible. No philosopher king, no avant-garde of social progress is in possession of absolute political truth. Politics is a search involving trial and error, with no obvious end in sight – and if one shares these assumptions, the entrenchment of secondary norms like human rights makes a great deal of sense. A good and entirely justified dose of epistemic and moral self-distance, a lack of self-righteousness and skepticism about human beings' political wisdom is built into the political project of human rights: This project does not guarantee the end state of human bliss but protects conditions that preserve a framework for humanity's search for a decent political order. In this sense, human rights are a politically mature expression of patience with human fallibility – they provide the scope to pursue very different paths and experiments of living and to learn from failure along the way.

There is a further important point: Human rights aim to preserve the possibility of a flourishing human life independently of whether a final, highest aim of social organization is reached. An imperfect life is still a life worth living – this is one of the insights buttressing the legitimacy of human rights. The value of a life as such suffices to justify their system of protection. These rights consequently are not at the disposal of a policy that justifies current interferences in human rights with the supreme future good that these interferences will bring about. Interferences have to be justifiable here and now. This does not exclude the possibility of considering the interests of future generations – for example, in the context of environmental policies. However, the rights of the people alive now cannot simply be discounted. There is no prerogative of a utopian future; every generation and its particular quest for a life well lived is equally worthy of respect.

Human rights therefore act as a check on certain eschatological political schemes that are prepared to sacrifice human beings in the present on the altar of future bliss. The history of nineteenth- and twentieth-century socialist and communist thought is determined by such ideas in theory, art and political practice. Some noble deeds of self-sacrifice and some of the greatest tragedies of the twentieth century were the consequences. Human rights' insistence on the equal importance of every human being is thus far from a political banality. The question of whether or not one follows this path has turned out to be one of the decisive normative questions of recent history and defining not only for the identity of the post-totalitarian left – a topic to which we will return.

As said above, human rights create a framework for an open political process. However, this framework is to be respected by everybody and is thus based on a claim of substantial legitimacy. This implies that the idea of human rights rests on epistemologically more solid grounds than other political questions. The assumption is that there are better reasons to assume that freedom of speech is justified, for instance, than opinions about particular controversial political questions – say, that the highest percentage of income tax should be 44 percent and not 47 percent. This is quite a plausible stance. There are compelling reasons for freedom of speech, whereas the maximum tax rate is loaded to a much greater extent with difficult

problems of political expedience. The content of human rights thus embodies a substantial theory of conditions for justified political aims.

The political idea of entrenchment is relevant not only for *legal* human rights. It is also an important element of a reflective *ethics* that seeks to identify a specific set of rights of other people, rights that carry *pro tanto* specific weight in comparison to other considerations. Religious tolerance as a moral virtue presupposes a sense of the moral entitlement of others to have their religious beliefs respected, not only by law, but also in everyday life. To discriminate against persons because of their religion is therefore not a morally appropriate thing to do.

Such a morality of rights is helpful in political ethics, too. It determines the constraints of one's own political or economic aspirations, which may take different forms but must not violate the human rights of others. This is also true for those cases involving a morally justified bias towards people with whom one enjoys specific relations. There is doubtlessly a morally legitimate special concern for one's children or other persons with whom one enjoys a personal bond. We legitimately do many things for our own children that we do not do for other children. Acknowledging this does not mean committing to a new form of tribalism, because there are limits to such permissible special concerns.<sup>71</sup> Human rights define some of these limits. The legitimate concern that one's own children receive a good education does not justify contributing to social structures that provide for this need at the expense of other children, for instance. Human rights define an ethical baseline in the framework of which other concerns take their appropriate place. Making them explicit ethical principles helps to draw their boundaries properly.

Entrenchment implies a stance on the idea of human *progress*: Whatever the future may look like, human rights underline that respect for human liberty, equality and worth is the condition for any progress. Consequently, progress does not consist – as in some teleologies of history – in humanity being reborn over and over on ever-higher levels of development, but in better ways of living that continue to respect human beings' basic rights.<sup>72</sup>

<sup>71</sup> As Dworkin, *Justice for Hedgehogs*, 324 observes: "Many people do believe, as I do not, that their racial, ethnic, religious, and linguistic connections bestow associational rights and obligations. Perhaps some of these convictions have a genetic foundation; if so they will prove particularly hard to ignore and perhaps pointless to disparage. But the idea of these special rights and obligations has been and remains a powerful source of evil. Throw a dart at a spinning globe, and the odds are good that it will land where tribes of race, religion, or language are killing each other and destroying their communities in the name of some supposed group right or destiny. These hatreds may be as enduring as they are destructive, and we should have no illusions that they will disappear or even ebb from human affairs."

<sup>72</sup> This can be reconciled with a sober concept of history. Arendt, for instance, notes in the expanded German version of *Origins of Totalitarianism* – Arendt, *Elemente und Ursprünge totaler Herrschaft*, 325 n. 36 – that the concept of progress of the Enlightenment, contrary to teleological ideas of limitless progress, included the idea that humanity had ultimately reached maturity and thus an end point of a certain kind of development, and would move onward with freedom and autonomy, not be carried away by the currents of history.

#### 5.4.2 *Scope to Act and the Political Subjects of History*

Human rights empower human beings as the agents of political development and social change. Does this make political sense? After all, one important question of political theory and the philosophy of history is who the subjects of this history actually are. This question only seemingly has an easy answer. Much intellectual effort has gone into showing that it is not human beings who drive human history forward (as it might appear), but forces beyond human control. It is not only religious perspectives that embrace this view. Hegel, for example, famously argued that it is the cunning of reason, the "*List der Vernunft*" that moves history – and in ways contrary to human beings' intentions.<sup>73</sup> Consequently, attempts to create a political order based on normative principles determined by free, autonomous human reflection are futile. Marxism was influenced by the idea of history being driven forward by economic forces, the dialectic of the forces of production and relations of production. Some evolutionary social theories invest the functional needs of social systems with the power to determine the course of human social history.<sup>74</sup> Others (unlike Adam Smith himself) see only the invisible hand of markets at play.

Human rights made explicit and established as powerful institutions of the law imply another story, however. The creation of such ethical systems and institutions manifests the conviction that human beings can influence history in a very profound way. These systems and institutions embody the human attempt to define the normative limits in which the future – whatever it might bring, with all of the surprises both good and bad that it surely holds in store – can unfold. The architecture of human rights intends to prevent certain courses that have plagued human beings in the past. Human rights are made to facilitate a human life that is enriched by a certain degree of normative integrity because individuals pursue their various aims within the morally legitimate limits of human rights. Within these carefully crafted constraints, however, humans are free to act. Human rights are a testimony to human beings' claim to being the autonomous authors of their own political fate.

There is much to be said about the importance of social structures and the many direct and indirect ways in which they influence human beings' political aspirations, political consciousness, motivations and, ultimately, action. Subjective voluntarism is not a convincing theory of political agency. However, acknowledging this does not mean that it is advisable to deny the importance of individuals' political agency. The claim that superindividual forces beyond human control drive the course of history forward has not proven to be a very successful theoretical stance. It was not merely an impersonal social structure that caused masses of human beings to inflict war

<sup>73</sup> Georg Wilhelm Friedrich Hegel, *Vorlesungen über die Philosophie der Geschichte*, in *Werke*, Vol. 12, eds. Eva Moldenhauer and Karl Markus Michel (Frankfurt am Main: Suhrkamp, 1970), Vorrede, 49.

<sup>74</sup> Luhmann, *Gesellschaft der Gesellschaft*.

upon other people and commit crimes during Nazism, but individuals who ultimately were responsible for these deeds. Human rights consequently draw a plausible lesson from the past.

The ethics and law of human rights presuppose that there is no reason for humans, as autonomous agents, to abdicate normative reflection in favor of other forces when determining the proper setup of institutions of social organization. There is no reason to assume the priority of the superhuman wisdom of the markets, for example, which transcends the capacities of human thought. Instead, normative principles form the legitimate framework of social organization. These normative principles are accessible to human understanding. Human beings not only are the authors of the normative framework of humans' social lives, but their ethical thought can also determine this framework's content convincingly. The idea of human rights acknowledges human ethical understanding as a guiding source of political organization.

The empowerment of human beings by human rights poses an important question to the politics of rights: How are we to prepare human beings for freedom? How are we to prevent the abuse of freedom for aims that have nothing to do with human rights? This question strongly exercised important thinkers after the experience of the French Revolution and in particular of *la Terreur*.<sup>75</sup> It continues to be a crucial question for the transition to democracy and the maintenance of democratic structures alike. The answer provided by systems of human rights is to secure rights and try to prevent abuse within this framework of guarantees. There is a case for cultivating the ability to appreciate freedom, including, for example, by such subtle means as art.<sup>76</sup> The rise of illiberal democracy attests the need for this, and dramatically so in recent years. There is, however, no legitimate "maturity test" for individuals or societies that could form a precondition for the enjoyment of rights. The entrenchment of freedom and other rights guarantees that lies at the base of the project of human rights thus involves a significant dose of trust in human beings' capability to exercise their rights conscientiously, with tangible institutional consequences that entail real political risks.

Trusting that human beings are able to use freedom responsibly bets on the sufficient maturity of human beings. Historical experience warns us not to be too sure about the outcome of this bet. It is thus important, as we will see shortly, that human rights not only create scope for action, but also incorporate safeguards against destructive political actions, something that is of decisive importance for the political theory of human rights.

#### 5.4.3 *Human Rights as a Condition of Community*

Human rights are not based on a *collectivist theory of social organization*: Their aim is to protect individuals, not superindividual values of whatever form. However, they are

<sup>75</sup> Cf. for instance Humboldt's remarks, Humboldt, "Ideen zu einem Versuch," 218.

<sup>76</sup> Schiller, *Ästhetische Erziehung*; Schiller, *Aesthetic Education*.



not motivated by an *atomistic, asocial individualism* either, although there have been plenty of attempts to make fundamental rights serve the interests of a powerful few. The importance of individuals as a limiting condition of political pursuits does not mean that human rights cannot be reconciled with solidarity and duties towards others, as we already have seen. Human rights are concerned with individuals, but individuals who are part of a community. Rights imply duties of others, they impose normative burdens in a variety of forms on everybody: Every individual not only is a bearer of rights, but also has duties derived directly or indirectly from the rights of others. If some persons have a right to freedom of expression, others have a no-right that these persons refrain from expressing themselves in a certain way, even if they strongly (and with good reason) disagree with the content of this expression. This includes their normative inability to make public authorities intervene in others' exercise of free speech – for instance, by action by courts. Respecting an order of rights is a strong statement of human solidarity, because it comes at a price for everybody.

In the law, further technical devices make this concern a legal reality. For instance, the doctrine of legitimate limitations of rights manifests the importance of the community-oriented aspect of human rights. Many codifications explicitly mention the rights of others in their systems of justified limitations alongside other community concerns. Influential courts have strongly emphasized the social nature of human beings.<sup>77</sup> The system of limitations is, after all, an attempt to balance the rights of individuals with the rights of others and community interests. Moreover, human rights catalogues include guarantees of equality and increasingly also incorporate some social rights that embody a minimum of legally guaranteed social solidarity with the needs and interests of others, mirroring moral principles with the same content. There is also a good argument for human rights as promoting the lasting integration of political communities: People's enjoyment of a significant set of shared, equitably distributed rights can create a social bond beyond the many divisions that remain. It is thus a profound misunderstanding to see human rights as opposing a deep concern for the importance of human community, including, on the international level, the community of all human beings.

#### 5.4.4 Human Rights as Legal Rights

Human rights as legal rights place particular demands on justification. One is the degree of certainty that law aspires to embody. Human rights, however, are abstract

<sup>77</sup> An interesting and influential case is the case law on human dignity in German constitutional law. In this context, the Federal Constitutional Court has underlined explicitly that the dignity-based freedom of the individual is not the freedom of an "isolated" and "autocratic" individual, but of an individual embedded and bound by human community, BVerfGE, Judgement of June 21, 1977, BVerfGE 45, 187 (227): "*Freiheit versteht das Grundgesetz nicht als diejenige eines isolierten und selbtherrlichen, sondern als die eines gemeinschaftsbezogenen und gemeinschaftsgebundenen Individuums*"; standing case law, cf. BVerfGE, Judgement of January 17, 2017, BVerfGE 144, 20 (para. 540).

and general. As a consequence, there is a need to specify them. Ensuring that this process is methodologically controlled so that it amounts to more than mere arbitrary decision-making by courts is a challenging problem. Nevertheless, through the incremental development of case law and doctrine, working human rights systems prove that this issue can be solved in practice.

A further problem is justiciability. This is an important constraint for legal human rights. The fact that something is a legitimate moral concern is not enough to make it a legal human right. It must be possible to formulate the concern in a way that makes it justiciable. Normative rhapsodizing devoid of legal effect does not foster the cause of human rights. There are intense technical debates about this question within human rights law. Given the vast number of concrete judicial applications of human rights law in courts around the world, it would be absurd to deny that this problem can be solved. To be sure, there are difficult cases, of which social rights represent a key example that we have highlighted several times in our discussion. These rights are very controversial for various reasons, not least because of their potentially redistributive impact on the wealth of society. However, such concerns about the legitimizing principles of social rights – important as they are – do not exhaust the debate. One also needs to be able to formulate social rights in a way that renders them justiciable. But even in this difficult case there is sufficient jurisprudence to show that social rights, too, can be properly integrated into justiciable law.

A further issue we have already touched upon is the role of courts in a theory of political institutions. In democracies, preventing courts from taking over legislative functions is of particular concern. The practice of human rights proves that this problem can be solved as well, not least by judicial self-restraint. These institutional questions are relevant for problems of specific groups of rights, too. As indicated above, one can be entirely convinced that there is a case, say, for a moral right to work and that a political society is under a duty to provide such work but legally question that courts should be the institutions allocating employment in a society.

The legal dimension of human rights therefore merits particular attention in a political theory of human rights. Nevertheless, it seems indisputable that the legal protection of human rights has proven a useful tool for fostering important goods of human beings. As we have seen, theories that doubt this have proven unconvincing.

## 5.5 RIGHTS AFTER AUSCHWITZ

Political theories do not exist in a historical vacuum. The weight of arguments depends in part on what history teaches us about their relevance. This is particularly true in our time. The many horrors of the last century are not sufficiently remote to have passed into comfortable oblivion. They are not episodes devoid of any deeper relation to our current lives, like castle dungeons that can be visited on a Sunday afternoon, sending a pleasurable shiver down one's spine at the thought of the cruel

deeds once committed there but soon forgotten over a beer in the museum bar – as if our present-day lives had exorcised the menacing ghosts – savage, narrow-minded and grotesque, greedy and devoid of remorse or pity – that plagued the unfortunate past. The twentieth century was on all accounts a watershed in human history. The catastrophes of that century – World War II, the Holocaust, the Gulag, the extermination campaign against the Armenians, the atrocities committed against the human beings submitted to colonial domination, including such defining events as the millions of deaths in the Congo under Belgian rule and the mass murder of the Herero by German troops, the massacres under Pol Pot in Cambodia or the genocide in Rwanda among other gruesome events – taught some dire lessons that are of decisive importance for the political theory of human rights.

The thoughts, feelings and actions of all those who have gone before, whether they have left a personal mark in the annals of the past or not, their suffering, humiliation and fleeting bliss are the characters in which history spells out what it really means to be human. History provides the key to what humanity is truly about – understood not as a group of beings but as the epitome of the characteristics with which the human species travels through time. Not only the achievements of art and science, not only the *Peplos Kore* and Newton's optics, the *Creation of Adam* on the ceiling of the Sistine Chapel and Euler's proofs say something about the existential makeup of humankind. Nor are the care and justice of everyday life, the dignity with which humans shoulder the many tasks of their existence as mortal beings the only things to take into account. The fact that an atrocity like the Holocaust was possible, that human beings performed the many tasks required to make mass murder happen, often with the deep conviction – *This is right!* – is another building block of any credible conception of what humanity means. This atrocity thus indicates a deep cultural, ethical and political crisis that enveloped humanity a mere few decades ago. Given the many crimes that have followed since then, there are good reasons to think that this crisis still defines important elements of our lives.

The events of the past cannot be undone. No future degree of decency can reconcile the moral balance sheet of the human species. The colonial massacres, the enslavement of people weak enough to be subdued, the concentration camps and gas chambers will remain on the records defining what it is to be human. The image of ourselves, painted by the trajectory of history, extending not in space but in time, contains elements we cannot digest. There is no way to come to terms with the fact that human beings were torn from their homes, herded into cattle wagons and killed in a production line of death for no other reason than a vile, obscenely shallow and entirely fantastic ideology. So little do thought and reason count, such absurd and dirty fairy tales can become human beings' intimate creed, so feeble is the force of the most basic and obvious demands of justice and human solidarity, so contemptuously can human beings deal with human life. The edifice of human institutions, the pious teachings of religion, the grand systems of ethics

born in the better hearts and minds of humanity? Not worth a cent when it counted most.

These experiences have put paid to important hopes. The human species without doubt has the capacity to do good and to act justly. But it will continue to be threatened by these other impulses, which enmesh humans in profound guilt and inflict cruelty and death upon their victims in many shapes. Any view that does not include these experiences in its picture of humanity and give them decisive weight is no more than a dangerous illusion.

Human beings have proved able to explain the motions of heavenly bodies in a universe vast beyond imagination and to decipher some of the codes of matter. But they have neither been nor become the sovereign masters of their social life. The workings of their societies, the economic structures they create, the systems of social interaction they build, the power relations by which their fates are decided, the web of human life woven by the back-and-forth of ceaseless action all seem to elude their full understanding, and thus humans often remain at the receiving end of events that they even sometimes mythologize as destiny. Given the state in which the world finds itself in the twenty-first century, humanity still appears unable to establish social structures at a global level that allow for a decent life for all of its members, prevent the worst atrocities from happening and ensure the survival of the species – tasks one might be inclined to think would not be beyond creatures such as ourselves.

The reality of the horrors of the past and the continued instability and imperfection of social relations suggest that the future of human societies is precarious. It is possible that long-cherished hopes will be brought closer to realization; it is possible that our worst nightmares will come true, including the self-annihilation of the human species.

In this situation, both full of promise and rife with threats, the most important lesson of the twentieth century is that certain normative principles must be protected without compromise. Whatever policy one may wish to pursue, certain norms must not be violated – this is the categorical imperative that the events of the last century have formulated. No aim is lofty enough to justify the abandonment of these norms, which protect some of the most foundational principles of human decency.

This lesson is taught not least by the tragedy of socialism. The ethical core of the best elements of this movement is the search for human equality and the protection of human dignity. However, the politics of key attempts to realize an economic and political order based on these principles made a terrible charade of these ideals: Authoritarian oligarchic party bureaucracies, let alone terror systems such as Stalinism, marked a cruel betrayal of these normative ideas.

The lesson that many thinkers draw from this tragedy deserves to be considered more emphatically than often is the case in debates about the political point of human rights. There are many reckonings with this tragedy, some of them by people who supported concrete socialist politics for some time or throughout their lives,

others by critics of these visions – from Arthur Koestler<sup>78</sup> and Ernst Bloch,<sup>79</sup> on to George Orwell<sup>80</sup> and Hannah Arendt,<sup>81</sup> from Bertrand Russell<sup>82</sup> and Albert Camus<sup>83</sup> to Noam Chomsky,<sup>84</sup> from Max Frisch<sup>85</sup> to Uwe Johnson.<sup>86</sup> One recurrent theme is the realization that the political aims pursued do not justify all means and in particular that no human community based on the freedom, equality and dignity of human beings can be built by politics that disrespect these very principles in the process of constructing this community. Individuals must count, not just abstract principles, which can quickly turn into hollow phrases, as the “untouchable” Veluta realizes in A. Roy’s tale about the “god of small things” when fleeing caste hatred and vainly seeking help from his fellow communist Comrade Pelay, the refusal spelling his death sentence: “*Individuals’ interest is subordinate to the organization’s interest. Violating Party Discipline means violating Party Unity.* The voice went on. Sentences disaggregated into phrases. Words. *Progress of the Revolution. Annihilation of the Class Enemy. Comprador capitalist. Spring-thunder.* And there it was again. Another religion turned against itself. Another edifice constructed by the human mind, decimated by human nature.”<sup>87</sup>

These insights seem straightforward enough but are clearly in need of defense. Their political foes come in various guises, and not only from the political right. Leftist movements of the 1960s and 1970s did not universally accept that human rights are inviolable. Tactical attitudes towards human rights were widespread, sometimes in the framework of decolonization or revolutionary aspirations. The leftist terror of the 1970s in Europe is just one example of the consequences that such ideas can have. The collapse of the state socialist systems, the moral and political reckoning that followed when the reality of these systems (which now no longer could be shrouded in comforting ideologies) could be inspected in full daylight confirmed beyond doubt the importance of the principle that no social and political good can come of the violation of human rights, whatever aims are pursued.

This lesson is also crucial for current and new attempts at social reconstruction and worldmaking. New egalitarian projects that rightly rebel against injustice in particular societies and in global economic and political structures, searching for a postcolonial cosmopolitanism able to overcome structures of domination and the

<sup>78</sup> Arthur Koestler, *Darkness at Noon* (London: Vintage Classics, 2020).

<sup>79</sup> Bloch, *Naturrecht und menschliche Würde*.

<sup>80</sup> George Orwell, *Homage to Catalonia* (London: Vintage Classics, 2021); George Orwell, *Animal Farm* (London: Vintage Classics, 2021); George Orwell, *Nineteen Eighty-Four* (London: Vintage Classics, 2021).

<sup>81</sup> Arendt, *Origins of Totalitarianism*.

<sup>82</sup> Bertrand Russell, *The Practice and Theory of Bolshevism* (London: Allen and Unwin, 1962).

<sup>83</sup> Camus, “L’homme révolté.”

<sup>84</sup> Noam Chomsky, *America and the New Mandarins* (New York: Vintage Books, 1969), 72 ff.

<sup>85</sup> Max Frisch, *Tagebuch 1946–1949* (Frankfurt am Main: Suhrkamp, 1985).

<sup>86</sup> Uwe Johnson, *Jahrestage 1–4* (Berlin: Suhrkamp, 2013).

<sup>87</sup> Arundhati Roy, *The God of Small Things* (London: Flamingo, 1997), 287 (emphasis in original).

global “color line,” will fail to achieve any meaningful and justified ends if they overlook the importance of human rights. Any form of human progress needs human rights to maintain the public space necessary for thinking and acting. Without rights to political participation, the freedom to communicate about ideas, the rights to associate with others in political groups, NGOs or trade unions, without guarantees for the liberty to be whatever a person chooses to be, from sexual identity to religious belief, without protection against being unlawfully prosecuted, incarcerated, tortured or killed, no political movement will succeed.

There is another point: Disregarding human rights would mean discounting the normative reasons – the human autonomy, equality and dignity at the heart of the human rights idea – that motivate the search for nondomination in the first place. Moreover, this discounting does not even promise success in the long run, as the history of postcolonial dictatorships and their contribution to imperial worldmaking, strengthening global structures of domination over the Global South, has shown – from the oil-producing authoritarian regimes in the Middle East and their role in the current political economy of energy resources to the South American military dictatorships. Ultimately, any emancipatory political project will betray its promises of freedom, equality and dignity if it loses its consciousness of what one does not do to human beings.<sup>88</sup>

As Albert Camus put it when reflecting on the many forms of nihilism that swept European culture in the nineteenth and twentieth centuries, it is not enough for the *l'homme révolté*, the rebellious human being, to say *no*. It is crucial to say *yes* to something, too – to a substantial idea of what human beings are like irrespective of history and social development, and to a set of normative principles that are sufficiently secure to lead the way and crucially are not negotiable.<sup>89</sup> For Camus, as for many others, human rights needed to form the building blocks of this answer to the challenge of nihilism and contempt for human life that dragged human beings into the many catastrophes of recent history.

The consequence of these thoughts for a theory of the justification of human rights seems clear enough: Nothing can redeem the pains and degradation of the victims of the past. However, underestimating the political importance of human rights fails to draw the minimum necessary conclusion from their

<sup>88</sup> When considering arguments that the human rights movement has neglected the struggle for substantive equality, cf. for instance Moyn, *Not Enough*, one should therefore also remain aware of what the neglect of human rights has meant for egalitarian movements. It would be a sad irony if contemporary egalitarianism were to reenact key destructive political fallacies of the egalitarianism of the past. Similar considerations hold for visions of postcolonial worldmaking. It is certainly true, as Getachew, *Worldmaking after Empire*, 33 f. argues, that sovereignty is not just a way to shield a regime against critique of its own human rights abuses, but an institution helping to protect political communities against domination, both colonial and of other kinds, cf. Chapter 2. However, this does not mean that it is justified to pursue paths of political self-determination that discount human rights for the sake of collective self-determination.

<sup>89</sup> Camus, “L’homme révolté.”

suffering, namely to honor those rights the contempt for which was the root of these victims' dire fate.

## 5.6 NORMATIVE PRINCIPLES

### 5.6.1 *Justice and Solidarity as the Wellsprings of Rights*

The discussion thus far has led to two conclusions: First, a justificatory theory of human rights depends on reasons why the goods protected are worthy of such protection. The argument was that a plausible theory of the human condition or human nature (not a theoretically suspicious concept if understood properly and purged of speculative metaphysics or repressive ideology) is needed to justify the selection of protected goods embodied in human rights bills and ethical theories.

Second, there are plausible reasons to believe that a convincing political case can be made for human rights as key instruments to secure these goods both as ethical principles and as legal institutions, despite a great number of critiques, both old and new.

Our review of the theories of justification and of the political theory of rights, including the critique of rights, has underlined the importance of normative principles for the justification of rights – hardly a surprising result, albeit sometimes less clearly stated in current debates than one might expect, as we have seen. But what exactly are these normative principles? How do they give rise to rights?

In the history and theory of human rights, one central concept is *equality*. Human rights are concerned with human equality, and part of the foundational principles of the human rights project is the equality of rights. Furthermore, human rights are an expression of *benevolent concern* for other human beings, for their liberty, for the proper treatment that they deserve. It therefore stands to reason that plausible candidates for the normative principles important for the justification of human rights include, first, principles of egalitarian justice and, second, principles of human care and solidarity. Let us look at these two sets of principles first before we turn our attention to another key normative concept for human rights: the idea of human dignity.

Principles of justice are the reason why human rights are conceptualized as equal rights. They also provide the reason why certain goods – be it interests or needs – possess normative relevance. This reason is the *necessary connection between justice and rights*:<sup>90</sup> Interests or needs as such are normatively neutral, as we have seen. The fact that I have an interest, perhaps even a need (given my deep-seated competitive passion) to win a rowing regatta does not mean that I have the right to win a rowing

<sup>90</sup> This is a standard observation, cf. Mill, "Utilitarianism," 247 f.; John Tasioulas, "Justice, Equality, and Rights," in *The Oxford Handbook of the History of Ethics*, ed. Roger Crisp (Oxford: Oxford University Press, 2013).

regatta. If a distribution is just, however, one has a right to this distribution. This seems to be a necessary connection. It is impossible to assert that the distribution D of good X is just, but that the patients of the distributive action have no moral right to their share D of the good X distributed. If sweets are distributed during a children's party, the kids have a moral right to their fair share – and will claim it with considerable moral passion (and noise). This relation between justice and rights is relevant for human rights as well: Human rights imply the idea of a just distribution and allocation of central goods such as respect, status and freedom. Because it is just that human beings are put in a position where they are equally capable of enjoying a certain share of goods as other humans are (e.g. to express themselves freely in way K under circumstances Y), they have a right to that good.

Principles of justice thus are key to transforming certain human goods into the content of rights: The justness of the distribution of goods gives rise to the existence of rights. If the goods meet the threshold condition of importance and have a qualified personal scope, they may be human rights.

What are these principles? This question leads to further vast problems and copious intense debates. Moreover, the concept of justice seems to have various dimensions – standard distinctions include distributive, corrective, retributive and procedural justice and justice in exchange. If we look at basic uncontroversial cases regarded as just or unjust (such as distributing a birthday cake, basic standards of just grading, etc.), however, we are able to make sufficient progress for our purposes in determining what this idea is all about. It is useful in this context to distinguish between normative principles, criteria of justice and spheres of justice, to use Walzer's terms.<sup>91</sup> The first set normative standards – importantly, for instance, the universally accepted principle “treat equals equally.” The second determine the normatively relevant reference points of just or unjust intentions, actions and states of affairs – for instance, the criteria for allocating goods in a certain way or for evaluating an already-existing allocation of goods. The third circumscribe certain areas of just or unjust intentions, actions or states of affairs that may follow a specific rationale for allocating goods.

The concrete meaning of the principle of equality has formed the basis of discussions on justice to a large degree ever since antiquity and is universally associated with justice in today's theory and empirical work, too. Accordingly, the most important questions in the theory of justice are not whether justice is connected to equality, but, first, what equality as a prescriptive concept means exactly (formal equality, substantive equality, something else?), second, between which objects this relation has to obtain to satisfy the principles of justice and, third, what the normative consequences of judgments about justice (or injustice) actually are.<sup>92</sup>

<sup>91</sup> Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983).

<sup>92</sup> A good example of a contemporary debate about these issues is the discussion about Rawls' principles of justice, Rawls, *Theory of Justice*, 60. Some argue that in particular the prudential



If one analyzes standard cases of distributive justice (a dimension of justice particularly relevant for the justification of human rights), the justness of the distribution of goods appears to have the following yardsticks. A just distribution demands proportional equality between the value of the specific criterion of distribution reasonably related to a particular sphere of distribution on the one hand and the amount of the good distributed on the other. Determining which criterion of distribution should count is a persistent problem.<sup>93</sup> This difficulty does not mean that there are not good reasons to prefer one criterion over the other: The criterion for the distribution of grades reasonably related to the sphere of university education is performance, for instance. Giving grades according to the perceived beauty of the student is, in contrast, a rather bad idea because it does not serve the function of grading, such as feedback and information about intellectual achievements. A just grading of an exam is consequently one that awards a good grade to a good performance, because this preserves the proportional equality between the value of the criterion of distribution (a good performance) reasonably related to the sphere of distribution (grading) and the good allocated (a good grade).

Another yardstick is that justice demands an interpersonal comparison and the preservation of the equality of the distribution between persons. The standard of treatment applied has to be equal for all equal patients of an intention or action. For example, if grading is made dependent on performance for some students and not for others, this grading is unjust. If there is no criterion for distinctions between patients of actions, then, as a default rule, a numerically equal distribution among equals is just to preserve the equality of persons. If there is no particular reason to distribute a birthday cake differently, an equal distribution is a just distribution. This principle is not entirely banal, as it is central for the allocation of scarce goods in a society for cases in which a criterion of distribution underdetermines the distribution both of these goods and of the chances to acquire these goods. As far as corrective justice is concerned, the restituting act has to equal the object restituted.<sup>94</sup> Finally, any

modification of egalitarian principles by the difference principle is unconvincing and that justice thus demands stricter egalitarianism than conceived of by Rawls, Gerald Allan Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008). Others argue that Rawls' egalitarianism goes too far – the principles of justice worth defending are not “end-result or end-state principles” of the distribution of social goods, but historical principles, Nozick, *Anarchy, State, and Utopia*, 153 ff. Sen, *Idea of Justice*, in turn doubts the wisdom of “transcendental institutionalism” observed in Rawls' theory. Michael J. Sandel, *Justice: What's the Right Thing to Do?* (New York: Farrar, Straus and Giroux, 2009), 268 argues for a “connection between distributive justice and the common good.” Despite these (serious and important) questions, the debate continues to be one about the meaning of equality.

<sup>93</sup> Cf. e.g. Sen's example of three children and a flute in Sen, *Idea of Justice*, 12 f.: Should a flute belong to the maker, the one who can play it best or the one that needs it the most for their well-being? The idea of proportional equality has been a centerpiece of the theory of justice since antiquity, cf. for a classic statement Aristotle, *Nicomachean Ethics*, trans. Harris Rackham, Loeb Classical Library 73 (Cambridge, MA: Harvard University Press), 1129a ff.

<sup>94</sup> Cf. Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 423 ff.

treatment or state of affairs (e.g. the distribution of capabilities to lead a meaningful life in a society) has to be reconcilable with human beings' basic equality of worth, the ultimate substantive yardstick of justice in human affairs. On this basis, one can start to rationally reconstruct other dimensions of justice, such as substantive or procedural justice, and try to tackle concrete political problems.<sup>95</sup>

In the case of goods that are the objects of protection by human rights, the criterion for distribution reasonably related to the sphere of distribution is the humanity of the rights-holder. As all humans enjoy full humanity in the normatively relevant sense, a just distribution of goods protected by human rights requires that every human being enjoy an equal set of goods protected by human rights, not some classes of human beings (say, women or people with a certain skin color) less and others (say, men and white people) more. Human beings consequently have rights to this kind of distribution of goods. The principles of equality are also important for the justified limitations of rights, which need to ensure that the sometimes-scarce good of liberty is distributed equally so that the liberties of one are reconcilable with the equal liberties of others.

In the theory of rights, there is another dimension to justice: Rights not only secure goods, they are *goods themselves*. To have a right to an asset is itself of great worth. Consequently, the distribution of rights *itself* is a matter of justice. This helps to explain why human beings have a *right to have rights*: Because of their shared humanity (or so it seems thus far), it is a matter of justice that they enjoy *rights* to an equal system of rights to goods crucial to their life as human beings, not only the goods as such.

The necessity to preserve interpersonal equality is another reason why only an equal allocation of rights among different but normatively equal persons forms a just system of rights. Principles of justice demand the equal treatment of persons by the

<sup>95</sup> It is important to underline that this reconstruction of principles of justice does not reduce equality to consistency. It raises, thus, not the concerns discussed e.g. in Sandra Fredman, *Discrimination Law*, 2nd ed. (Oxford: Oxford University Press 2011), p. 8 ff. The criterion for equal treatment determines the respects in which persons are to be treated alike or differently, depending on the value of the criterion. Two persons with equally high incomes are to be taxed equally highly, whereas a high-income earner and a low-income earner are justifiedly taxed unequally (to treat them equally depending on their financial capabilities). Given that the relation of equality has to obtain between the value of the criterion of distribution and the treatment, one does not always need a different person as comparator. A good grade is just for a good exam performance even if only one student participated in the exam. Moreover, in cases of interpersonal comparisons there is the possibility of hypothetical comparators, now widely accepted in equality law. Thus, the account of justice outlined helps to develop an idea of substantive justice that aims to break the cycle of disadvantage of certain groups, to respect the dignity of everyone, to cherish diversity and to secure the equal participation of everyone in society. Cf. on these aims *ibid.* p. 25 ff. The significance for satisfying the demands of principles of justice to maintain proportional equality between the criteria of distribution and the kind of distribution of goods is one reason why equality is not a redundant concept, as some argue. A second reason is the importance of interpersonal, comparative equality for the just allocation of scarce goods. A third reason is that equal treatment shows respect for the equal worth of human beings. Cf. for an overview Jeremy Waldron, *One Another's Equal: The Basis of Human Equality* (Cambridge, MA: Harvard University Press, 2017), 41 ff. with similar conclusions.

equal distribution of goods and the rights that secure them because of the equal normative status of human beings. This equal system of rights protects everyone's equal opportunity (or capability) to use their potential as a human person. The thesis that already suggested itself in the critical review of theories of justification therefore seems to be on the right track: *Justice is a wellspring of rights*.

The other relevant principle is *care or solidarity*. There are obligations to care for others; this is a core principle of morality and ethics. These obligations are not boundless, but still are meaningful. For example, there is a duty not to let somebody die who can be helped without compromising overwhelmingly important interests of the agent.<sup>96</sup> Some legal systems even buttress such duties with criminal sanctions.<sup>97</sup> Other duties may be more controversial: Leibniz argued that not only Samaritan duties to prevent harm to others exist, but also duties to promote the well-being of others if that is possible at no or a small cost to the agent.<sup>98</sup> Kant thought that the only duty of virtue is to foster the beatitude of others.<sup>99</sup> If one goes yet a step further and holds that loving one's neighbor as oneself captures an important ethical principle, duties to concern oneself with the well-being of others become even more exacting. Be this as it may, for the purpose of these remarks it suffices to say that there is a strong case at least for some basic duties of human solidarity.

The flipside of the coin of the duty to care for others is the prohibition to harm them – the least one can do for the well-being of others is not to harm them. Unlike positive duties of solidarity, this prohibition of harm is rather uncontroversial.

These moral obligations of agents give rise to the rights of others.<sup>100</sup> This is important. There is not only an obligation to help others under certain circumstances, but also a right of those in need that this be done as long as the threshold of supererogatory acts of the agent is not crossed. If Ayodele collapses on the road, bystanders have a duty to call an ambulance, and she has a right that they do (at least) this. The same holds for the prohibition of harm – it creates not only duties, but also entitlements.

Rights protect human goods that are often of existential importance; they can even be matters of life and death. Human beings therefore have a duty of solidarity to help others to enjoy these goods – for instance, the possibility of leading a free and secure life, a duty that gives rise to rights to these goods.

Furthermore, human rights are crucial instruments for protecting the enjoyment of central human goods and – as just highlighted – goods *themselves*. Human solidarity is therefore a further reason for humans' *right to have rights*. Moreover, contributing to

<sup>96</sup> This is sometimes discussed as the rescue principle. There is nothing new about this idea, cf. for instance Thomas Aquinas' arguments for strong duties of care for others in need (and the implied claims of the persons in need), discussed in Chapter 2.

<sup>97</sup> Cf. Strafgesetzbuch (German Penal Code [StGB]), January 1, 1872, § 323c; Strafgesetzbuch (Swiss Penal Code [StGB]), SR 311.0, December 21, 1937, Art. 128.

<sup>98</sup> Cf. Chapter 2.

<sup>99</sup> Kant, *Metaphysik der Sitten*, 385.

<sup>100</sup> On these problems, including but not limited to the relation of imperfect obligations and claims, see Chapter 1.

the efficiency of the (legal and extralegal) instruments of protection of these goods is a command of human care and solidarity. One consequence of this is the obligation to strengthen mechanisms of rights protection – for instance, by sustaining a legal order that protects such rights by one’s taxes, by lending political support to international institutions for the protection of human rights or by participating in an NGO committed to improving the political culture of human rights. These duties are supplemented by the duties stemming from the prohibition to harm anybody – by depriving others of central goods or the rights that protect them.

Accordingly, the next important finding is that not only principles of justice, but also *duties to care for others are a wellspring of rights*.

### 5.6.2 Dignity and Rights

The theory of human goods needs to identify those goods that are plausibly of such qualified value for human beings that they are justifiably protected by human rights. Some reasons for the identification of some such goods have been outlined above. However, the goods identified in this way are only morally significant if the being for which they constitute goods is itself morally significant. One question thus remains that any theory of human rights needs to answer: Why are human beings of normative concern?

This question can be formulated more precisely when one pays due attention to three presuppositions in the argument so far. These are – simply put – first, that individual human beings count *at all*; second, that they count *equally*; and third, that they count *decisively* for any evaluation of a course of action. To address the first point, if human beings were of no *moral significance*, if they did not possess a certain value status, the project of human rights quite evidently would be pointless. The protection of life, liberty, equality, subsistence and well-being is based on the idea that the being for which these things are goods of importance matters. If human beings were creatures of no worth that better would not exist, an unfortunate, corrupted product of natural history that ought to be driven from the face of the Earth, the protection of their life, freedom or other goods would make no particular sense. The protection of life, liberty, equality and well-being is only important because the being whose goods these things are is itself morally significant.<sup>101</sup>

Second, it is important that each individual is of *equal worth*. This is the precondition for protecting life and liberty equally. It is not, as it might appear, a consequence, but rather a precondition of equality guarantees: They presuppose the equal worth of the human beings they are designed to protect. If racism were right

<sup>101</sup> Tasioulas, “Human Dignity,” 307 comes to a similar conclusion from the point of view of an interest theory of human rights. Jeremy Waldron, “Is Human Dignity the Foundation of Human Rights?” *NYU School of Law, Public Law & Legal Theory Research Paper Series*, Working Paper No. 12-73 (2013), has correctly pointed out that dignity designates not only a cluster of normative positions, but also an underlying idea.

and certain so-called races were worth more than others, prohibitions of discrimination on the ground of ascribed race would not make any sense.

Third, it is pivotal that human rights not only imply that human beings have worth and that this worth is equal, but also determine the *weight of this worth* in comparison to other considerations. After all, one of the central questions in social history is whether other values ever outweigh the significance of individual human lives, and if so, under which circumstances. It has perhaps been something like the antihumanistic default assumption throughout history that individual human lives are of only relatively small importance, if any at all. Human life and liberty were held to be of little concern in comparison to the desire to build pyramids, to the power of dynasties and ruling groups, to the amassment of riches, to the grandeur of nations, to the future happiness of social classes or to the final, blissful, redemptive victory of religious creeds. Accordingly, many have perished without much ado on the construction sites of the cultural wonders of the world, in wars fought in the interests of dynastic power, in the pursuit of wealth and national glory, in class wars and in the religious suppression of heretical thought. Today, some of these ideas have lost their importance, while others have not: For the managers of the Bhopal factory, the lives of the poor living close to the factory premises were evidently only of limited concern, to take this classical example from economic history. National security is yet another example that continues to be significant. In this context, the idea that individuals have little importance in comparison to greater goods like the security of a nation is defended and put into practice – although there are, to be sure, effective security policies that follow a course respectful of human rights. The war in Ukraine with its many consequences from civilian deaths to starvation in poor countries teaches the same lesson.

What, then, supports the idea that all human beings enjoy a particular inalienable value status?

The central idea underpinning the attribution of equal worth to individuals and determining the qualified weight of this value status in relation to other goods is the notion that human beings enjoy human *dignity*. This is at least the language of contemporary human rights in which human dignity is taken as foundational for human rights – both in fundamental documents and treaties of human rights law and in much theoretical reflection.<sup>102</sup>

<sup>102</sup> Cf. for a reconstruction of the history of the concept and discussion of the current debate Mahlmann, *Grundrechtstheorie*, 97 ff.; Matthias Mahlmann, “The Basic Law at 60 – Human Dignity and the Culture of Republicanism,” *German Law Journal* 11, no. 1 (2010): 9–31; Mahlmann, “Human Dignity and Autonomy,” 370 ff.; Matthias Mahlmann, “The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Ethics and Law,” in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), 593 ff.; Matthias Mahlmann, “Die Garantie der Menschenwürde in der Schweizerischen Bundesverfassung,” *Aktuelle Juristische Praxis* 22, no. 9 (2013): 1307–20; Mahlmann, “Menschenwürde in Politik, Ethik und Recht,” 267–81; Matthias Mahlmann, “Dignity and the Philosophy of the Republic,” in *The Oxford Handbook of Republicanism* (forthcoming).

There is something in human beings – that is the core of this idea – that bestows particular worth upon them. All humans enjoy it, and the value of their life is thus equal. In addition, the worth inherent in human beings is supremely important. Human dignity means that individuals are of intrinsic, supreme, inalienable value, ends-in-themselves, and everybody equally so. According to this idea, human beings are the justified highest-order ends of human intentions and actions.

Human dignity is thus the expression of a radical egalitarian humanism, of human beings' uncompromising respect both for others and for themselves, not because of ephemeral achievements and contingent merits, but because of the nature of the core of their existence, the humanity they share. Such an interpretation of the value status of each individual cannot be reconciled with ethical principles in which the aggregate welfare trumps individual rights.<sup>103</sup> Furthermore, the idea of human dignity is the most radical critique of those ideas that relativize the importance of human life because of the greatness of dynasties, nations, classes or religions, because of the seductive pull of the pursuit of wealth or because of the heterogeneous interests behind what are often quite misleadingly called "reasons of state."

As we have seen, Arendt's famous assessment of the role of human rights as a force against the abuses of Nazism and Stalinism insisted on the importance of the *right to have rights*. Arendt identified this with the right to belong to a political community that protects the rights of its members, skeptical that humanity itself could fulfill this role.

On the function of integrating people into society and establishing solidarity, Regina Kiener, "Grundrechte in der Bundesverfassung," in *Verfassungsrecht der Schweiz/Droit constitutionnel Suisse*, eds. Oliver Diggelmann, Maya Hertig Randall and Benjamin Schindler (Zürich: Schulthess, 2020), 1217 f. Cf. also for instance Christopher McCrudden, "Human Dignity and the Judicial Interpretation of Human Rights," *European Journal of International Law* 19, no. 4 (2008): 655–724; Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015); George Kateb, *Human Dignity* (Cambridge, MA: Harvard University Press, 2011); Michael Rosen, *Dignity* (Cambridge, MA: Harvard University Press, 2012); Jeremy Waldron, *Dignity, Ranks, and Rights* (Oxford: Oxford University Press, 2012); Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Oxford: Hart, 2015); Joas, *Sakralität der Person*; Peter Bieri, *Human Dignity: A Way of Living* (Cambridge: Polity Press, 2016). This basic stance encompasses thinkers with a somewhat skeptical attitude towards the normative concept of dignity, cf. for instance Griffin, *On Human Rights*, 21: "If the weight we attach to rights is not to be arbitrary, we must have a sufficiently rich understanding of the value that rights represent – for *human* rights that would most likely require a sufficiently rich understanding of the dignity, or worth, of the human person, whatever the proper understanding of that now widely used phrase is. A satisfactory account of *human* rights, therefore must contain some adumbration of that exceedingly vague term 'human dignity', again not in all of its varied uses but in its role as a ground for human rights" (emphasis in original).

<sup>103</sup> This is the normative basis of the standard critique of utilitarianism that it disregards the necessary respect for persons, cf. Chapter 4. The point thus has deep roots in the history of ideas. Griffin, *On Human rights*, 22: "Nozick introduces an element of ethical substance: rights represent the moral significance of the separateness of persons." Such comments underestimate the importance of the long tradition based not least on the idea of dignity that defended the worth of the individual.

It has been argued above that a more promising approach might be to understand justice and human solidarity as the roots of such a right to have rights. Moreover, the right to have rights presupposes that a person is morally significant enough to become a holder of fundamental rights. Human dignity seems to be at the core of this idea. Under principles of justice and benevolent moral concern for others, human beings' worth, their intrinsic value as ends-in-themselves demand that they have rights securing the main pillars that make possible their pursuit of happiness and demand that these rights are those of *equals*. Belonging to a political community continues to be important for the efficient enforcement of rights. However, the right to belong to such a community is itself derived from the value status of human beings, and not, vice versa, this value status being from membership in a political community.

There is no right to have the right to have rights. There is no right to have human dignity to entitle someone to have equal human rights (likewise, Arendt does not argue that there is a right to the right to be a member of a human community that protects human rights in her original statement of the problem). Human dignity is the value status humans enjoy that, together with principles of justice and human concern, provides the *ultimate* foundation of human rights. This is where the spade turns, to return to this metaphor.

One may admit that this argument about dignity as a foundational principle of human rights has some merits. One may agree, too, that it would be beneficial for everybody to have reason to think it correct to ascribe dignity to all human beings, adding dryly that having human dignity as their foundation is all the worse for human rights, because human dignity itself has no justification. The castle of human rights, constructed to shield the essence of humanity, is built of normative sand and is quickly brought tumbling to the ground by a few swift strokes of doubt.

There is a vast debate both about the possible justification for ascribing dignity to all humans and about the concrete meaning of this concept, including the influential opinion that there is no such justification and that dignity is simply a piece of deplorable vacuous rhetoric at best and a harmful (and stupid) political ideology at worst, both in ethics and in law.<sup>104</sup>

Admittedly, it would make theoretical and political life much easier if one did not have to answer demanding questions about the meaning and justification of dignity. It would simplify human life even more if there were no need to take the idea seriously when taking actions that affect other human beings. If the dignity of others were irrelevant, one could just deal with them as one pleases, restricted by much less exacting standards.

<sup>104</sup> Cf. for instance Steven Pinker, "The Stupidity of Dignity," *New Republic*, May 28, 2008, 28; there has been a vast amount of dignity criticism ever since Schopenhauer's much-quoted (and less often seriously assessed) attack on Kant's idea of dignity, Arthur Schopenhauer, *Preisschrift über das Fundament der Moral* (Hamburg: Felix Meiner Verlag, 1979), 64.

But is this really so? The following thoughts indicate that this skeptical view is overly simple. A path that we will now explore further speaks for the plausibility of contemporary human rights' foundational assumption of the dignity of human beings and its consequence, namely the assertion of the respect owed to them.

The first argument to consider draws on the fact that human beings experience their life as intrinsically valuable, as an end-in-itself (pathological cases aside). This is why self-preservation is such a strong impulse. Life in this context cannot be reduced to continuous physical reproduction. It encompasses the totality of a human existence in its manifold dimensions. Life in this sense is not only a good, but the life of every human being is an *equal* good. There is nothing about one person's subjective experience that makes it qualitatively more worthy to be lived than the subjective experience of any other person. Love, friendship, happiness, despair are made of the same stuff in all human beings. Nor is anything objectively better about one life of a human being than about another as far as the basic value of human existence is concerned, although one can obviously do very different things of unequal value with the equally valuable gift of life. Nothing in the life of one person as such elevates it above the value of the life of another.

If that is so, if there is no reason to differentiate the value of life of different persons, then justice demands the equal protection of each human life as an end-in-itself. The universalization of the just, equal concern for the equal value of each life justifies the right to the protection of the intrinsic value of everyone's human existence.

In addition, humans enjoy particular properties that seem to give reason to think that the ascription of dignity is justified. Human beings have unpleasant characteristics, including being the only known organism with genocidal inclinations – no small flaw. The serious accounts of human dignity are therefore those underlining the fact that whatever worth human beings may possess, they continue to be highly ambivalent creatures, living just one step away from often self-inflicted, gratuitous, profound suffering, tragic errors and appalling crimes.

But this is not all that can be said about them. We already beheld some contours of the human life form in the mirror of the ethical and legal norms ascertaining its most important rights. If we take a closer look, some of the following observations may attract our attention: Humans are distinguished by their desire to look behind the facades of appearance and comprehend those parts of the structure of the world that are accessible to their understanding. This is of substantial importance for their position in the world. They cease to be *objects* of forces beyond comprehension and by epistemic means establish themselves as *subjects* within the world. They become capable of mastering some of the forces of nature and using them for their human purposes. For the many aspects of nature beyond such use, the understanding of at least some of their properties still prevents human beings from becoming mere passive things in the chain of events that make up the stuff of the world.

Human creativity is another constitutive factor of human beings' status as subjects. Humans put this creativity to use in very particular ways. In aesthetical



representations whose beauty pleases and sometimes even enraptures, human beings critically reflect upon their own form of life and develop accounts of how things could be otherwise. They are themselves the authors of some of their deepest pleasures and of the prudentially and morally preferable imaginary worlds they continue to construct with the fine brush strokes of art. This faculty to produce works of beauty is very important for the concept of human dignity: In aesthetic creation, human beings bring a world according to their own image into being by which and in which their subjectivity can manifest itself in the form of and with the freedom of meaningful and at the same time deeply pleasurable artistic play.

Human existence is characterized by an emotionally rich, conscious, autonomous selfhood with a vulnerable longing for respect: Human beings inhabit a world of sentiment and are conscious of it, which both deepens their joy and can make suffering unbearable. They live with the consciousness of their mortality, which poses the challenge of earnestly striving for one's goals in life while knowing that ultimately one will have to let go of everything one has managed to achieve and holds dear. Thinking and acting despite the transience of one's existence (and the transience of the human species as such) adds to the reasons for the respect that humans rightly desire to enjoy.

The capacity for autonomous conscious self-determination offers humans the striking privilege of being the authors of their one life. They are not the mere plaything of drives that determine the actions they take but are able to choose and themselves decisively shape the course of their existence. They are a product of nature, but one with a demiurgic power to mold anew what human existence means within the limits set by their human nature. At the same time, their acts greatly influence the lives of others. Their autonomy is the source of the responsibility for what they do to themselves and to others – a responsibility to which humans have to be able to stand up, sometimes with dire consequences, including guilt, remorse and punishment. When deciding the course of action they intend to take, humans have the ability to transcend some of their most important interests, motivated by the force of moral obligations to secure what is due to others and to respect their rights, sometimes leading strong souls even to risk and sacrifice their lives.

Human beings are reflective, creative, autonomous, feeling, self-conscious, mortal subjects under moral laws. They unfold their potential and realize their capabilities in human communities and through their many bonds with others. These existential characteristics enable a particular form of life, extended over time, encompassing growth, maturity and decay, and plausibly can be taken as some of the crucial reasons for justifiably ascribing dignity to human beings in all phases of their life and for defending their delicate yet proud sense of their own worth and their unremitting desire for respect.

It is important to note that there are no justificatory resources beyond such reasons. One cannot transcend arguments of this kind and the axiological principles underlying the justified predication of dignity with some kind of striking meta-

argument. One can only hope to elicit agreement with these reasons based on the same act of cognition by which one was persuaded oneself – and continue to listen to why these reasons may fail to convince. There is nothing epistemologically spurious about this. An argument about the question of why the Earth is not flat is no different: One provides arguments (we can travel around it, the notion that arriving back where one started is just a dream is not convincing, etc.) and hopes that they convince by a similar act of cognition that persuaded oneself about the truth of this proposition. Critics of the reasons given for human dignity – arguing, for example, that it is nothing but a deplorable example of speciesism to take existential characteristics such as autonomy or feeling, self-conscious subjectivity under moral laws to be relevant reasons for the ascription of dignity – draw on exactly the same epistemic resources: They provide counterarguments that in their view are convincing but have nothing over and above these reasons to make their case.

Understood in this way, dignity has concrete surplus content as compared to other human rights. The core of the matter is the idea – in whatever way one wants to express it – that human beings are ends-in-themselves and thus have to be protected as such, as the autonomous subjects of their life. This implies prohibitions of instrumentalization, objectification and reification and gives rise to correlated rights. It also implies a basic level of respect for every human being beyond these prohibitions. Respect as a normative concept is not just a contemplative appreciation of the qualities of human life, looking at human life as one would at a millipede's astonishing number of legs. Rather, respect has normative consequences, including the duty to refrain from actions irreconcilable with it and encompassing the right to be treated accordingly.

These are hard, applicable and – in the law – justiciable normative principles. They have both implicitly and explicitly guided courts around the world in cases concerning the death penalty, torture, discrimination, social rights, procedural rights and democratic participation.<sup>105</sup> They formulate an uncomfortable need to make individuals matter as they deserve in various normative contexts. They play a decisive role in the weighing and balancing exercises that now are at the heart of the application of human rights law by providing yardsticks for the normative calibration of the value judgments involved.

These remarks provide some important answers to standard objections against dignity. They show that human dignity is not a redundant concept. It is not empty or vague beyond hermeneutical redemption, although of course in practice its application may be dubious and lack precision. One also may want to add that it is not exclusionary. On the contrary, any plausible account of dignity is inclusionary – that is, it includes every human being, and most certainly infants, persons with disabilities, mentally ill and unconscious people. Anything else would amount to drawing distinctions between members of the human species as to who is “human enough”

<sup>105</sup> Cf. Mahlmann, “Dignity and Autonomy,” 370 ff.

to count as human, without there being any plausible yardsticks for such distinctions. Besides, it would risk denying the richness of the human experience of some of these persons and the potential for a full human life of some others.<sup>106</sup>

Basing human rights on the respect for the dignity of human beings does not lead to the implausible consequence that human rights fill the whole moral domain, as has been argued.<sup>107</sup> There are very many matters of moral relevance that have nothing to do with human dignity.

To give generously to people in need beyond what might be regarded as obligatory is a morally laudable deed. Not doing so, however, does not constitute a violation of the recipients' dignity. Moreover, there are without doubt many possible violations of human rights that are not violations of human dignity – in fact, this is actually the standard case in human rights law. Making a demonstration dependent on prior authorization, excluding the possibility of assembling spontaneously, is arguably a violation of the right to freedom of assembly, an important fundamental right. However, requiring such a prior permit hardly already constitutes a violation of human dignity. It is simply a disproportionate limitation of a liberty. Therefore, one important element of any credible concept of human dignity is that it must prevent an inflationary use of this idea, which loses its meaning if it is understood as covering any violation of moral or legal norms.

Human dignity in this well-circumscribed sense is neither an ideologically nor a religiously partisan concept. To be sure, it is certainly used in this way. But in this it simply shares the fate of every important normative idea. There is no important normative concept that has not been abused by political forces. In the history of liberty, equality and democracy, examples of this abound. Highly authoritarian systems have been called democracies without this constituting a reason to abandon the normative idea of democracy. This is one of the decisive reasons why one needs to be precise about what dignity means and what its justifications are.

Human rights resting on human dignity are thus built not on imaginary foundations, but on the justified cognition of what ethical reflection about common humanity demands. Human dignity is not a tool for subjugating human ethical, legal, social and political imagination to a reactionary, metaphysical or otherwise obscure concept. On the contrary, it is the skeptical self-assertion of humanity, and it is not to be toyed with given how fragile and stained humanity's claim to decency is.

The principles of justice, human care and solidarity together with the idea of human dignity take the theory of human rights a long way towards its aim of specifying the normative principles that form necessary elements of any justification

<sup>106</sup> In this context, the diachronic identity of human persons is of substantial normative relevance, cf. Mahlmann, *Elemente*, 300 ff. Waldron, *One Another's Equals*, 173 has rightly underlined that dignity is predicated of human beings "conceived not as momentary time slices but as persons extended over time."

<sup>107</sup> Cf. Griffin, *On Human Rights*, 201.

of human rights. Human rights spell out what justice, solidarity and respect for human dignity mean in the hard currency of rights.

### 5.7 MAKING HUMAN RIGHTS CONCRETE

Human rights as explicit ethical principles and legal norms are regularly formulated in abstract terms. One important task therefore is to render human rights more concrete. This goes not only for the law, but also for meaningful ethical accounts of human rights.

Real-life human rights protection poses many highly intricate problems. One key issue is the question of what morally legitimate burdens can be imposed on others both *prima facie* and all things considered. In order to assess this, different normative considerations need to be placed in relation to one another. For instance, the constraints of justice mean that there is no right to everything. There is neither a right to the self-abandonment of others nor even a right to their utmost efforts to benefit somebody else, because of the rights of these others to lead their own equally important lives. More complicated are questions in specific cases where a lot hinges on the specific circumstance at stake.

In legal practice, the scope of a right determines the *prima facie* protection of a certain good. A proportionality analysis is a key practical tool in finding a solution all things considered. This includes reviewing whether a measure that is interfering with a right pursues a legitimate aim, is suitable to achieve this aim, is the least burdensome of all equally effective means and whether the burden imposed on the bearer of the right is not disproportionate as regards the gains of the measure. Proportionality in this sense is ultimately a device of justice: The burdens and secured goods are to be allocated among the rights-holders in a way that remains fair.<sup>108</sup> Other considerations include the possibilities and limits of securing particular human goods by rights – a problem already discussed above. There is no reason why the ethical concretization of rights should not follow a comparable path.<sup>109</sup>

Looking at concrete cases underlines the importance of a caveat concerning the limits of our findings so far: Whether or not banning burqas in public can be reconciled with freedom of religion, for example, can only be answered after substantial reflection about the *telos* of this right, the kind of freedom protected, some serious thought about what a society can demand of a person, whether “*vivre*

<sup>108</sup> It is thus a misunderstanding to equate proportionality with an expansive interpretation of human rights, John Tasioulas, “Saving Human Rights from Human Rights Law,” *Vanderbilt Journal of Transnational Law* 52, no. 5 (2019): 1167, 1186. Proportionality is a tool to limit legitimate inference with human rights, not a tool to expand their scope. Cf. for thoughts on the moral point of proportionality and its relation to law George Letsas, “Proportionality as Fittingness: The Moral Dimension of Proportionality,” *Current Legal Problems* 71, no. 1 (2018): 53–86.

<sup>109</sup> This includes proportionality. It is a traditional concern of ethics to criticize disproportionate punishment, for instance.

*ensemble*” is in fact a sufficient reason to force a person not to wear a burqa (as the ECtHR has argued), the impact of such a ban on the women concerned, whether it liberates them from oppression or drives them deeper into the dungeon of isolation and so on.<sup>110</sup> The theory of goods, the political theory of rights and the normative principles considered do not answer all of these questions. They are thus only a part of the full unfolding of human rights, not least in the hard doctrinal work of the law.

Something similar is important for the question of how to derive guidance from what has been said about the new frontiers of human rights – say, the development of privacy rights in the digital age. The results of this inquiry define benchmarks for any solution but do not give all of the answers needed – for example, as to whether a right to be forgotten should be included in the scope of protection of privacy or not.

## 5.8 SOME MORE RESULTS

What are the results of our inquiry so far? What do they mean for the questions pursued?

First, the concept of rights gained some contours, showing that rights are best understood as an intricate web of normative relations woven by claims and duties, privileges and no-rights, powers and immunities, both in ethics and in law. Human rights deal with a limited set of qualified human concerns protected for all human beings by virtue of their humanity, including the respect for humans’ intrinsic worth, life, liberties, equality and some of the material means required for a fully human life.

Second, the long and rich history of the making of the idea of human rights was sketched in rough outline. One lesson drawn was that human rights are plausibly understood as reflective, abstract, objectified generalizations and universalizations of concrete rights claims of individual actors, often stemming from perceived violations of rights under particular circumstances, based on not arbitrary but principled intuitions about justice and moral obligations, rendered explicit after a critical reflection of their possible personal scope and content and finally selectively turned into law in various forms. Their acceptance and slow political and legal realization in incremental, incomplete steps devoid of any teleology, involving both progress and regression at a very high human cost, depended on the political and ultimately ethical choices, convictions and decisions of human subjects embedded in the culture and social structures of their time, which created the preconditions, scope and constraints for insights and possible social action. Human rights faced many foes from different political and ideological corners, depending on historical circumstance. Our historical inquiry revealed the importance of a political and ethical analysis that specifies the heterogeneous actors and interests driving human rights

<sup>110</sup> Cf. ECtHR, *SAS v France*, Judgement of July 1, 2014, appl. no. 43835/11.

history and refrains from simplistic theses about monolithic cultures and their causal impact on the development of human rights. The history outlined is not about the presence of the full, explicit concept of human rights in all times and places. Rather, it is the history of normative phenomena that *were not human rights* but paved the way to their ultimate formulation. It is the history of islets of decency in the wide seas of injustice, islets that slowly grew into the idea of human rights.

Third, it became clear that the justification of human rights is a large and difficult topic. Some highly demanding theories were reviewed, and much has been learned from these impressive efforts. The questions to be answered about the justified goods protected by human rights, their place in a political theory and their normative foundations are far from trivial. However, some arguments about the sources of these goods, their political rationality and their normative basis have been formulated that seem to stand the test of critical reflection.

So far, this inquiry has traveled on well-known ground, albeit not on paths commonly trodden. But while the findings outlined are necessary elements of a theory of human rights, they are not sufficient to complete our theoretical task. One reason for this is that we now have a new kid on the block. In recent years, moral psychology, behavioral economics, cognitive science and neuroscience have turned their attention to the question of ethics and in particular to human rights, with sometimes far-reaching revisionist theses, holding that the arguments about the justification of human rights that have been mustered here are in fact no more than an intellectual hoax, the post-hoc rationalization of the illusions produced by human beings' psychological machinery. However, such revisionist theories are only one approach to the problem of the cognitive foundations of human rights, and one that does not exhaust the theoretical options available.

This psychological interest is not surprising: After all, human rights are an element of ethics, and ethics is traditionally associated with moral psychology. In addition, this inquiry started from the observation that human rights are a product of human thinking, and that human rights theory suffers from a potentially highly relevant blind spot if it does not concern itself with the theory of the human mind that, after all, generates this thought.

Our inquiry covered some distance to arrive at these findings. This journey has not been a digression. On the contrary, these efforts were necessary in order to formulate the first of the central results of this study: *Our findings about the concept of human rights, the goods they legitimately protect, their history and justification define the plausibility conditions of any meaningful theory of human rights, including the theories developed by psychology, behavioral economics, evolutionary theory and neuroscience.*

The results of our inquiry show that such theories need to address complex issues – that there is much that enters into an understanding of human rights. This includes problems of the origins of beliefs about human rights and in this sense of the epistemological dimensions of theories about these rights. Given the rich and intricate findings produced, one thing seems rather obvious: The epistemology of

human rights is the epistemology of many things. *Conceptual questions* need to be addressed. *Factual propositions* of human anthropology enter into the justification of rights, as do multifaceted theses about the *working of human societies* into the assessment of the political theories of human rights. Lessons need to be drawn from history, which presupposes *historical analysis* and understanding. Finally, a *normative theory* needs to be outlined that includes loaded ideas such as justice, solidarity and human dignity.

This is a crucial point. It shows that no psychological or neuroscientific theory can afford any naivete about the complexity of the explanatory task at hand. There is no way to make this clear other than to outline in sufficient detail the many difficulties to which the theory of human rights has to face up, as has been attempted in the preceding chapters. The results of the inquiry formulate important parts of the research agenda in this field. At the same time, these findings from the beginning limit, or so it seems, the role that a psychological or neuroscientific theory can play for the theory of human rights, including its epistemological dimensions. It is a nonstarter to assume that such a theory can explain all of the substantial and epistemological issues raised, ranging from human anthropology to the effects of rights in society to the normative content of human dignity. This does not mean that there are no important insights to be gained or that one does not need to keep an open mind about where the inquiry may lead, only that one should not expect (or promise) too much. The inquiry about the relation between human rights and the mental structure of human beings is an intriguing and important piece of the puzzle of understanding human rights and perhaps human moral orientation more generally. It is, however, only *one* piece of the puzzle alongside other, equally important ones.

Given the cognitive interests of this inquiry into mind and rights, the question is now: What is the origin of the normative principles in human thinking that are pivotal for the idea of human rights? Why have human beings pursued these ideas for such a very long time with such deep conviction? Why do they form such commanding elements of normative systems of belief in the contemporary world across cultural and religious divides? What do psychology, cognitive science and neuroscience add to our understanding of these matters, given that some theories claim to possess the key to answering these questions? What consequences do the answers to these questions have for the epistemological and ontological status of the principles crucial to the justification of human rights? Are they properly regarded as foundational principles in any meaningful sense? Are they justified true beliefs or deeply held but ultimately contingent ideas? Or are they nothing but moral illusions, on par with illusions in other cognitive domains? Do the answers to these questions (if there are any) matter for a normative theory of human rights and thus ultimately for their justification, perhaps even undermining their legitimacy? Or are they entirely irrelevant in this regard? These are the next problems we will consider, problems that are as exciting to address as they are difficult to solve.