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Heiner Bielefeldt

Sources of Solidarity

A Short Introduction to the Foundations of Human Rights

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Foreword

This short introduction cannot be more than an "appetizer". Its purpose is to motivate readers to familiarize themselves more thoroughly with human rights: their normative aspirations, their philosophical foundations and their evolving international infrastructure. Human rights are a theme full of surprises, including quite a few paradoxes. They represent humanity's unfulfilled yearnings for justice, and they are a ray of hope for numerous people. Yet dealing with human rights issues can also cause profound disappointment, even bitterness and feelings of betrayal. Although intending to create a broad normative consensus across different regional and cultural contexts, human rights remain politically contested in many ways. On the one hand, human rights are easy to comprehend; it does not require an academic degree to understand their meaning and significance. On the other hand, the politics of human rights is fraught with conflicts and tensions, which warrant diligent analysis. At any rate, there is something inherently compelling in the idea of equal dignity and equal freedom for all human beings, an idea that has the potential of mobilizing people to take action across boundaries, in a spirit of solidarity.

Unlike many other introductions to human rights, which usually have a strong focus on legal standards, procedures and institutions, this course mainly deals with the guiding principles, which together define the human rights approach: human dignity, freedom, equality and solidarity. Each chapter tackles a systematic question: How can we distinguish human rights from other normative titles and claims? Why do they enjoy a specific rank within the legal order? Do human rights mainly reflect particular "Western values" or can they legitimately be claimed across cultural boundaries? What is their critical role in the era of globalized capitalism? What is the appropriate reaction to governments invoking an alleged need to restrict people's freedom in the interest of public order or national security? How can the existing system of human rights protection become more consistent? No one should expect easy answers to questions of this caliber. But it is important to raise them anyway and try to come up with responses – or more likely: *fragments of responses.*

The way this short introduction tackles various themes is at best sketchy. A small book like this one cannot provide a general overview about all important issues worth exploring in the vast area of human rights studies. Instead, this text mainly intends to trigger curiosity, critical questions, debates and personal discoveries. For one thing is certain: a culture of solidarity based on respect for human rights can only develop through the commitment of many people with an open, critical and discursive mindset.

The idea to write this book emerged during the preparation of a human rights module within a course organized by "Jesuit Worldwide Learning – Higher Education at the Margins" (JWL) in cooperation with Hekima University College in Nairobi. I am particularly grateful to Peter Balleis SJ, executive president of JWL, for having "recruited" me to this project. Stefan Hengst SJ and Anna Mayr were always available for consultations. Julia Mazina supported me in the final phases of preparing the text. I would like to thank FAU University Press represented by Markus Putnings and Andrea Petzoldt for their professional cooperation. I learned a lot from the colleagues, with whom I had the pleasure to cooperate in this project. Thanks a lot to all of you!

Erlangen, December 2021, Heiner Bielefeldt

1. The Authority of Human Rights

1.1 Nagging questions

Human rights are a powerful idea. They are not just another set of legal tools, norms, regulations or entitlements. Instead, they enjoy the supreme rank of *"inalienable rights"*, which all human beings equally possess simply because of their humanness. This is the foundational idea. Accordingly, human rights claim an authority that reaches across regional, political, religious or cultural boundaries. To cite the famous words of the 1948 *Universal Declaration of Human Rights* (UDHR), the "mother document" of international human rights protection: "All human beings are born free and equal in dignity and rights."[1] In a nutshell, this defines the normative profile of human rights: their universalism, egalitarianism and empowerment-function. The proclamation of equal rights to freedom for all humans carries a peculiar weight. Indeed, it radiates authority.

To begin a speech or a text by stressing the authority of human rights inevitably provokes skeptical objections. Has the international infrastructure of human rights protection not largely proven inefficient, especially in the face of mass-scale human rights abuses? How can one dare to invoke the authority of human rights in a world, where numerous people die as victims of police brutality, where minorities remain exposed to stigmatizing prejudices, where hundreds of millions of parents do not know how to feed their children, where countless refugees drown when desperately trying to reach a safe haven? People sometimes react with skepticism, if not unconcealed sarcasm, to the language of human rights, which in the eyes of critics is but a lofty philanthropic idealism detached from reality. In spite of the various human rights conventions established in the wake of the UDHR, we continue to witness egregious human rights violations, including mass killings, torture, deportations, "ethnic cleansing", forced labor and domestic violence. Massive abuses frequently even remain without an adequate political response, to put it mildly. In the face of all of this, how can one in earnest ascribe authority to human rights?

[1] Article 1, first sentence of the UDHR.

Critical questions can go even deeper. In addition to the problem of inefficient implementation, which has often caused disappointment, bitterness and even feelings of betrayal, critics have also challenged the legitimacy of the whole enterprise. Do human rights not reflect a particular Western type of normative reasoning? Can they ever become more than just a "Western concept with limited applicability", to echo the title of a skeptical article?[2] Postcolonial critics see human rights campaigns in continuity to European colonialism and imperialism, possibly even as a new version of the crusades. As Makau Mutua ironically remarks, while the victims are always supposed to live in the global south, the self-declared saviors usually come from the Western parts of the northern hemisphere.[3] Eurocentrism is not an isolated charge in critical debates. Feminists have exposed the ambiguities of classic human rights documents, which openly monopolized male experiences, wishes, perspectives and interests. A French declaration of 1795 proclaims: "No one is a good citizen unless he is a good son, good father, good brother, good friend, good husband."[4] Where are the daughters, mothers, sisters and wives? The 1948 UDHR still invokes the "spirit of brotherhood"[5] as the seemingly unquestioned symbol of political solidarity. Although more recently enacted human rights instruments use quite nuanced language in this field, gender-related biases may still affect the interpretation of norms and judgments. It is furthermore questionable that contemporary human rights standards sufficiently accommodate escalating economic disparities, widening political power-asymmetries or existing class distinctions. It would be easy to expand the list of grave problems and unsolved questions. In short, both the *efficiency* and the *legitimacy* of human rights are seriously at stake. If that is so, where is the authority of human rights?

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[2] See Adamantia Pollis & Peter Schwab, "Human Rights: A Western Concept with Limited Applicability", in *Human Rights: Cultural and Ideological Perspectives*, ed. by Adamantia Pollis & Peter Schwab, New York: Praeger, 1979, pp.1-18.

[3] See Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights", in *Harvard International Law Journal*, Vol. 42 (2001), pp. 201-245.

[4] Quote taken from https://revolution.chnm.org/items/show/552.

[5] Article 1, second sentence of the UDHR.

These are haunting questions, indeed. They will accompany us through the entire book. That is why I raise them, at least briefly, already in this introductory chapter. The responses given in subsequent chapters will not make those critical questions disappear. Rather, they will come up again and yet again, in different shapes and with various modifications. It is not my intention to "refute" critical questions or objections. At the end of this course, many nagging questions will linger. Maybe this is necessary. Skeptical questions, critical deconstructions and sarcastic comments may serve as antidotes to the ever-lurking dangers of complacency or paternalistic superiority claims, which would erode the credibility of human rights norms and poison human rights practice.[6]

Surely, my clear purpose is nonetheless to *defend* human rights as a meaningful enterprise. I am convinced that there is something *compelling* in human rights and that their appeal can reach – and does reach – people across boundaries. To demand human rights publicly may furthermore help stem the waves of political cynicism, which otherwise would become even more rampant.[7] A world without human rights aspirations would certainly be a world with less hope; we cannot afford to let that happen. At the same time, there are good reasons for human rights practitioners always to be open to critical objections wherever they may come from. Indeed, critical questions need to be built into the center of any theory and practice of human rights; they must become part and parcel of the whole enterprise. In the last analysis, it will turn out that the legitimacy, to which human rights norms, institutions, mechanisms and organizations lay claim, will always remain *legitimacy on probation.*

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[6] See David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism,* Princeton University Press, 2004.

[7] There is only a thin line between sarcasm and cynicism. Nonetheless, the two attitudes remain quite different. Sarcasm is a bitter form of irony of those who suffer from the prevailing conditions. By contrast, the cynic no longer suffers and may even derive feelings of gloating superiority from people's loss of hope.

1.2 An authority prior to legislative standard-setting

What is the source of the peculiar authority of human rights? This question receives different answers. One typical answer refers to "authoritative" human rights documents: the various bills of rights enshrined in national constitutions; regional and international human rights conventions established in the wake of the UDHR; important court decisions or the findings of formally mandated monitoring agencies. Do the huge piles of legal documents not sufficiently prove the relevance, and thus the authority, of human rights?[8] What is true is that legal standards and mechanisms, as they exist at national and international levels, play an indispensable part in human rights practice. Human rights need an institutional infrastructure to gain political traction and a certain (albeit so far limited) effectiveness. They furthermore require legislative and judicial interventions to even obtain their specific contours. The precise content, scope and limits of human rights are not given once and for all; they are determined through ongoing legislation and jurisdiction. However, all of this comes second. Prior to the processes of legislative and juridical standard-setting, the idea of human rights claims an *intrinsic authority*. Measured against this intrinsic authority, the authority of positively legislated standards is merely derivative. As former UN High Commissioner for Human Rights Mary Robinson has put it, "Human rights are inscribed in the hearts of people; they were there long before lawmakers drafted their first proclamation."[9]

It is interesting to note that human rights documents explicitly testify to the priority of an intrinsic authority upon which they themselves are based. For example, the preamble of the UDHR sets in with "recognition of the inherent dignity and of the equal and

[8] Academic approaches, which base normative authority mainly or exclusively on given (= positive) legal standards are generally called "legal positivism". Those representing this type of thinking often claim that it is more in line with modern rational thinking, which has to operate without being able to resort to religious or metaphysical notions.

[9] Cited from https://www.amnesty.ie/wp-content/uploads/2016/09/Chapter_01.pdf.

inalienable rights of all members of the human family". One should bear in mind that these are the opening words of the preamble of the first-ever international human rights document; they mark the very beginning of the entire process of standard-setting at the global scale. Remarkably, the first word within that introductory sentence is "recognition". The text furthermore clarifies that recognition is due to human beings because of their "inherent dignity".[10] The crucial term dignity requires interpretative efforts, which we will tackle in the next chapter. What should mainly interest us here is the adjective "inherent". It signals a clear understanding that the whole project of establishing international human rights standards rests on the assumption that there is something *inherent* in human beings that commands respect. In other words, it is *not* through the establishment of positive human rights standards that people can lay claim to respect of their dignity. It is the other way around, in that the recognition of an inherent dignity provides the precondition for this whole process of standard-setting to make any sense. The various human rights conventions established in the wake of the UDHR do not "create" the authority of human rights. Strictly speaking, they merely formally *corroborate* an already existing authority – while at the same time spelling out the precise content of human rights and adding important remedies and monitoring mechanisms.

This insight has practical consequences. For example, it follows that human rights are not the exclusive domain of legal experts. I have an enormous respect for the legal profession and the important contributions of lawyers to human rights theory and practice. They add a much-needed precision, clarity and transparency to the understanding of human rights norms and mechanisms. Human rights cannot flourish without the ongoing involvement of legally trained experts. At the same time, it would be problematic to see the legal aspects of human rights in isolation. The result would be – and often is – a somewhat technocratic language. Textbooks on human rights are actually abound with technical acronyms, and many human rights organizations seem inclined to develop ever new "tool boxes" and "tool kits". To enhance the accessibility of relevant legal

[10] See also Johannes Morsink, *Inherent Human Rights. Philosophical Roots of the Universal Declaration,* Philadelphia: University of Pennsylvania Press, 2009, pp.17-54.

documents and juridical decisions is certainly useful for practitioners. Yet it may be less helpful for winning over the hearts and minds of people for the cause of human rights.

There are also genuinely political reasons for insisting on the merely secondary role of legislative and juridical standard-setting in the area of human rights. The awareness that human rights represent an *intrinsic authority* prior to any acts of law-making in this field can help build resilience against various attempts, undertaken by authoritarian governments, to exercise full interpretative control over the status, content and scope of human rights. Let me explain what I have in mind. One of the most confusing experiences in human rights politics is the fact that nowadays virtually all states worldwide occasionally use the language of human rights.[11] Nearly all of them at least pay lip service to human rights, whenever it seems opportune to do so. Quite a number of authoritarian regimes with highly problematic human rights records even sit in international forums, like the *UN Human Rights Council* in Geneva. What may motivate them is an interest to ensure that they themselves remain the "sovereign" interpreters of human rights standards. In particular, autocratic governments see human rights norms as just an artifact of their own sovereign legislative decisions, which therefore should fully remain in the grip of their sovereign interpretative power. Hence, they take the liberty to limit, curtail or even remove those rights, whenever they become a serious obstacle to their political interests. As a mere "product" of political decision-making, however, human rights would lack any independent standing against the state – which is exactly what those promoting the primacy of state sovereignty may wish to achieve. Likewise, when signing up to international conventions, governments often enter broad reservations, with the goal of reserving as much space as possible for their own interpretations of what those standards should mean in practice. The assumed primacy of state sovereignty thus purposefully erodes the authority of human rights – if not openly, then at least factually. Authoritarian governments may still from time to time use human rights rhetoric as a sort of moral dress code that has become customary in international diplomacy. Yet in their view, human rights

[11] See Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. by Amy Gutmann, Princeton University Press, 2001, p. 53.

are not supposed to unfold any independent normative force. This is the problem. At the end of the day, what remains are acts of state mercy, which those in power may grant when it seems opportune to do so.[12] Acts of state mercy, however, do not deserve to be called human rights.

It is against such proclaimed primacy of the sovereign state that the insistence on an *intrinsic* authority of human rights unfolds its political relevance. Hence, the first duty that the state has vis-à-vis human rights is *respect*. This includes the legislator. Human rights should not end up as mere tools employed in diplomatic games; nor should they depend upon the good will of those in power. Instead, they command respect, thus claiming an *independent normative standing*. National or international acts of legislative standard-setting concerning human rights can only be meaningful when being undertaken in a *spirit of respect* for the idea of human rights, which itself has its own compelling persuasiveness. For all the importance of legislative efforts, by which human rights gain their specific contours and institutional force, they only make sense when carried out in the service of an authority that precedes any such processes.

1.3 Diverse ways of highlighting the authority of human rights

The intrinsic authority of human rights, independent of and prior to the state, has found expression in a broad variety of concepts and metaphors. While some anchor human rights in religious belief, others conjure up "natural rights" or "unwritten laws". Yet another approach is contemporary discourse ethics; it aims to derive the authority of human rights from their indispensable role in safe-guarding certain non-negotiable preconditions of communication. What I would like chiefly to demonstrate in this sub-chapter is the

[12] The theoretical background of upholding a systematic priority of state sovereignty over human rights frequently stems from Carl Schmitt (1888-1985), a German right-wing lawyer and legal philosopher, who for a few years even served as a chief legal ideologue of the Nazi government. For a discussion on the problematic legacy of Carl Schmitt see *Law as Politics. Carl Schmitt's Critique of Liberalism,* ed. by David Dyzenhaus, Durham and London: Duke University Press, 1998.

diversity of such attempts to strengthen the authority of human rights. This diversity of approaches deserves acknowledgment.

An idea that has always been popular among believers of different religions is that human rights derive their authority directly from God – as *a divine gift* to humanity. God-given rights even found access into some of the classic human rights documents. Being anchored in religious belief, human rights claim significance far beyond their limited pragmatic usefulness; they even touch upon the dimension of the absolute. The concept of an inherent dignity, which constitutes the ethical nucleus of human rights, actually resonates profoundly in different religious traditions. For example, the Bible ascribes an elevated rank to all human beings, owing to man's and woman's creation "in the image and likeness of God" (Genesis 1:27). In Psalm 8, the singer admires the sublime beauty of the nightly sky, which makes him simultaneously aware of his frailty and his divine calling within the order of creation. He turns to God wondering: "What is man that you are mindful of him, and the son of Adam that you care for him!" (Psalm 8:5). Such ideas are no monopoly of the Biblical tradition. The Qur'an acknowledges the human being's role as God's vicegerent (*khalifa*) on earth (Sura 2:30), which is the reason why even the angels have to bow to Adam (Sura 2:34). According to Sura 33, the human being has accepted a divine trust (*amana*), which the mountains and the heavens (i.e. the most powerful cosmic elements) had previously rejected (Sura 33:72). These and other religious notions and metaphors, Jeremy Waldron writes, "convey a profound sense of the sanctity of the human person – each of us unimaginably and incomparably sacred because of this relation to the Most Holy."[13] For many activists working in faith-based organizations – Jews, Christian, Muslims, Baha'is, Buddhists, Hindus and others – the promotion and protection of human rights may actually assume the status of a divine command.

It is interesting to note, however, that international human rights documents, starting with the UDHR, cautiously and consistently avoid religious language. The reason for such reluctance is that human rights should not become the exclusive domain of

[13] Jeremy Waldron, *One Another's Equal. The Basis of Human Equality*, Cambridge/Mass.: The Belknap Press of Harvard University Press, 2017, p. 196.

religious people. In fact, proposals made by some governments during the deliberations of the draft UDHR to further strengthen the authority of human rights by inserting a religious reference remained unsuccessful. A clear majority of representatives endorsed the counter-argument that the use of religious language would be inappropriate in a pluralistic world.[14] Accordingly, the language of the UDHR, as well as of the human rights conventions enacted in its wake, remains thoroughly secular. This does not preclude the possibility for faith communities to appreciate human rights as a divine gift or to use other religious concepts if they so wish. The secular language of human rights is not polemical against religion.[15] Its purpose is merely to *keep the space open* for a broad variety of ways in which people – believers as well as non-believers – may try to make sense of human rights.[16]

Textbooks on human rights sometimes still use the terminology of *"natural rights",* whose normative rank is supposed to be superior to any "positive rights" enacted by human legislators. The idea of natural rights played an important role in the historical genesis of human rights. For example, Bartolomé de Las Casas (1484-1566) cited the natural rights of all human beings when trying – with little success – to prevent the genocide of indigenous peoples by European *Conquistadores* in Central and South America.[17] John Locke (1632-1704) referred to the idea of natural rights when arguing for the inalienability of certain fundamental entitlements, which people can never surrender to the government, without thereby betraying their

[14] See UN Doc. A/C.3/SR.96-99.

[15] See Heiner Bielefeldt & Michael Wiener, *Religious Freedom Under Scrutiny,* Philadelphia: University of Pennsylvania Press, 2020, pp. 209-220.

[16] Religious references from different traditions are included in the 2017 Beirut Declaration to support 18 commitments on "Faith for Rights". See Beirut Declaration and its 18 commitments on "Faith for Rights" (2017), available online at https://www.ohchr.org/en/issues/freedomreligion/pages/faithforrights.aspx. See also the related toolkit for peer-to-peer learning exercises: https://www.ohchr.org/Documents/Press/faith4rights-toolkit.pdf.

[17] See Bartolomé de las Casas, *A Short Account of the Destruction of the Indies* (originally published in 1542), London: Penguin Classics, 1992. This book is arguably the first detailed documentation of a genocide.

own moral obligations.[18] A century later, Moses Mendelssohn (1729-1786) likewise invoked the concept of natural rights when demanding religious freedom for all, including the discriminated Jewish minority, to which he belonged.[19] One could easily add more examples. The underlying idea of natural rights thinking is that certain positions are a *gift of nature,* as it were. Natural rights thus point to a "plan of nature", which unfolds binding force, because it is a manifestation of what the divine creator has designed.[20]

Critics have exposed a number of problems and pitfalls connected to natural rights thinking, though. As a particular European philosophical legacy, the idea of natural rights may be just another manifestation of Eurocentrism, which we have to overcome when trying to make sense of universal human rights today. This is one major objection. Others have argued that the idea of natural rights rests on crypto-theological premises, i.e. the idea of a divine creator whose will manifests itself in the order of nature. For those people who do not share the theological assumptions, however, the idea of a purposefully ordered nature would not make any sense. Yet others have pointed to the experience that the notion of the binding "plan of nature" used to function over the centuries as a major ideological tool employed to render traditional gender roles immune against criticism. This is an important point, which currently may be the most influential objection against the invocation of "nature" in ethical and political debates. In fact, countless women have suffered systematic discrimination in the name of certain allegedly "natural" norms and standards. To this very day, women's rights activists across the continents have to struggle against restrictive notions of woman's supposedly "natural" destiny.

Although the concept of natural rights has meanwhile fallen into disrepute, however, it may still be worth carving out at least *one critical core message* ingrained in that concept, namely, the insistence

[18] See John Locke, *Two Treatises of Government* (originally published 1689), available under https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf.
[19] See Moses Mendelssohn, *Jerusalem: or On Religious Power and Judaism* (originally published in 1783), trans. by Allan Arkush, Waltham/Mass.: Brandeis University Press, 1983.
[20] Most conceptualizations of natural rights presuppose an implicit theology, while often avoiding a straightforward religious language.

that the authority of the state cannot be the final instance. Sophocles' drama *Antigone* is a famous testimony to that insight.[21] When clandestinely burying her brother, who had been killed in a battle, Antigone acted against the king's explicit prohibition. She thus knowingly violated the law of the city of Thebes. When being held responsible for her disobedience, she referred to certain "unwritten laws", which she said occupy a rank superior to any human-made laws or decrees, including the king's orders. After receiving a death verdict for her obstinate invocation of the unwritten laws, Antigone died as a martyr of her moral conviction. This ancient story unfolds its powerful appeal to this day. It appears that similar notions exist in different cultural traditions. People from most diverse cultural backgrounds may agree that there must be a normative instance above the state, whether we call it "unwritten laws", "the laws of nature", "heavenly commands" or whatever. This critical awareness can promote resilience against any political pretense of absolute power.

Let me briefly present one more project, which – albeit in a quite different way – aspires to strengthen the authority of human rights. Discourse ethics, as inter alia elaborated by Jürgen Habermas[22] and Seyla Benhabib,[23] is a contemporary philosophical theory closely related to modern democratic deliberations. What the proponents of discourse ethics wish to demonstrate, by means of sophisticated philosophical and linguistic analysis is that meaningful communication rests on certain elementary preconditions, whose violation would render communicative efforts from the outset pointless. One of these necessary preconditions, implicitly ingrained in the structure of communication as such, is *mutual respect on an equal footing* between all potential communicators. Now, it is the role of human rights to back up such due respect for people on the basis of equality; this accounts for their specific authority. Contemporary

[21] The poet Sophocles lived in the 5th century before CE. *Antigone* is by far his most prominent drama. For an open access to the works of Sophocles, see: https://ir.canterbury.ac.nz/handle/10092/9681.

[22] See Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory on Law and Democracy,* Cambridge/Mass. MIT Press, 1997.

[23] Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press, 2002.

discourse ethics does not rest on religious concepts, like the idea of a divine creator who has endowed humanity with certain rights; nor does it presuppose notions of unwritten laws or natural rights. Rather, the assumption is that legal norms and entitlements are the result of democratic discourse, public deliberation and political negotiations. Nevertheless, human rights carry a peculiar weight, because they are supposed to protect certain *non-negotiable preconditions of fair deliberations,* as it were, by enshrining egalitarian rights to freedom for all. Hence, from the perspective of discourse ethics, too, human rights legitimately claim an elevated normative rank.

1.4 Rights without price tags

The approaches just briefly presented are *mere examples.* They do not exhaust the vastly diverse ways, in which people from different religious, cultural or philosophical backgrounds have tried in past and present to highlight the inalienable nature of their basic rights. The good news is that such diversity does not necessarily create a problem. There is no need for all of us to agree on a specific conceptual or metaphorical justification of human rights *in theory,* as long as we accept their authority *in practice.* This is no new insight. In his introductory chapter to a human rights commentary published in 1949 by UNESCO, the French philosopher Jacques Maritain acknowledged, with undisguised surprise, that it actually seems possible to achieve a practical consensus on human rights, in spite of profound differences concerning their ultimate philosophical or religious foundations. Referring to the UDHR adopted shortly before, Maritain ironically concluded: "Yes, we agree about the rights, but on condition no one asks us why."[24]

Maritain's famous statement is not without ambivalence, though. While he makes an important point when stressing that diverse justifications of human rights are possible, his warning not to "ask why" might discourage people from even raising questions about the ultimate source of human rights. However, this would seriously impoverish human rights debates. It would deprive us of

[24] See Jacques Maritain, "Introduction", in *Human Rights: Comments and Interpretations,* Paris: UNESCO 1949.

opportunities to discover and voice, in various ways, how human rights unfold significance far beyond their limited pragmatic usefulness as legal tools. Against Maritain's dictum, I would therefore insist that we should actually continue to "ask why". The search for understanding the ultimate sources of human rights should go on, even though we cannot expect ever to achieve a definitive result, let alone unanimous endorsement on any specific answer to that basic question.

To appreciate human rights as an endowment by God or a gift of nature continues to carry an important message today; it is the message that we humans have a strong obligation to cherish these rights as something utterly precious. To say it in traditional religious language, which also non-religious people may find appealing: there is something "sacred" in human rights. This is the reason why human rights are more than just another set of legal tools or entitlements. Unlike copyrights, which an author is free to sell for money, human rights are *inalienable;* and unlike rights of membership in a particular club, which one only obtains after paying the requested fees, human rights do not have a price. One can actually define human rights as *rights without price tags.* They are not for sale. Religious language has no monopoly for expressing such normative insights, though. Secular concepts like the ones elaborated by contemporary discourse ethics are also suitable to deepen the understanding of human rights, which protect certain *non-negotiable preconditions of any meaningful communication* whatsoever. From the perspective of discourse ethics, too, human rights legitimately claim an elevated normative rank, thus differing in principle from the usual legal entitlements, which people can gain or lose, buy or sell, preserve or forfeit.

Human rights allow for a broad diversity of religious or non-religious viewpoints on how to understand their peculiar authority. This openness to diverse philosophical, theological or other forms of appreciation belongs to their strengths.[25] Making sense of human rights is furthermore no monopoly of academics or intellectuals. There is something *inherently compelling* in the idea of basic rights

[25] See Tore Lindholm, "Philosophical and Religious Justifications of Freedom of Religion or Belief", in *Facilitating Freedom of Religion or Belief: A Deskbook*, ed. by Tore Lindholm, W. Cole Durham, Jr. and Bahia G. Tahzib-Lie, Leiden: Martinus Nijhoff Publishers, 2004, pp.19-61.

that all human beings should equally be able to enjoy, simply because of their humanness. Moreover, although the underlying egalitarian universalism shows specifically modern features, human rights at the same time respond to humanity's yearnings for justice, which are traceable far back in history.

Tasked by UNESCO, philosopher Jeanne Hersch more than fifty years ago published a sizeable collection of testimonies, which illustrate the yearning for justice across the centuries and the continents. The collection originally published under the title *"Le droit d'être un homme"* [= the right to be a human being] appeared in English under the somewhat awkward title "Birthright of Man".[26] What is interesting is that Jeanne Hersch's documentation brings together very different types of ancient and modern texts: ethical treatises, religious parables, pedagogical guidance, poetic fiction, heroic narratives and many more. While most of these texts cannot count as human rights documents in the narrow sense, they together provide the wider horizon of meaning, within which the idea of human rights unfolds its compelling force.

1.5 Unpacking the inherent persuasiveness of human rights

A woman, who had spent her youth under an authoritarian regime, professed in a letter, "Even when you are in what seems an abyss of humiliation, you still know that one of your rights is being violated. Perhaps you have no idea how it is called, but you nonetheless feel it." This is a moving testimony. Human rights are "basic" rights in the most literal sense of the word; they represent something "elementary" close to many people's hearts, who possibly feel it before knowing how exactly to comprehend it. Human rights are not only a matter of the mind; they are no less – and perhaps even more so – a matter of the heart. It certainly does not require an academic certificate to understand the significance of rights which all human beings should be able to enjoy, simply because they are human. Nelson Mandela once remarked, "To deny people their human rights is to challenge

[26] Jeanne Hersch, Birthright of Man – An Anthology of Texts on Human Rights, Paris: UNESCO 1969.

their very humanity."[27] This is a statement everyone should be able to understand. In this sense, we have to conclude that human rights are *an easy subject*.

Yet this is only one side of the coin. The late American philosopher Richard Rorty was wrong when suggesting that we should abandon further intellectual investments aimed at a better understanding of human rights. Popular literature or films, Rorty said, would be more helpful than philosophical justifications to mobilize emotional and political commitment.[28] I do not think this is good advice. Human rights practice cannot just rely on movies made in Hollywood or Bollywood. It also requires information, argumentation, analysis and critical reflection.

One problem is that even our most fundamental normative intuitions can occasionally collide with each other. For example, we may be strongly committed to combating racism, while at the same time holding freedom of expression in high esteem. However, these two concerns can come into conflict with each other, as testified by numerous court cases. Tensions can furthermore arise in the intersection of freedom of religion and gender equality or between the freedom of scientific research and the protection of private data. In such situations, we need to search for workable solutions based on persuasive arguments. To respond to this challenge requires intellectual efforts: reflection, argumentation, discussion and knowledge.

When trying to find adequate ways of handling normative conflicts in the intersection of different human rights concerns, it is furthermore useful to be aware of relevant case law, which could give additional guidance. It may turn out that even the courts have taken quite different routes when deciding on such issues. In that situation, the consistency of jurisprudence may be at stake, which would be a serious problem, since it could in the long run erode the principles and institutions of the rule of law. This illustrates the need of familiarity with the specifically legal features of human rights – positive norms, institutions, monitoring mechanisms and so on. I

[27] http://www.mandela.gov.za/mandela_speeches/1990/900626_usa.htm.
[28] See Richard Rorty, "Human Rights, Rationality, and Sentimentality", in *On Human Rights. The Oxford Amnesty Lectures,* ed. by Stephen Shute & S.L. Hurley, New York: Basic Books 1993, pp. 111-134.

have argued above that the legal aspect of human rights should not be seen in isolation. Still, they are important. Solid knowledge of human rights law is undoubtedly required to make the existing infrastructure of human rights protection more consistent and more efficient.

Moreover, human rights research also has to struggle with the difficulties of fact-finding. Human rights work largely depends on carefully verified information about specific incidents, cases or situations. Given the experience that "fake information" often spreads faster than diligently researched facts, this presents an increasing challenge. Even if a certain fact, say, an act of police brutality, has been established beyond doubt, it may still be debatable whether this was just an isolated incident or indicative of a general pattern. One may also wish to look into the structural root-causes of abuses. Obviously, skills in empirical research are indispensable for addressing such contested issues.

Yet another type of questions concerns the legitimacy of human rights. One example, briefly mentioned already in the beginning of this chapter, is the charge that universal rights merely disguise an ongoing Western hegemony. Some governments have therefore promoted alternative concepts, like "Asian values", which are supposed to strengthen community ties against what has been perceived as "Western life-style" with its strong focus on the rights of the individual.[29] Such challenges cannot remain without answer – even though any given answer may trigger new questions. In my view, the alleged dichotomy of individualism versus collectivism is a source of much confusion, which threatens to obscure the profile of human rights. We will tackle this issue in one of the next chapters.[30] At any rate, what I wanted to demonstrate here when raising the above questions is that critical analysis, conceptual clarification, and solid knowledge are indispensable for any meaningful human rights practice.

Let me stop here. It looks like human rights are actually both: *easy and complicated.* If that is so, we obviously need both: a clear

[29] For a critical view on the concept of "Asian values" see Amartya Sen, *Human Rights and Asian Values,* New York: Carnegie Council on Ethics and International Affairs, 1997.

[30] See below, chapter 3.

awareness of their easy features – as something elementary in human life – as well as an appreciation of the various difficulties one inevitably discovers when digging deeper. Having worked myself mostly in academia, I have always felt that the easy parts of human rights are ultimately more important than the difficult aspects. Be that as it may, rather than burying the authority of human rights in acronyms and footnotes, academic efforts in the area of human rights should contribute to unpacking *the inherent persuasiveness* of the whole enterprise. This requires the willingness to listen carefully, in particular to old and at the same time ever-new experiences of injustice, like the one expressed in a poem by D. Ravikumar:

"It is indeed my wish to say
That another house will not be burned
That another throat will not be slit
Another honour not defiled
Another passage not denied
Another door will not be shut
Another opportunity will not be blocked.
It is indeed my wish to say
That everyone's voice will be heard
All grievances are redressed
That every wound is healed
Every tear is wiped
And everyone's view respected.
It is indeed my wish to say
That the innocent will be identified
And the guilty punished
That the vile ones will be removed
And the virtuous recognized.
It is indeed my wish to say
the next year won't be like this year."[31]

[31] https://scroll.in/article/948329/the-art-of-resistance-a-poet-and-parliamentarian-yearns-for-justice-and-equality-in-india.

2. What Are Human Rights? The Defining Principles

2.1 No timeless "canon" of rights

What are human rights? This seems to be a simple question. However, when wishing to come up with an answer, one cannot refer to a timeless "canon" of rights, for instance, the 30 articles of the *Universal Declaration of Human Rights* (UDHR). Human rights have evolved in history, and they remain open to further changes. For all its significance, the UDHR is not a document of eternal validity. From today's perspective, the term "brotherhood", used in article 1, looks outdated. The non-discrimination clause in article 2 fails to mention disability and age among the prohibited entry points of unequal treatment. Article 16 on the right to marriage and family life shows no trace of the more recent discussions on "rainbow families". None of this should come as a surprise. After all, the UDHR represents the standard of the human rights debate in the immediate aftermath of World War II. Changes have since taken place at various levels. They concern (1) the international infrastructure of human rights protection; (2) new threats to human dignity in the wake of technological evolutions; (3) amendments to non-discrimination agendas; and (4) the emergence of new challenges and themes.

(1) The international infrastructure of human rights protection
While the UDHR is a declaration of political will, many of the instruments developed in its wake have the status of *legally binding conventions.* This is an important difference. Examples include the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965)[32], the *International Covenant on Economic, Social and Cultural Rights* (1966), the *International Covenant on Civil and Political Rights* (1966), the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979), the *Convention Against Torture* (1984), the *Convention on the Rights of the Child*

[32] The years mentioned in brackets concern the adoption by the UN General Assembly, not the time of the entrance into legal force, which usually took place a few years later.

(1989), the *Convention on the Rights of Persons with Disabilities* (2006) and the *International Convention for the Protection of All Persons from Enforced Disappearance* (2006).[33] Human rights instruments inspired by the UDHR also developed at regional levels, in particular in the context of the *Council of Europe,* the *Organization of American States* and the *African Union.*

The difference between the UDHR and the various human rights conventions is not a mere formality; it has practical consequences. States ratifying any of the above conventions have to undergo regular monitoring processes aimed at assessing the seriousness of their human rights commitment and the effectiveness of their implementation policies. Independent expert committees mandated to carry out this periodic monitoring can furthermore handle complaints submitted by individuals. The results of their work are publicly available on the website of the Office of the High Commissioner for Human Rights.[34] At regional levels, specialized human rights courts (in Strasbourg, San José and Arusha) issue judgments about human rights violations in response to individual complaints.

The efficiency of the existing infrastructure of international human rights protections is contested. Obviously, the system suffers from serious weaknesses, exacerbated by insufficient coordination between different institutions operating at various levels. We will tackle these problems in the final chapter of this book when discussing proposals to enhance the consistency and effectiveness of human rights protection.[35] The point I want to make here is that for an adequate account of the evolution of human rights after 1948, one certainly has to take into consideration important infrastructural developments.

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33 For an overview, see Fact Sheet no. 30/Rev. on *The United Nations Human Rights Treaty System,* issued by the Office of the High Commissioner for Human Rights, available under: https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf.

34 See www.ohchr.org.

35 See below, chapter 8.

(2) Responding to new threats in the wake of technological evolutions

"My home is my castle". When the British lawyer Edward Coke coined this well-known slogan in the early 17th century, he wished to defend the private sphere against arbitrary interferences by state authorities.[36] In contemporary ears, Coke's metaphor may sound almost romantic. To compare the private sphere to a fortress with walls, moats and drawbridges no longer seems to make much sense. In the digital age, encroachments of the private sphere often remain invisible. Moreover, they come from different angles, not only from control agencies operating in the service of the state, but also from internet companies that penetrate people's most personal preferences in the interest of targeted marketing. The consequences of such encroachments range from internet mobbing to the loss of job opportunities to straightforward political persecution. Indeed, the mere possibility of being under permanent surveillance can already cause the proverbial "chilling effect" on people who may therefore prefer to keep controversial opinions and positions to themselves – to the detriment of democratic discourse.

In order to respond to such challenges, the *German Federal Constitutional Court* decided in 2008, that the integrity of personal electronic data systems falls within the protection of the constitutional bill of rights.[37] In public debates, this decision has been termed the "computer right" judgment. In the understanding of the judges, however, the court did not "create" a new right, but merely updated the necessary protection of privacy in the digital age. Similar developments have occurred in other countries as well. At the UN level, the Human Rights Council established the mandate of the *Special Rapporteur on the right to privacy* (2015), which has a particular focus on new challenges arising in the digital age.[38] It

[36] The popular version "my home is my castle" is a short form of Coke's following statement: "For a man's house is his castle, et domus sua cuique est tutissimum refugium [and each man's home is his safest refuge]." Quoted from *Oxford Essential Quotations,* ed. Susan Ratcliffe, Oxford University Press, 2018, also available under: www.exfordreference.com.

[37] See Federal Constitutional Court of Germany, decision of 27 Feb. 2008 (1 BvR 370/07).

[38] For information on this mandate, see srprivacy@ohchr.org.

should be noted that new dimensions of data processing are but one example illustrating the need for ongoing adaptations of international human rights protection, in order to respond to technological evolutions.[39]

(3) Amendments to non-discrimination agendas

As already mentioned, the non-discrimination article of the UDHR does not contain a reference to disability. This is remarkable, given the fact that Eleanor Roosevelt, chairperson of the UN Human Rights Commission, was quite familiar with prejudices against people with disabilities. Her late husband, former US President Franklin D. Roosevelt, had to use a wheelchair in his last years, which was considered unusual, perhaps even embarrassing for a high-ranking politician. In those days, the typical understanding was that disability was a personal tragedy, not a human rights issue.

The attitude toward disability has meanwhile changed considerably. In 2006, the UN General Assembly adopted the *Convention on the Rights of Persons with Disabilities* (CRPD), which spells out the purpose of a barrier-free inclusive society.[40] The CRPD is the result of public campaigns carried out by civil society organizations throughout decades. They raised awareness, exposed concealed societal barriers to critical scrutiny and called for a consistent policy of equality and inclusivity. The disability movement's strong focus on structural forms of discrimination has also contributed to broadening and deepening non-discrimination agendas in general, far beyond the issue of disability.

The achievements of the disability movement are not an isolated example. Self-organizations of Dalits (i.e. people at the bottom or outside the caste system) in India and Nepal have embarked on an uphill-battle against deep-seated negative attitudes and humiliating practices. Members of linguistic minorities have

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[39] Possible interference within the genetic "hardware" of human beings is another problem, which will likewise confront us with human rights challenges of enormous dimensions. In this context, it is remarkable that article 21, paragraph 1 of the European Union's Fundamental Rights Charter, enacted in 2000, contains the reference to a person's "genetic features" as a prohibited ground for unequal treatment.

[40] See article 9 of the CRPD.

highlighted the significance of language rights as a precondition for their full participation in society. Lesbians, gays, transgender and queer people work for equality and non-discrimination in the area of sexual orientation and gender identity. In 2007, international organizations of indigenous peoples won a symbolic victory, when the UN General Assembly adopted the *Declaration on the Rights of Indigenous Peoples.*[41] That Declaration is an important step – but still a mere step – in long-term fight for indigenous rights.

(4) Emerging new areas of human rights protection

In recent years, environmental issues have received increased attention in human rights debates. UN forums, like the *Human Rights Council,* deal with adverse effects of climate change on the situation of people living in vulnerable situations, such as elderly persons, the poor, women and girls or indigenous peoples.[42] New instruments are under discussion, including the project of an international convention on the human right to a healthy environment.[43] Greta Thunberg, worldwide spokesperson of the "Fridays for Future" movement, supports a campaign that demands the inclusion of "ecocide" in the list of crimes to be treated by the *International Criminal Court.*[44]

A human right with an obvious relevance for environmental politics is the right to water. There is no trace of it in the UDHR and even the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR) still does not explicitly mention access to clean water as a human rights issue. In 2003, however, the UN

[41] See article 2 of the *UN Declaration on the Rights of Indigenous Peoples*: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."

[42] See e.g. the report to the UN Human Rights Council by the then Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz: *UN Doc. A/HRC/36/46* of 1 November 2017.

[43] See the report to the UN Human Rights Council by the Special Rapporteur on human rights and the environment, David Boyd: *UN Doc. A/HRC/43/53* of 30 December 2019.

[44] See https://www.euronews.com/living/2020/07/21/greta-thunberg-donates-1-million-to-groups-fighting-the-climate-crisis.

Committee tasked with the monitoring of the ICESCR published a General Comment, which acknowledged the right to water as an implicit component of the Covenant. The Committee pointed out, "The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights."[45]

Let me stop here. The above examples do not exhaust the manifold adaptations, amendments and transformations, which international human rights protection has undergone in recent decades. While some of the changes occurred through the adoption of new international conventions, important adaptations also proceeded through case law, i.e. the ongoing jurisdiction of courts and other institutions tasked with the monitoring of human rights. Such transformations are going on, and no one can seriously predict how exactly human rights instruments will look like toward the end of the 21st century.

To be open to changes is an advantage; it allows human rights to remain closely in touch with societal developments. At the same time, such openness is not without risks. Is there not a danger that human rights will lose their normative focus and end up as a trivial wish list? Would this not exacerbate the fragmentation of the entire system of human rights protection? "Today, human rights law has all the clarity of a tax code", a Danish lawyer once remarked sarcastically.[46] Does such lack of clarity not create an incentive for states to pick and choose the rights that suit their political agendas, while ignoring other human rights concerns? The answer to these questions is: yes indeed, all these dangers doubtlessly exist. In debates of the UN Human Rights Council, they are actually quite tangible. Accordingly, there is a need to exercise vigilance to ensure

[45] UN Committee on Economic, Social and Cultural Rights, *General Comment no. 15, UN Doc. E/C.12/2002/11* of 20 January 2003, section 1. In view of the fact that "over a billion persons lack access to a basic water supply" (ibid.), it seemed imperative to the Committee members explicitly to carve out the human rights dimension of a safe access to water for everyone.

[46] Quoted from Aaron Rhodes, *The Debasement of Human Rights. How Politics Sabotages the Ideal of Freedom,* New York/ London: Encounter Books, 2018, p. 25.

that human rights will keep their normative persuasiveness, coherence and force. The only question is how best to tackle this task.

Driven by unease in the face of a growing list of human rights claims, some commentators have proposed to move back to a narrow concept of "original" human rights, for example, the 30 articles of the UDHR. On the surface, this seems to have a number of advantages. It would allow us to keep the focus on a limited list of rights, which everyone would be able to learn by heart. This would spare us complicated discussions about which claims should count as human rights. However, I do not think that such a retrogressive policy of "human rights originalism" would be a viable path.[47] Many of the developments we have witnessed in the last decades respond to urgent needs. One cannot ignore far-reaching technical evolutions, which obviously warrant new safeguards, for instance in the shape of digital rights. To devalue dearly won achievements in the area of non-discrimination would be a slap in the face of social movements. The accelerating environmental crisis in the context of global warming confronts us with justice issues of planetary proportions, which will have far-reaching impact on the further development of human rights. Although no one knows exactly what an adequate solution should look like, it is just inconceivable to separate human rights from the ongoing political debates on environmental justice.

How can we ensure openness to future developments while at the same time preserving the contours of human rights? There is no easy answer to that question. If it is not possible to invoke a timeless "canon" of rights, it seems all the more necessary to reflect upon the underlying principles, which together define the human rights approach. Of course, these principles, too, are not above controversies, conflicting assessment and interpretative changes. Nevertheless, a clear awareness of the basic principles may be the only available antidote to the dangers of eroding the consistency of human rights.

[47] An example is the 2020 report submitted by the US Commission on Unalienable Rights, available under: www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf.

2.2 Defining the human rights approach

Human rights are (1) rights (2) of all human beings (3) to equal freedom concerning various sectors of society. None of this should come as a surprise. However, to spell out the implications contained in those components is less trivial than it may look at first glance.

(1) Rights

To have a right implies the possibility *to insist* on its being respected. Rights thus differ from benefits, which people receive without being able to lay claim thereto. Take the example of freedom of religion or belief, which is enshrined in the *International Covenant on Civil and Political Rights* (ICCPR).[48] As a human right, freedom of religion or belief essentially differs from policies of religious tolerance. Past proclamations of tolerance typically had the nature of unilateral acts of grace, which those in power would grant to certain religious minorities under their jurisdiction. The decisive point is that the government could reconsider its policy at any time and repeal its religious tolerance. Those benefitting from tolerance were unable to *insist* on respect of their religious freedom. By contrast, the human rights approach contains a binding guarantee of religious freedom, which calls for respect, especially by the state. If the government deems it necessary to limit certain manifestations of freedom of religion or belief, e.g., in the interest of public order or public health, it has to present compelling reasons for such limitations to be justifiable.[49] People have the possibility to appeal to a court in order to formally check the persuasiveness of such reasons and try to override governmental restrictions on their rights.

The difference between rights and benefits applies to the whole range of human rights. Rights holders do not have to "beg" for their concerns to be considered, but can insist on respect. This is no less than a paradigm shift. Take the example of the *Convention on the Rights of Persons with Disabilities* (CRPD), which empowers people to insist on the implementation of a barrier-free inclusive society. Of course, physical and attitudinal barriers will not magically disappear with the ratification of a human rights convention. Persons with

[48] See article 18 of the ICCPR.

[49] For details, see the discussion in chapter 6.

disabilities will still have to fight for their rights, and it is only realistic to also expect defeats and setbacks. Yet the situation within that ongoing fight changes in principle once people can publicly lay claim to rights and have access to judicial remedies.

Social rights are another example. In everyday parlance, they are still often termed "social benefits". With the adoption of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), however, this language has become questionable. Surely, when it comes to the practical implementation of social rights, much hinges upon the availability of resources, which differs vastly from country to country, depending on the national economic potential and other factors. International human rights law therefore cannot spell out the details of a rights-based social security system. This must be left to national legislators, courts and administrations. Yet one of the overarching features of social rights is that people, in their capacity as rights holders, should at least be able to *insist* on being included in social security systems without discrimination.[50] Again, this is a paradigm shift.

The implementation of human rights presupposes statehood. Under international human rights law, states function as the formal guarantors of the rights of those under their jurisdiction. After all, they are the ones signing and ratifying the respective international conventions. States are expected to shoulder the complex task of providing an adequate infrastructure of human rights protection, including a system of independent courts. Given the experience that quite a number of states are notorious violators of human rights, this may look paradoxical. In fact, it is an area full of tensions and pitfalls, which is the reason why international forums, courts and monitoring agencies have to exercise vigilance by constantly reminding states of their responsibility. In situations of disrespect of human rights – be it by state actions or omissions – the international community has to step in. Civil society organizations also play an important role; they exercise criticism and initiate public campaigns.[51]

The emphasis on the strategic role of states does not give governments the authority over the understanding of human rights, however. As discussed in the previous chapter, human rights are not

[50] See article 9 of the ICESCR.

[51] For more details see chapter 8, section 3.

mere products of legislative and administrative efforts of sovereign states. They have their inherent persuasiveness, which is prior to any formal commitments made by states. It is the other way around in that human rights harness the enforcement power of states in order to back up the component of *insistence,* which belongs to any definition of rights proper – as opposed to mere benefits.

My last remark in this context is that rights have their inherent limitations; rights are not everything. There are many important issues in human life, which we cannot claim as rights. The most obvious example is love. No one can seriously "insist" on being loved. Any insistence on being loved would betray a total lack of understanding of love. Happiness is another example. It would be absurd to resort to legal remedies in order to try to enforce one's personal happiness. Existential questions of how to live a life full of meaning are likewise outside the implementation mechanisms of human rights provisions, which apparently have their *intrinsic limitations*. In other words, human rights cannot fulfill all our wishes, desires, dreams and yearnings.[52] This is not one of their shortcomings; it belongs to their definition. A clear awareness of those inherent limitations is necessary, in order not to overburden human rights protection with false expectations. To turn human rights into a utopian salvation ideology would be no less than a recipe for their destruction.

(2) Rights of all human beings (in respect of their human dignity)

According to a definition proposed by James Griffin, a human right is "a right that we have simply in virtue of being human".[53] While there are many rights that we can only claim after paying the requested fees

[52] I do not wish to deny that human rights can *indirectly* enhance the prospects for the desires just mentioned to be fulfilled. Human rights can strengthen people's freedom to choose a spouse, whom they love; they can empower people to unfold their professional talents; the right freedom of religion or belief inter alia facilitates free search for meaning in life. Still, human rights cannot *directly* guarantee a successful life and the fulfillment of existential yearnings.

[53] James Griffin, *On Human Rights*, Oxford: Oxford University Press, 2008, p. 2.

or after fulfilling certain criteria, *human* rights are a different category of rights. They can neither be bought nor sold, nor can they be enhanced or forfeited. Human rights are rights without price tags, as it were. Intimately linked to the humanness of human beings, these fundamental rights must be respected in *all human beings equally*. Let me cite again article 1 of the UDHR, which famously professes: "*All human beings* are born free and equal in dignity and rights."[54] The preamble of the UDHR underlines this universalistic aspiration when referring to "*all members of the human family*."[55] Most of the following articles start with the word "everyone" thus again and again corroborating the claim to universal applicability: "Everyone has the right to life, liberty and security of person." "Everyone has the right to freedom of opinion and expression." "Everyone has the right to education." This structure runs through the various human rights documents enacted in the wake of the UDHR. Human rights are rights for everyone. They include all human beings, across geographic, cultural, political and jurisdictional boundaries. Whether or not the claim to universal validity is fully plausible remains to be seen.[56] At any rate, for the sake of providing a definition of human rights, this universalistic aspiration has an overarching significance. As a high-ranking judge once put it, "Human rights are universal – or else they simply would not exist."[57]

The universalistic nature of human rights – as rights for everyone – does not preclude the possibility of paying special attention to people living in particularly vulnerable situations. Take again the example of the *Convention on the Rights of Persons with Disabilities* (CRPD). Notwithstanding its specific focus on persons with disabilities, the Convention places itself in continuity of the UDHR and other universalistic instruments.[58] What the CRPD contributes to international human rights is not a particular set of "extra rights" separated from universal human rights. Rather, the

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[54] Emphasis added.
[55] Emphasis added.
[56] See chapter 4.
[57] Udo di Fabio, "Menschenrechte in unterschiedlichen Kulturräumen", in *Gelten Menschenrechte universal?,* ed. by Günter Nooke, Georg Lohmann and Gerhard Wahlers, Freiburg: Herder, 2008, pp. 63-97, at p. 63 (trans. HB).
[58] See the preamble of the CRPD.

Convention adds a *new perspective* on the entire range of human rights by incorporating experiences of stigmatization and exclusion, which people with disabilities have suffered through the ages. Until a few decades ago, many forms of discrimination experienced by persons with disabilities were largely absent in human rights debates. By rectifying previous ignorance, the CRPD contributes to a more credible conceptualization of universal rights.[59]

Universal human rights have their basis in human dignity. The notion of human dignity represents the insight that we humans – indeed all of us – have something in common that commands respect. In its *Declaration on the philosophy of human rights* the *World Youth Alliance* proclaims: "Human beings have intrinsic dignity. This intrinsic dignity does not depend on any circumstance, stage of development, or potential, and no human community can grant or rescind it. Thus, human beings must always be treated as an end and never used solely as a means. All human persons share this common dignity and as such are called to live in solidarity with each other."[60]

Yet what exactly does human dignity mean? Why should we humans have such an intrinsic value, which is supposed to be equal in all of us? Interestingly, we mostly refer to human dignity when protesting against its violation. While it may be difficult to find a broad consensus on how to understand the concept of dignity in positive terms, it actually seems quite easy to agree on examples of what violates dignity. Everyone will agree that slavery is a blatant offence to human dignity. To treat a fellow human as a mere commodity, which could be trafficked, sold and exploited, is obviously in total breach of the basic respect that human beings owe each other. The same is true for acts of torture, which reduce the victim to a helpless bundle of pain and shame. Policies of state censorship, which aim to stifle public debate, rob people of their freedom to communicate with each other openly; this too offends

[59] The same is true for other more specific human rights conventions. Rather than privileging particular kinds of people, they further spell out the specific consequences of universal rights for people living in situations of increased vulnerability.

[60] https://www.wya.net/publications/declarations/philosophy-of-human-rights/.

their human dignity. Forced evictions violate the dignity of those who end up living unprotected in the streets. Racist ideologies, which depersonalize the person by reducing them to just an "exemplar" of an allegedly "inferior" group, are a slap in the face of our common humanity and thus incompatible with human dignity.

When analyzing what is at stake in these and other offences to dignity, we can infer that human dignity has much to do with the *potential of responsible agency, which we all share as humans*.[61] To respect human beings implies to treat them, on par with others, as responsible subjects, not as mere objects. What the just cited examples of violations have all in common is that they blatantly deny such respect, for instance, by trafficking human beings like cattle, stifling their voices through policies of censorship or depersonalizing them through derogatory racist stereotypes. At the end of the day, any human rights violation is at the same time an offence to human dignity. Hence, human dignity is not a separate entitlement; rather, it constitutes *the common denominator* running through all human rights provisions.

When linking human dignity to the potential of responsible agency, it is important to highlight the word "potential". Otherwise, the invocation of responsible agency could lead to perfectionist, meritocratic, elitist or even exclusivist readings of dignity. This would be disastrous. Examples from past and present demonstrate that the language of dignity has often been reserved for a particular class of self-declared "distinguished" people. As a result, the invocation of dignity could assume strong elitist overtones. However, in the framework of human rights, the concept of human dignity has a totally different function. It represents a *fundamental status position of respect, in regard to which all human beings are equal.* Rather than

[61] With this proposed definition, I do not intend to exhaust the significance of human dignity. In the traditions of Judaism and Christianity, human dignity has been linked to idea of all humans, men and women, being "created in the image of God" (Genesis 1,27), while the Quran acknowledges the specific calling of the human being as God's vicegerent (khalifa) on earth (Sura 2,30). These are only two examples illustrating the inexhaustible wealth of metaphors, concepts and narrations used to appreciate the specific calling of human beings. My emphasis on the potential of responsible agency is a pragmatic attempt to spell out one component, which might serve as a common denominator.

merely recognizing dignity in appreciation of specific empirical skills, merits or successful performances, the concept of human dignity defines an egalitarian status position of all of us as *addressees of normative demands,* i.e. expectations of responsible agency, which we share with our fellow humans.[62] Human dignity, thus understood, cannot exist in different degrees; it is ingrained in the human condition. An internally differentiated human dignity would be an absurdity; it would amount to a blatant betrayal of our common humanity. The fundamental status position of respect, as it is defined by human dignity, must therefore equally include those who e.g. due to grave cognitive impairments are factually unable to fully manifest their responsible agency. In that case, fellow humans have to step in and actively protect their dignity and rights to allow them to live a respectful life in an inclusive human society.[63]

If someone willingly and knowingly fails to live up to legitimate expectations of responsible conduct, he or she is usually held "responsible" for their actions or omissions, in grave cases even before a criminal court. Everyday parlance thus corroborates that we continue to ascribe the potential of responsible agency also to people who factually fail to act responsibly. Even warlords or former autocrats, when standing before a criminal court, should of course be able to exercise all the rights connected to fair trial. They are humans after all, and it is only *as humans* that they can even stand before a

[62] As the UDHR corroborates in article 1, all humans are "equal in dignity and rights".

[63] See: Elizabeth Anderson, "Animal Rights and the Values of Non-Human Life", in *Animal Rights. Current Debates and New Directions,* ed. by Cass R. Sunstein & Martha C. Nussbaum, Oxford University Press, pp. 277-298, at p. 282: "Even a profoundly demented Alzheimer's patient, unable anymore to recognize herself or others, or to care about or for herself, has a dignity that demands that others care for her body. It is an indignity to her if she is not properly toileted and decently dressed in clean clothes, her hair combed, her face and nose wiped, and so forth. These demands have only partially to do with matters of health and hygiene. They are, more fundamentally, matters of making the body fit for human society, for presentation to others. Human beings need to live with other humans, but cannot do so if those others cannot relate to them as human. And this specifically human relationship requires that the human body be dignified, protected from the realm of disgust, and placed in a cultural space of decency."

court. By contrast, a dog trained to intimidate prisoners in a concentration camp, would never be held "responsible" for the fear and pain, which it has caused. In that case the responsibility would entirely rest with those who have trained the animal; only they may come into a situation where they have to justify their actions before a court.

Responsible agency is a potential that we humans share with each other. This defines a bond of egalitarian solidarity, which includes all of us.[64] No one has to produce an IQ certificate in order to qualify for full membership in the human family; and no one has first to demonstrate basic cognitive or social skills before being entitled to respect of their dignity as humans. Respect for human dignity is of foundational significance for the human rights approach. We all are "dignitaries" in the context of human rights. The powerful moral connotation that the term human dignity carries, points beyond the sphere of positive law. Prior to any specific acts of lawmaking, human rights derive their moral justification from the necessity to respect everyone's equal dignity as the *non-negotiable precondition of respectful coexistence* in an inclusive human society.

(3) Rights to equal freedom

Human rights span a broad range of entitlements, ranging from freedom of conscience to the right to education, from the right to life to the right to asylum, from freedom of association to the right to health. They thereby cover various spheres of society: religion and the arts, business and trade unions, the press and the judiciary, public life as well as private life. In recent decades, news issues like water management, food production or the implications of global warming have also come within the focus of human rights-based monitoring. What the various rights have in common is that they aim to *empower human beings*. Human rights are rights to freedom, and they are likewise rights to equality. The general idea is that people should be able to enjoy the maximum degree of freedom that is compatible with equal freedom of everyone else. This is so everyone's human dignity is respected.

The principle of equality is *prima facie* easy to grasp. Human rights documents, starting with the UDHR, always contain a non-

[64] See Waldron, *One Another's Equal,* op. cit, pp. 215-256.

discrimination clause, which – via double negation – aims to ensure that all the enshrined rights are accessible to everyone on the basis of equality. For instance, article 2, first sentence of the UDHR specifies: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." As discussed before, the list of explicitly prohibited entry points for unequal treatment has meanwhile further evolved; it nowadays also contains disability, age, sexual orientation, gender identity and other characteristics. Yet the general structure is still the same: Human rights are rights for everyone on an equal footing. This principle of equality thus applies to each and every article.[65]

The principle of freedom, too, clearly comes to the fore in any human rights document. Quite a number of rights carry "freedom" in their titles: freedom of expression, freedom of assembly, freedom of association, freedom of religion or belief, freedom of movement and many more. It goes without saying that the prohibition of slavery and bonded labor likewise protects human freedom. In other words, just as the principle of equality is relevant for the understanding of each and every article, so is the principle of freedom. It defines economic, social and cultural rights no less than civil and political rights.

Let us briefly look at a few examples. Freedom of expression[66] enjoys high reputation as the epitome of a liberal right, which at the same time has political significance, since it facilitates democratic discourse. In a landmark decision of 1958, the Federal Constitutional Court of Germany pointed out that freedom of expression "is in a certain way the foundation of *all* freedoms".[67] The reason is that rights of freedom can only flourish where people have an opportunity to voice their grievances, express their wishes and publicly call for political reforms. When wishing to join together with others in the public sphere, they can invoke their right to peaceful assembly.[68]

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[65] For a thorough discussion on the principle of equality and how to apply it through anti-discrimination agendas, see chapter 5.
[66] See article 19 of the ICCPR.
[67] Entscheidungen des Bundesverfassungsgerichts, Vol. 7 (1958), p. 198 (emphasis in the original).
[68] See article 21 of the ICCPR.

Peaceful demonstrations against tyranny or political corruption are most impressive manifestations of people's yearnings for freedom, and the way governments handle such demonstrations indicates their respect – or lack of respect – for human rights in general. When wishing to solidify their joint commitment in a more sustainable manner, people can furthermore make use of their freedom of association.[69] This right facilitates the establishment of different organizations, ranging from political parties to trade unions to international NGOs.

Freedom of religion or belief, too, is a multi-dimensional right of freedom.[70] Against a typical misunderstanding, it should be said that freedom of religion or belief does not protect religions in themselves. It does not shield religious dogmas or traditions from critical debates; nor does it strengthen the "honor" of certain religions against satirical jokes. Instead, this right aims to protect the freedom of human beings in the vast areas of religious convictions and practices. Freedom of religion or belief entails a broad range of sub-freedoms, such as the freedoms to search for meaning life, to receive and impart faith-related information, to bear testimony to one's convictions, to worship together with others, to raise one's children in conformity with one's religion or belief, to build an infrastructure for religious community life and many other dimensions. Freedom of religion or belief includes the right to change one's religion and turn to another faith or to an atheistic conviction. The right to reconsider, change or abandon one's religion is litmus test for dealing with issues of religion in a spirit of freedom.

The right to marry and found a family, too, incorporates the principle of freedom, as testified by the UDHR, which unambiguously states: "Marriage shall be entered into only with the *free and full consent* of the intending spouses."[71] In the face of practices like child marriages or forced marriages this is an important clarification.

Rather than freezing traditional notions of marriage against societal changes, the human rights approach thus empowers people to pursue their own life plans concerning partnership and family life. Although this does not per se rule out broader family involvement in

[69] This is also enshrined in article 21 of the ICCPR.
[70] See article 18 of the ICCPR.
[71] Article 16, paragraph 2 of the UDHR (emphasis added).

the search for a fitting spouse, the crucial point is that the future partners must be effectively free to consent – or not to consent. The human right to marry a spouse of one's own choice can also back up the ongoing fight, in many countries, against legal, cultural and social barriers, which prevent some people from contracting marriage with the spouse of their choice.

The examples mentioned so far belong to the category of civil and political rights. Now, what about economic, social and cultural rights? Critics of social rights have objected that they are in tension with the principle of freedom. Aaron Rhodes goes so far as to contend: "Economic and social rights blur the distinction between tyrannies and free states (…)."[72] I do not think this verdict is justified; it actually misses the decisive point. An analysis of the work conducted by the UN Committee on Economic, Social and Cultural Rights shows a clear orientation toward the principle of freedom, which fully applies to the interpretation of economic, social, and cultural rights as well. Take the example of the right to health.[73] Among other things, it demands respect for the autonomy of patients who should be able to decide on their health issues based on adequate information. The UN Committee on Economic, Social and Cultural Rights furthermore insists that the right to health include "sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation".[74] The Committee's General Comment on the right to health has ample references to the principle of freedom, which guides the interpretation and application of this right *in toto*.

Another example is the human right to food. Advocates of animal rights have occasionally cited the right to food to argue that humans and animals have many common concerns. In fact, humans and animals are equally in need of food, water and many other things; this renders them vulnerable in many ways. In addition to all of this, however, human beings – unlike animals – are also exposed to risks of humiliation through the denial of responsible agency on an equal

[72] Rhodes, *The Debasement of Human Rights,* op. cit., p. 47.
[73] See article 13 of the ICESCR.
[74] UN Committee on Economic, Social and Cultural Rights, *General Comment no. 14, UN Doc. E/C.12/2000/4* of 11 August 2000, section 8.

footing with others. In a General Comment dedicated to exploring the precise nature of this right, the UN Committee on Economic, Social and Cultural Rights highlights that the right to food goes far beyond the availability of the daily calories and proteins.[75] Human beings should receive *recognition as responsible agents* with regard to their food, which inter alia includes the respect for food-related cultural traditions, dietary prescripts based on religious ideas or moral convictions, such as vegetarianism. The right to food has furthermore much to do with hospitality and the cherishing of social ties through common meals. To treat refugees as mere passive recipients of food boxes is a violation of the right to food – at least where alternatives, which would give refuges a more active role in freely choosing and preparing their own meals, are generally available. Qua its nature as a *human* right, the right to food has strong components of a right to freedom.

My last example is the right to water and sanitation, which only recently received broad acknowledgement as a human right. While water is needed for all life to flourish, human beings can also suffer from power asymmetries connected with unilateral control of water resources. Economically poor people, who have to live from the dirty trickles left over from the luxurious usage of water resources by their rich neighbors, will experience this as permanent humiliation, i.e. as a structural manifestation of disrespect. Moreover, without a sufficient daily ratio of clean water, personal hygiene becomes a problem. Cleanliness and self-respect are inextricably intertwined, since individuals always see themselves also through the eyes of others, as it were. Torturers intending to break their victims' self-respect typically utilize the denial of daily hygiene within their arsenal of systematic humiliation. Such experiences of injustice stand in the background of the right to water and sanitation. While aiming to fulfill an urgent biological need, the right to water and sanitation at the same time responds to experiences of structural discrimination in the societal management of water resources. This qualifies the right to water and sanitation, just like the right to food, as a distinctly *human* right to effective freedom and equality.

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[75] See UN Committee on Economic, Social and Cultural Rights, *General Comment no. 12, UN Doc. E/C. 12/1999/5* of 12 Mai 1999, section 6.

2.3 Concluding questions

The three components just elaborated – (1) rights (2) of all humans (3) to equal freedom – jointly define the programmatic profile of human rights. In view of these components, the various human rights – civil, political, economic, social and cultural rights – essentially belong together. Of course, the right to life, freedom of religion, the right to education, freedom of assembly, guarantees of judicial fairness, gender-related emancipation, the prohibition of torture, the right to asylum and other human rights provisions all have their distinct features and specific applications. At the same time, however, they *mutually reinforce each other* in the ongoing effort to create an inclusive society based on equal respect for everyone's human dignity. The 1993 Vienna World Conference has coined the term "indivisibility" to capture this positive interrelatedness of the various human rights provisions. The Conference document proclaims: "All human rights are universal, indivisible and interrelated and interdependent."[76]

A clear understanding of the basic human rights principles can also help us to distinguish between useful, debatable and problematic proposals for amending the human rights agenda. To start with a trivial example, moderators of human rights conferences, when inviting their guests to a coffee break, sometimes cannot resist the temptation to say: "Now let us enjoy our human right to coffee or tea." This is a lame joke, which I personally do not like. It cannot be in the service of human rights to link them to all sorts of things that are just nice to have. In a commercial advertisement, I once even came across the awkward slogan "luxury is a human right", which I found quite annoying. To amalgamate human rights concerns with the interest in luxurious lifestyle issues does not merely indicate a grave conceptual misunderstanding; in a world where hundreds of millions of people live under conditions of absolute poverty, it betrays a disturbing lack of empathy. Human rights are a serious issue and should not be invoked for trivial matters.

There has been a tendency in recent decades to anchor global aspirations – like peace or international development – in human

[76] *Vienna Declaration and Programme of Action,* UN Doc. A/CONF.157/24 (Part I), chap. III, sect. I, paragraph 5.

rights language. While no one can seriously doubt the urgency of such goals, the question remains whether it makes sense to turn them into immediate human rights claims. There are good reasons to remain cautious. To insert broad international aspirations into the rights matrix can overburden, and thus weaken, the existing infrastructure of human rights protection. Moreover, if governments invoke a collective "right to economic development", without explicitly recognizing the free and active participation of the concerned individuals and communities, including the consultation of indigenous peoples,[77] they would actually abuse human rights semantics. The 1986 *UN Declaration on the Right to Development* adds a much-needed clarification when proclaiming that human beings are the decisive rights holders also in the context of development: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."[78] The insistence on free participatory involvement of the concerned human beings is important, as it thwarts the self-serving invocation on the right to development by autocratic governments.

In the face of ecological disasters, the "anthropocentric" matrix of human rights has recently come under increased criticism. This is another source of far-reaching questions. Why should we reserve certain basic rights to human beings only? Should we not grant such rights also to animals and other living beings, many of whom have suffered a lot from human exploitation, especially since the era of industrialization? More and more species are even at risk of collective extinction. Should we not see this as a wake-up call to move beyond the anthropocentric matrix of rights? My answer to the last question is: yes and no. Yes, it has become evident that ethical, political and legal responsibility must go far beyond human interests;

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[77] See Article 10 of the *UN Declaration on the Rights of Indigenous Peoples:* "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

[78] *UN Declaration on the right to development,* article 1, paragraph 1.

it must also include care for animals, plants, ecosystems and the biosphere as a whole. Let me add that living beings should receive appreciation and care *for their own sake,* not just as useful resources for the fulfillment of human interests. This does not alter the fact, however, that we human beings are the ones who have to shoulder that overarching responsibility for the future of life on our planet. Within the wide network of all living beings, of which we are an integral part, we humans are exposed to demands of ethical and political responsibility, which we *can only share among ourselves,* i.e. with our fellow humans, not with animals. This has little to do with an anthropocentric "superiority complex", as critics might object; it is just an inescapable reality. In my view, this also justifies upholding a distinct category of human dignity and human rights. In spite of the obvious necessity to develop sensitivity, empathy and a sense of responsibility for all living beings, we should carefully avoid to overstretch and inadvertently trivialize the category of "rights holders".[79]

As emphasized in the beginning of this chapter, human rights have been, and will always be, an evolving concept. Ideas of "human rights originalism", which aim to "freeze" a certain stadium of normative achievements against further changes, would merely cut off human rights from societal developments. This would be an impasse. However, to accept the historical openness of human rights does not mean to turn a blind eye to obvious dangers. The accumulation of more and more human rights claims can erode the normative consistency of human rights standards and overburden the existing implementation mechanisms. Hence, there is an undeniable need for exercising vigilance to protect human rights from dangers of fragmentation, trivialization and loss of normative focus. This presupposes a clear understanding of the principles, which jointly define human rights as rights of all humans to equal freedom in various areas of society.

[79] See Heiner Bielefeldt, "Moving Beyond Anthropocentrism? Human Rights and the Charge of Speciesism", in *Human Rights Quarterly,* Vol. 43 (2021), pp. 515-537.

3. "Inter homines esse": Human Rights as Relational Rights

3.1 Promoting the "unencumbered self"?

"None of the so-called rights of man, therefore, go beyond egoistic man (…) that is, an individual withdrawn into himself, into the confines of his private interests and private caprice and separated from the community."[80] This is the upshot of Karl Marx's critique of human rights. According to Marx, the principle of freedom as propagated in the 1789 *Declaration of the Rights of Man and the Citizen*[81] "is based not on the association of man with man, but on the separation of man from man. It is the *right* of this separation, the right of the *restricted* individual, withdrawn into himself."[82] Severed from the bonds of tradition, religion and communitarian loyalty, the seemingly liberated individual is fully exposed to the destructive dynamic of capitalist economy. At the end of the day, the "so-called rights" merely open the floodgates of capitalist competition and exploitation – or this is what Marx thinks.

In his article "On the Jewish Question", published in 1844, Marx sets the tone of a left-wing version of human rights critique, which equates individual rights to egoism, possessive individualism and the dissolution of all bonds of solidarity. The subject of human rights, he says, is the isolated individual mainly interested in his own private affairs. This has become a widespread assumption in human rights criticism. One contemporary follower of Marx's line of critique is Samuel Moyn, who links the international breakthrough of human rights in second half of the 20th century to the global hegemony of neo-liberalism. In his view, human rights are but "a powerless

[80] Karl Marx, "On the Jewish Question" (originally published in 1844), available under: https://www.marxists.org/archive/marx/works/1844/jewish-question/.

[81] The *Declaration des droits de l'homme et du citoyen* was proclaimed in August 1789; it belongs to the iconic documents of the French Revolution.

[82] Marx, Jewish Question, op. cit. (emphasis in the original).

companion of market fundamentalism".[83] The complicity between the two, he opines, rests "on the sort of individualistic and often antistatist basis that human rights share with their market fundamentalist *Doppelgänger*".[84] Like Marx, Moyn assumes that human rights both presuppose and promote the isolated individual that perfectly meets the expectations and interests of modern capitalism.

Conservative objections to human rights often sound surprisingly similar. While otherwise differing in many regards from left-wing political views, conservative critics have likewise castigated the one-sided focus on rights of the individual. Take the example of Carl Schmitt, a militant critic of the Weimar Republic, Germany's first constitutional democracy after World War I. According to Schmitt, individual rights are part and parcel of a bourgeois ideology, which is antagonistic to the preservation of a collective political identity. Schmitt rejects individual rights as a symptom of anti-political dissolution: "These dissolutions aim with great precision at subjugating state and politics, partially into an individualistic domain of private law and morality, partially into economic notions. In doing so they deprive state and politics of their specific meaning."[85] In a similar vein, Michael Sandel criticizes the individualistic bias within a rights-based liberalism, which he thinks fosters the "unencumbered self", thereby stripping the political community of any profound goals. In Sandel's words, "Freed from the dictates of nature and the sanction of social roles, the human subject is installed as sovereign, cast as the author of the only moral meanings there are."[86]

Contemporary critics of human rights come from various angles and different political camps. Representatives of postcolonial studies have combined their protest against a hegemonic "Western

[83] Samuel Moyn, *Not Enough. Human Rights in an Unequal World,* Cambridge/Mass.: The Belknap Press of Harvard University Press, p. 216.
[84] Moyn, *Not Enough,* op. cit., p. 218 (emphasis in the original).
[85] Carl Schmitt, *The Concept of the Political.* Trans. of the 2nd edition of 1932, by George Schwab, University of Chicago Press, 1996, p. 72.
[86] Michael J. Sandel, "The Procedural Republic and the Unencumbered Self", in *Political Theory,* Vol. 12 (1984), pp. 81-96, at p. 87.

lifestyle" with criticism of a narrow focus on rights of the individual.[87] For example, Saba Mahmoud holds that human rights are generally "apathetic to communal aspirations".[88] The debate on "Asian values", too, has crystallized around the juxtaposition of communitarian loyalty and individual rights. It should be noted in passing that those who invoke communitarian Asian values are met with a lot of criticism, much of which comes from within Asian countries, too.[89] What is true for the West, namely, that there is no monolithic set of values, is of course equally true also for other regions of the world, including Asia.

The charge that human rights favour individualism at the expense of community-related solidarity belongs to the traditional arsenal of anti-human rights polemics. Against this background, it is surprising that human rights advocates, too, often describe human rights as mainly focusing on the individual. Some go so far as to celebrate human rights as the "triumph of the individual".[90] What is true is that human rights should be respected in each and every individual person. In this sense, it is in fact possible to define them as rights of the individual. In order to avoid misunderstandings, however, it seems important at least to add further explanations and qualifications. In the face of polemical attacks, which equate individual rights with the pursuit of narrowly individualistic interests and the erosion of communitarian solidarity, the focus on rights of the individual requires critical scrutiny and conceptual clarification. This is the purpose of the present chapter.

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[87] It is interesting to note in this regard that the African Charter, enacted in Banjul in 1981, explicitly refers to rights of peoples beside rights of human beings. Its title is *African Charter of Human and Peoples' Rights,* available under: www.achpr.org/legalinstruments/detail?id=49.

[88] Saba Mahmood, *Religious Difference in a Secular Age. A Minority Report*, Princeton University Press, 2016, p. 51.

[89] For a critical analysis, see Yash Ghai, "Human Rights and Asian Values", in *Journal of the Indian Law Institute,* Vol. 40 (1998), pp. 67-86; Hyungjoon Jun: *Beyond Asiatic Perfectionism,* FAU University Press, 2021.

[90] Michael A. Elliott, "Human Rights and the Triumph of the Individual in World Culture", in *Cultural Sociology,* Vol. 1 (2007), pp. 343-363.

3.2 Rights of the individual, not "individualistic" rights

Human rights address *human beings just as human beings*. The fundamental status of a holder of human rights is independent of specific group relations, such as family background, membership in a particular religious community, allegiance to a particular political party or citizenship in a particular country. Take the example of family relations. Human rights cannot depend on whether a person is unmarried, married or widowed; nor should it be linked to the number of one's children, grandchildren or siblings. Likewise, human rights do not depend on membership in a specific religious community or affiliation to a particular political party. None of these specific groupings determine the status of a human rights holder. The only membership that counts in this regard is *membership in the "human family"*.[91] Given the independence of human rights from any specific groupings, it is justified to define them as rights of each individual. This applies to the whole range of rights, from the right to life to the right to education, from freedom of conscience to the right to health, from the right to due process to freedom of expression – they all are *rights held by individual human beings*. However, rights held by individuals are not necessarily "individualistic" in the sense of focusing on the isolated individual. Confusing rights held by individuals with an "individualistic", unencumbered way of life has become the source of countless misunderstandings.

One cannot emphasize enough that while human rights are held by individuals, they are typically *exercised together with others*. Indeed, they actively facilitate getting together with others. One obvious example is the freedom to peaceful assembly.[92] Although it is a right of each individual person, its purpose is to allow people to overcome individualistic isolation. I am always impressed at the sight of peaceful demonstrators jointly voicing their concerns in public – in Hong Kong, Khartoum, Harare, Minsk, Paris, Frankfurt or Minneapolis. To participate in a political demonstration can be an intense experience of solidarity. The right to freedom of assembly also protects people from coerced participation in political parades

[91] See preamble of the UDHR.
[92] See article 21 of the ICCPR.

organized by governments. It is a right to *freedom,* after all. Accordingly, people should be able to decide for themselves whether or not to join a public demonstration. In any case, freedom of assembly certainly does not aim at "the individual withdrawn into himself, into the confines of his private interests and private caprice and separated from the community", to repeat Marx's words.

Freedom of assembly is just one illustration of the *relational structure,* which characterizes human rights in general. Have a look at freedom of association,[93] which facilitates the establishment of organizations through which people pursue common interests in a more sustainable manner. The possible interests can be manifold, ranging from artistic activities to political parties to international NGOs. Again, the crucial principle of freedom ensures that people have choices concerning the organizations they would like to join – or not to join. Freedom of assembly furthermore facilitates the establishment of new organizations, thus challenging monopolies wherever they exist. The important point for the context of our discussion here is that, just like freedom of assembly, freedom of association, too, can only be exercised in conjunction with others.

Freedom of religion or belief is another case in question. It inter alia protects manifestations of religion or belief "in worship, observance, practice and teaching", which may be exercised "either individually or in community with others and in public or private".[94] Freedom of religion or belief incorporates elements of freedom of assembly and freedom of association, such as the right to worship together with others or to establish religious charity organizations.

Yet another example is freedom of expression. No one can make use of this right unless there is someone else willing to listen, read or respond. Freedom of expression both presupposes and fosters a discourse community, which is furthermore the precondition for the flourishing of discursive democracy.[95] At first glance, *habeas corpus* rights[96] may seem to be a less clear case. However, their main purpose is to prevent an "incommunicado" situation, where a

[93] See article 22 of the ICCPR.
[94] Article 18, paragraph 1 of the ICCPR.
[95] It is interesting to note in this context that the traditional proxy used for this right was "freedom of the press".
[96] See article 9 of the ICCPR.

detainee is deprived of any contact with the external world. To put it positively, *habeas corpus* rights ensure that even in the situation of detention people can stay in relation with family members and have access to a lawyer whom they can consult.

What about the right to privacy?[97] On the surface, this seems to come closest to Marx's description. The right to privacy entitles individuals to withdraw from the community, if they wish. Such withdrawal into a private sphere, however, may well be in the service of a more demanding understanding of public community life. As Hannah Arendt has observed, permanent exposure to the limelight of public attention renders communicative interaction sterile, predictable and shallow.[98] A rich public debate, she says, presupposes the possibility for individuals and groups of individuals to withdraw from time to time, in order to come up with fresh ideas, which can best be tested first within the safe confines of a private meeting.

My last example is the right to marriage and family life, whose very purpose is to facilitate meaningful relationships. As a right to freedom, the right to marriage protects the individual from coercive interferences in the choice of one's spouse. Moreover, if a marriage turns out to be untenable, the individual should have the possibility to terminate it. In that sense, the right to marriage includes the component of a right to separation. To have an exit option from an unhappy marriage allows people to have a second choice. It does not alter the fact, however, that the freedom of marriage is the epitome of relational right; held by the individual, it is all about relations. Moreover, family members need specific protection in situations of civil war, flight or mass migration, where they are in danger of being separated from each other. Whenever such separation occurs, family members ought to receive support in their search for reunification. A working paper by the UN High Commissioner for Refugees proclaims: "A right to family unity is inherent in the universal recognition of the family as the fundamental

[97] See article 17 of the ICCPR.

[98] See Hannah Arendt, *The Human Condition,* University of Chicago Press, 1958, p. 71: "A life, spent entirely in public, in the presence of others, becomes, as we would say, shallow."

group unit of society, which is entitled to protection and assistance."[99]

3.3 Transforming, not eroding community life

Human rights are *relational rights* in that they both presuppose and foster manifold human relations in society. The above examples are non-exhaustive. At the end of the day, I would claim, *every* human rights provision has its specific relational features.[100] Accordingly, human rights are neither "individualistic" in the narrow sense nor a sign of decadence and "dissolution" of the political community, as Carl Schmitt wants us to believe. Instead, their purpose is to overcome coercive practices, authoritarian structures and power asymmetries, wherever they exist. The frequently unqualified semantics of "individualism" overshadows the fact that human rights are essentially *anti-authoritarian, not anti-communitarian.* Confusing their anti-authoritarian thrust with an allegedly anti-communitarian orientation is a source of countless misunderstandings, which can seriously undermine the attractiveness and persuasiveness of the human rights approach.

By challenging various forms of authoritarianism in politics, economy, religion or family life human rights become a positive factor of community reforms. For example, they can contribute to transforming autocratic regimes into democracies based on the rule of law; they help broaden the space for public critical discourse; they play a crucial role in reshaping the understanding of marriage and family life by demanding respect for women's rights, not least in the domestic sphere; they back up the development of trade unions, political associations and civil society organizations; they support children in their access to education and participation in public life; and they serve as a normative reference for the full inclusion of

[99] UNHCR, *Summary Conclusions: Family Unity.* Expert roundtable organized by UNHCR and the Graduate Institute of International Studies, Geneva Nov. 2001, available under: www.unhcr.org/419dbfaf4.pdf.

[100] To give just a few additional examples, one may also think of the right to education, which allows students to learn together with others, or the right to work, which includes non-discriminatory access to employment. Rights to participation in cultural or political life are likewise obviously relational.

persons with disabilities in an evolving barrier-free society. Hence, human rights are far from "apathetic to communal aspirations", as Saba Mahmoud opines. Instead of pitting off the individual against the community, the critical frontline drawn by human rights runs between freedom and authoritarianism. This is a huge difference.

Authoritarianism is a multifaceted phenomenon. It often comes in the shape of collective units, which subjugate individuals to the primacy of alleged community interests without giving them sufficient breathing space to voice independent views or interests. Given such experiences, it is indispensable to strengthen individual freedom, for example to facilitate dissent, criticism or voluntary withdrawal. Yet authoritarianism also manifests itself in forms of involuntary exclusion *from* the community. For instance, in a climate of fear created by control obsessed autocratic regimes, dissidents may confront insurmountable obstacles when wishing to meet, communicate and establish independent political associations. In the face of political intimidation, people with a critical mindset may actually feel quite isolated – even more so, if just sharing one's views in private conversations incurs unpredictable risks. To be forced to participate in collective parades, where everyone has to march in the same direction and shout the same empty slogans, does not help; it merely exacerbates feelings of loneliness, isolation and hopelessness. The "*restricted* individual, withdrawn into himself", which Marx falsely ascribes to human rights, is actually the typical upshot of political authoritarianism; it is not the result of human rights, but follows from a *lack of respect for human rights*.

One can make similar observations also with regard to other forms of authoritarianism, which likewise produce loneliness and isolation. For example, in homophobic societies, gays or lesbians often do not dare to live openly together with their partner for fear of societal reprisals. "Rainbow families" can merely exist at the margins of society. This situation may cause feelings of guilt, betrayal or even self-hatred amongst the members of such families.[101] Undocumented migrants typically avoid getting in contact with mainstream society

[101] See the reports of the UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity, available under: www.ohchr.org/EN/Issues/SexualOrientation Gender/Pages/AnnualReports.aspx.

for fear of discovery, blackmail, punishment and deportation. Again, their structural isolation follows from inefficient protection of their human rights. Where governments stage themselves as guardians of religious orthodoxy, converts, dissidents or members of minorities sometimes feel compelled to hide their real convictions in order not to endanger themselves and others. Once again, the result is isolation and an impoverished community life. A climate of intimidation may also exist in business communities, where employees live in permanent danger of losing their jobs. Under such conditions, productive cooperation between colleagues can hardly flourish.

Human rights are relational rights. Against various forms of involuntary separation or isolation, they facilitate joint activities and practices, such as holding public demonstrations, establishing political parties or trade unions, cherishing a pluralistic discourse community, appreciating diverse forms of partnership and family or creating adequate conditions for religious minorities to develop a sustainable communitarian infrastructure, to mention just a few random examples. By empowering individuals within those various communities, human rights do not weaken relationships or communities; instead, they can thereby contribute to more dynamic and lively communities based on partnership, respect and an appreciation of diverse viewpoints.

An interesting testimony to the relational character of human rights is the 1992 *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.*[102] The title of this declaration cuts across the sterile juxtaposition of individualism versus collectivism which has confused many human rights discussions. Rights holders are individual persons who wish to cherish their sense of belonging to an ethnic, religious or linguistic community.[103] This requires protection of minority communities against political or economic forces of involuntary assimilation. Yet it likewise presupposes the free and voluntary commitment of individual members within those communities. The title of the 1992

[102] Adopted by the UN General Assembly on 18 December 1992, as GA resolution 47/135.

[103] See Peter Hilpold, "UN Standard-Setting in the Field of Minority Rights", in *International Journal on Minority and Group Rights,* Vol. 14 (2007), pp. 181-205.

declaration is well chosen. In my view, it could serve as a good model for understanding human rights in general. In a way, they all are rights of "belonging", which at the same time qualify the kind of belonging by strengthening the rights of individuals. It is surprising, to say the least, that many critics of human rights just repeat old clichés and stubbornly fail to acknowledge what is actually quite obvious, namely, the relational dimensions inherent in human rights.

3.4 "Inter homines esse" (Hannah Arendt)

Inter homines esse – "to live among humans". When choosing this Latin motto for herself, Hannah Arendt drew the consequences from her many years living at the margins of society – as a refugee, as a detainee and as a stateless immigrant. As a Jew, she had to flee Germany once the Nazis came to power in 1933. She spent a few years in France, where she also was detained for a short period. From France she fled again – this time to the USA, where it took her about ten years before she eventually managed to obtain US citizenship. She thus knew from her own experience what it means to be an outcast.[104]

Arendt's reactions to the 1948 proclamation of human rights were mostly sarcastic.[105] She feared that the UDHR was just another manifestation of lofty philanthropic idealism detached from real life and real needs. Against the background of her critical comments on the UDHR, it is remarkable that she at the same time postulated *one elementary human right,* namely, the "right to have rights", as she put it. Her point was that in order to be able to enjoy any rights at all, people need to have access to a political community. Arendt's "right to have rights" thus demonstrates the foundational significance of living a respected life together with fellow humans – *inter homines esse.* The relational character, which implicitly grounds *all* human rights, explicitly culminates in the postulate of a right to live among fellow humans and within a political community. Although the right to have rights is the most basic of all rights, it remains unfulfilled as long as countless people – refugees, internally displaced persons,

[104] See Hannah Arendt's essay "We refugees", written in 1943, available under: https://www.documenta14.de/de/south/35_we_refugees.
[105] Hannah Arendt, *The Origins of Totalitarianism,* New York: Schocken books, 1951, p. 296.

stateless persons, the homeless, victims of enforced disappearances and others – live at the margins of society.

A special test case is the right to asylum. Article 14, paragraph 1 of the UDHR proclaims: "Everyone has the right to seek and to enjoy in other countries asylum from persecution." This is a disturbingly weak formulation, because it circumvents the crucial question of how to *obtain* asylum. The article merely covers the components of leaving a country in search for asylum as well as the right to enjoy asylum once it has been granted. While these two components are not trivial, there is a big gap between them, namely, the right *to get access* to a potential host country. Obviously, the drafters of the UDHR felt unable to achieve a political consensus on how to regulate access, thus leaving this crucial question unanswered. Article 14 is the weakest provision of the UDHR. On the surface, it may look promising, but it does not contain much substance. The headline sometimes placed on top of article 14 – "right to asylum" – merely hides the fact that the UDHR actually *fails* to guarantee a comprehensive right to asylum, which would have to include safe access to a host country. The two overarching international human rights covenants of 1966 – the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights* – which jointly transpose the substance of the UDHR into binding international law, even remain silent on the issue of asylum. In the eyes of critics, this is a form of betrayal. What remains is the *Geneva Convention Relating to the Status of Refugees*, adopted in 1951, which in article 33, paragraph 1 states: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Apart from frequent violations in practice, the principle of *non-refoulement* enshrined in the Geneva Convention still falls short of positively regulating the right to access a host country.[106] It is merely an indispensable *part* of a

[106] The *Convention Against Torture* also contains the prohibition of refoulement with regard to the risk of torture. Article 2, paragraph 1 states: "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in

future comprehensive human right to asylum, whose elaboration and enactment still lies ahead of us.

In March 2021, the Human Rights Commissioner of the Council of Europe, Dunja Mijatovic, documented the continued lack of solidarity with refugees in Europe. Her publication appeared under the telling title "A Distress Call for Human Rights. The Widening Gap in Migrant Protection in the Mediterranean".[107] In the foreword, she notes: "For years, European countries have engaged in a race to the bottom to keep people in need of our protection outside our borders, with dire consequences."[108] Commenting the popular invocation a so called "refugee crisis" at the European borders, Peter Balleis, former director of *Jesuit Refugee Services,* remarks: "Refugees are being stigmatized, as if they had created a problem that threatens our security and welfare. The symptoms of a disordered world are turned upside down into the alleged root-cause, since we are unwilling or unable to tackle the real root-causes."[109] When it comes to the treatment of refugees, there is no way around the sobering finding that Arendt's right to have rights remains dramatically unfulfilled, in Europe as well as in other parts of the globe.

In December 2006, the UN General Assembly adopted two new human rights conventions, both of which critically address phenomena of involuntary exclusion from society: the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *International Convention for the Protection of All Persons from Enforced Disappearanc*e (ICPPED). Let us first have a look at the CRPD. Its main message is the goal of an inclusive society. Within the list of basic principles, article 3 demands "full and effective participation and inclusion in society".[110] The terminology of "inclusion" occurs repeatedly in the Convention; it is actually written all over the document. Inclusion must be more than lumping people together

danger of being subjected to torture." The principle of non-refoulement also plays a role in the jurisdiction of the European Court of Human Rights.

[107] See https://rm.coe.int/a-distress-call-for-human-rights-the-widening-gap-in-migrant-protectio/1680a1abcd.

[108] Ibid., p. 5.

[109] Peter Balleis, *Seht den Menschen. Die Versuchung zur Macht und das Elend der Flüchtlinge,* Ostfildern: Patmos, 2017, pp. 163f.

[110] Article 3 (c) of the CRPD.

with others; it requires respect for the specific needs, wishes and possibilities of every individual person. In this sense, article 3 postulates "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons".[111] In the understanding of the Convention, societal inclusion and individual autonomy inextricably belong together.

Since time immemorial, persons with disability have suffered from two forms of authoritarianism: on the one hand, they have been exposed to patronizing attitudes and disrespect of their individual autonomy; on the other hand, many of them had (or still have) to spend their days in separate institutions cut off from mainstream society. Accordingly, their fight for rights combines the two goals of autonomy and inclusion.[112] These two goals belong together. Indeed, they are like two sides of the same coin, as testified in article 19 of the CRPD, which proclaims: "States parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others (…)." Life within a human community presupposes respect for individuals, all of whom have their personal ideas, wishes, preferences, concerns, convictions and creative possibilities, from which the community might actually benefit. In short, inclusion presupposes respect for the autonomy of the individual. It is equally true, however, that rights of freedom can only flourish when living together with fellow humans. In short, autonomy presupposes inclusion. The CRPD spells out this insight in a long list of articles, which cover various dimensions of human life, such as, marriage and family, school education, employment, housing, mobility, health care, culture and arts, political life, social security and other aspects. While specifically focusing on persons with disabilities, the insights formulated in the Convention are ultimately applicable to everyone. The CRPD is an impressive testimony to the relational character of human rights in general – also beyond the specific area of disability.

Just a few days after passing the CRPD, the UN General Assembly adopted the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPPED). This treaty

[111] Article 3 (a) of the CRPD.

[112] See Theresia Degener, "Disability in a Human Rights Context", in *Laws, MDPR,* Vol. 5 (2016), pp. 1-24.

tackles the most gruesome form of involuntary exclusion from human relationships imaginable, namely, the crime of forcing certain unwanted people to simply "disappear". Article 2 of the ICPPED defines: "For the purposes of this Convention, 'enforced disappearance' is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support of acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law."

Disappeared individuals, if still alive, exist outside of society, indeed outside of humanity; they are "outcasts" in the most brutal sense of the word. A UN document describes the situation as follows: "The victims are well aware that their families do not know what has become of them and that the chances are slim that anyone will come to their aid. Having been removed from the protective precinct of the law and 'disappeared' from society, they are in fact deprived of all their rights and are at the mercy of their captors."[113] A survivor of torture who was detained in a secret prison in Syria reported that the main worry, which all his fellow prisoners shared, was to be cut off from the external world, so no one knew – and perhaps would ever know – what was happening to them. "I am afraid to die here, and nobody will know about me (…)." In the overcrowded prison cell, the sentence "nobody knows", he wrote, was more frequently heard than anything else.[114]

For friends and family members, this creates an unbearable situation. They often do not even know whether the disappeared person is dead or still alive. "Eight years without any information, the helplessness and heartbreak I day by day see in my mother's eyes, has killed me a thousand times", the sister of disappeared young man wrote, who was 15 years old – still a child – when being taken away.[115] The painful absence of any reliable information can last decades, thus

[113] Introduction to Fact Sheet No. 6/ Rev. on *Enforced and Involuntary Disappearances,* issued by the OHCHR: https://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf.
[114] Unpublished report sent to the author.
[115] Ibid.

making it difficult for family members and friends to carry on with their own lives. They "experience slow mental anguish, not knowing whether the victim is still alive and, if so, where he or she is being held, under what conditions, and in what state of health".[116] Even if it appears hopeless, after many years of waiting, to expect their spouse, parent, sibling, child or friend to ever come back, relatives and friends do not have a place where to mourn the lost person. There is no grave, no death certificate and no trustworthy information about what actually happened.

Networks of relatives, like the *Mothers of the Plaza de Mayo* in Buenos Aires, regularly held their silent demonstrations displaying posters, on which they demanded reliable information about the fate of their disappeared children. They just needed to know the truth.[117] It is for good reasons that the ICPPED explicitly includes relatives and friends within its broad conceptualization of the victim-status. Article 24, paragraph 1 defines: "For the purpose of this Convention, 'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance." Claims brought forward by relatives of disappeared persons to obtain reliable information on the fate of their dearest and nearest have found recognition under the title of "right to the truth". The ICPPED states in article 24, paragraph 2: "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard." In a resolution adopted in September 2012, the UN Human Rights Council called upon the international community "to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable (…)."[118] The right to the truth obliges States and the international community to support relatives of victims in their search for trustworthy information. The relational nature of this right is beyond question. It is a right of family

[116] Introduction to Fact Sheet No. 6/ Rev., op. cit.

[117] See www.theguardian.com/world/2017/apr/28/mothers-plaza-de-mayo-argentina-anniversary.

[118] *UN Human Rights Council Resolution 21/7,* 24 September 2012.

members and relatives, which at the same time has relevance for society as a whole.

Human relations do not stop with the death of a close person. As human beings, we need to cherish memories of our dearest and nearest who have passed away. We want to remember their faces, tell their stories and occasionally visit their graves. Human rights would cease to be fully humane, if they did not recognize that important dimension of human existence. This implies supporting the right to the truth for relatives of disappeared persons. Indeed, human rights are relational rights. They even relate to our memories of the deceased.

4. Rights of All Humans across Boundaries: Universalism under Scrutiny

4.1 Interventionism across boundaries

Human rights are fundamental rights, which we simply possess because we are humans. By implication, this means human rights are *rights of all human beings equally,* across regional, cultural, religious, political, jurisdictional and other boundaries. The concept of human rights is inextricably linked to the claim of universal validity.[119] It is no coincidence that the UDHR carries the adjective "universal" in its title. In its preamble, the UDHR claims special authority "as a common standard of achievement for all peoples and all nations". Subsequent human rights conventions elaborated by the United Nations or within regional frameworks place themselves in keeping with the UDHR. Formulations like "all human beings" or "all members of the human family" explicitly confirm the universalistic aspiration. Moreover, the various articles contained in human rights instruments typically start with the word "everyone". In fact, human rights are rights for everyone. When it comes to the prohibitions of torture, slavery or enforced disappearance, the "everyone" gives way to an apodictic "no one", which is no less universalistic. In short, it is unthinkable to decouple human rights from their universalistic validity claim. To deny the universalism inherent in the idea of human rights would be tantamount to discarding the concept of human rights *in toto*.

No component within the definition of human rights seems more obvious than their claim to universal validity. Yet it is equally true that no component has been more contested. The main reason is that, due to their inherent universalism, human rights require *active interventions across boundaries.* In order to avoid misunderstandings, let me immediately add two qualifications here. By "interventions", I

[119] In the following, I will mainly use the term "universalism", including the adjective "universalistic", to capture the claim of applicability for all human beings.

do not mean heavy-handed forms of interferences, such as military invasions or economic boycotts. In human rights practice, the typical interventions are media outlets, reports composed by officially mandated monitoring agencies, awareness-raising campaigns initiated by civil society organizations, sometimes also formally binding judgments of transnational courts. These are the types of interventions I have in mind. However, even such "soft" interventions seek to gain political influence, for example through public pressure aimed at reminding governments of human rights obligations, which they have endorsed in principle, while possibly ignoring them in practice. My second qualification concerns the term boundaries. When claiming that human rights are valid "across" boundaries, I do not deny that boundaries will continue to exist and be relevant. Universal rights do not intend to play down cultural and other differences; nor do they aspire to dissolve state borders for the sake of a future world government.[120] However, existing boundaries *lose their hermetic character*. This is the decisive point. For example, most governments will continue to insist on state borders when defining their specific jurisdictional responsibility. While human rights respect such jurisdictional boundaries in principle, they challenge the traditional idea that the treatment of the population is just an "internal affair" and thus immune from external criticism.[121] Similarly, although human rights acknowledge the relevance of cultural or religious differences, they do not accept the supposedly hermetic nature of certain cultural or religious boundaries. While state borders should at least be permeable, cultural boundaries should become open and fluid.

Although accepting cultural, political and other boundaries in general, universal human rights contribute to their *opening up* by facilitating exchange of goods, information, ideas and people, not least with the purpose of exercising political influence across

[120] Normative universalism is not a territorial or quasi-geographic category. Some misunderstandings stem from confusing normative universalism with the process of political or economic globalization.

[121] Just as human rights imply openness for criticism from outside, it also requires assuming political and at times jurisdictional responsibility for human rights concerns outside of a country's state border. This issue is generally discussed under the heading of "extra-territorial" state obligations.

boundaries.[122] It is this strategic intention that has met with critical objections. The motives for such criticism can be manifold. While some critics are interested in restoring a traditional concept of state sovereignty with tightly controlled borders, others worry about the future of cultural diversity. Yet others point to existing power asymmetries in international politics, which expose vulnerable populations to the ongoing political, economic and cultural hegemony of the West. Hence, critical objections to universal rights come from different political corners, from the right as well as from the left, but also from positions not really fitting into the right-versus-left-matrix.

4.2 Blind spots and hidden agendas? Critical voices

"The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism."[123] With this polemical attack, Carl Schmitt wanted to restore a classic understanding of political sovereignty, which he thought was threatened by universalistic aspirations of the *League of Nations,* the predecessor organization to the UN created after World War I. At the end of the day, Schmitt was convinced, the antagonism of sovereign political units would remain the insuperable reality in international relations. As he put it, "The political world is a pluriverse, not a universe."[124] Schmitt inferred that the goal of establishing overarching normative standards must either be a sign of naivety or – more likely – a strategic maneuver employed by hegemonic forces to disguise their political interests. It was his intention to expose hidden particularistic agendas and unmask claims to normative universalism as a despicable manifestation of dishonesty and hypocrisy. Schmitt's vitriolic deconstruction culminates in a quote taken from Proudhon: "who-ever invokes humanity wants to cheat."[125]

[122] See also the discussion in chapter 8, section 3.
[123] Carl Schmitt, *The Concept of the Political,* op. cit, p. 54.
[124] Ibid., p. 53.
[125] Ibid., p. 54.

Whereas Schmitt's aggressive anti-universalistic language comes close to fully-fledged conspiracy theories, the position taken by the *American Anthropological Association* sets a quite moderate tone. In their "statement on human rights", issued in June 1947, the authors express reservation against the project of a universal declaration of rights, which at the time was still in preparation. Their main concern was that the promotion of a worldwide normative standard would jeopardize the inexhaustible diversity of cultures, all of which cherish their particular normative viewpoints. "Ideas of right and wrong, good and evil, are found in all societies, though they differ in their expression among different peoples. What is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history. The saint of one epoch would at a later time be confined as a man not fitted to cope with reality."[126] As this quote illustrates, the objections raised by the American Anthropological Association were based on cultural and historical relativism, whose flipside was a positive concern for pluralism. The authors feared that a universal declaration of rights would factually amount to the hegemony of the West, at the expense of cultural diversity of non-Western countries: "How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America?"[127]

When the American Anthropological Association published their critical position shortly after World War II, large parts of the global south were still under the yoke of European colonialism. The authors alluded to the colonialist doctrine of "white man's burden", which they feared might find its continuation through the promotion of allegedly universal rights of Western origin.[128] More than half a century later, after lengthy, tiresome and often violent processes of

[126] American Anthropological Association, "Statement on Human Rights", in *American Anthropologist*, Vol. 49 (1947), pp. 539-543, at p. 542. The American Anthropological Association later changed its position. See Karen Engle, "From Skepticism to Embrace", in *Human Rights Quarterly,* Vol. 23 (2001), pp. 536-559.
[127] Ibid., p. 539.
[128] See ibid., pp. 540f.

formal decolonization, the critique expressed in postcolonial studies continues to expose the unfairness of global power asymmetries. According to Makau Mutua, human rights politics is complicit in the preservation of the global north-south-divide. In an article titled "Savages, Victims, and Saviors", he contends that human rights organizations, which usually have their headquarters in the capitals of Western Europe and North America, stage themselves as the "saviors" of people mostly living in economically impoverished countries of the global south. By assuming that the "victims" are threatened by an environment of "savages", human rights advocates pursue just another version of Eurocentric colonization, Mutua says.[129] The old dichotomy of civilization versus barbarism assumes the contemporary shape of human rights interventionism. Mutua actually sees substantial elements of continuity between "the colonial administrator, the Bible-wielding Christian missionary, the merchant of free enterprise, the exporter of political democracy, and now the human rights zealot. In each case the European culture has pushed the 'native' culture to transform. The local must be replaced with the universal – that is, the European."[130]

Another influential source of human rights criticism is feminism. Various feminist studies have demonstrated that supposedly universal standards often privilege male interests, male values and male perceptions. In many cases, the word "everyone", which regularly occurs in human rights documents, factually means *every man*. In traditional human rights documents, andro-centric[131] presuppositions were even undisguised, as testified by a French declaration of 1795, which goes so far as to proclaim: "No one is a good citizen unless he is a good son, good father, good brother, good friend, good husband."[132] Although human rights language has meanwhile become more gender-sensitive, basic concepts concerning privacy, family, career, healthcare, education, the labor market etc. may still be modeled on predominantly male expectations, which thus have an ongoing impact on the formulation and interpretation of human rights standards. For example, the protection of privacy,

[129] See Mutua, "Savages, Victims, and Saviors …", op. cit.
[130] Ibid., p. 218.
[131] Andro-centrism means male-centrism.
[132] Quote taken from https://revolution.chnm.org/items/show/552.

which is part of human rights guarantees, has often shielded structures of inequality and violence within the family. It was as late as 1993 when the issue of violence against women in the domestic sphere received formal international recognition as a human rights concern.[133] In her 2019 report to the UN Human Rights Council, the UN Special Rapporteur on violence against women, Dubravka Simonovic, comes to the sobering conclusion, that even 25 years after adopting the *UN Declaration on the Elimination of Violence Against Women* "gender-based violence against women and girls continues to be tolerated and has become normalized in many societies".[134]

Andro-centric and Euro-centric presuppositions frequently exist in tandem. They jointly impact the understanding of human rights politics, standards and norms – with the result that claims to universal validity may be questionable from a combination of reasons. It is from such a complex "intersectional" viewpoint that Gayatri Chakravorty Spivak exposes human rights practice to her relentless scrutiny. In an iconic article titled "Can the Subaltern Speak?", she sarcastically wonders why "white men are saving brown women from brown men".[135] The noble attitude of the white male savior, she holds, merely conceals racist and sexist superiority feelings. Nothing could be more remote from the idea of egalitarian rights for everyone.

4.3 Two types of critique

The motives and intentions underneath various "deconstructions" of universal rights represent a plurality of standpoints – far beyond the short list of examples just presented. While some critics try to discredit normative universalism *in toto,* others plead for more caution, modesty, self-criticism and sensitivity when designing workable cross-cultural normative standards. Conservative skeptics

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[133] See *UN Declaration on the Elimination of Violence Against Women*, adopted by the UN General Assembly on 20 December 1993.

[134] Annual report of the Special Rapporteur on violence against women, its causes and consequences, *UN Doc. A/HRC/41/42* of 29 June 2019, paragraph 95.

[135] Gayatri Chakravorty Spivak, "Can the Subaltern Speak?", in *Marxism and the Interpretation of Culture, :* ed. by Cary Nelson & Lawrence Grossberg, Chicago: University of Illinois Press, 1988, pp. 271-313, at p. 297.

have objected that by glossing over irreconcilable cultural divides, the promotion of universal rights might inadvertently increase the risks of a "clash of civilizations".[136] Left-wing scholars engaged in post-colonial studies have pointed to suspicious parallels between contemporary human rights promotion and earlier forms of a European *mission civilisatrice.*[137] Critics working in the area of gender have unmasked male and hetero-normative biases, which only recently have come within the focus of international human rights debates.

It may be useful to distinguish typologically between two general orientations running through the whole range of critical voices. One type of criticism (type A) assumes that universal human rights fail to accommodate diversity. The implicit understanding is that universalism comes close to demanding uniformity. For example, when defending the political "pluriverse" of states, Carl Schmitt equates universalistic aspiration with anti-pluralism and a trend toward uniformity on a global scale. Similarly, the statement of the American Anthropological Association suspects that universal rights will in the long run undermine the existing diversity of particular ethical traditions. It is the intention of this type of critique to reject universalism in the interest of diversity. Another type of criticism (type B), by contrast, points to various hidden "particularisms", which factually permeate any pronouncements of supposedly universal rights. What this type of criticism chiefly insinuates is that universal rights have always been, and will always be, shaped by particular interests, particular viewpoints, particular presuppositions and particular prejudices – in short: by all sorts of particularisms, which those promoting universal standards may even be unaware of. It is true, human rights have traditionally privileged particularly male over female experiences, they have promoted a particular form of hetero-normative marriage and family, they have been mainly articulated in particular languages of European descent etc. Thus, the purpose of type-B-criticism is to question the validity claims of universalistic

[136] See Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, New York: Simon & Schuster, 1996, 70-72.

[137] See Nikata Dhawan, ed., *Decolonizing Enlightenment. Transnational Justice, Human Rights and Democracy in a Postcolonial World,* Opladen/ Berlin/Toronto: Barbara Budrich, 2014.

aspirations, including human rights, because they actually hide all sorts of particularisms.

Accordingly, critics use the adjective "particular", i.e. the semantic counterpoint to the adjective "universal", in at least two different ways. Without keeping these two forms apart, the discussion becomes hopelessly confusing. From the perspective of type-A-criticism, the "particular" generally receives a positive appreciation, often under the heading of "diversity", which critics see jeopardized by universalistic standards and aspirations. In this context, the "particular" represents many good things in life: various ways of life, the wealth of cultural tradition, the diversity of religious or philosophical beliefs and so on. The question is whether and to which degree universal standards give space for the unfolding of "particularities" in this positive sense? In keeping with type-B-criticism, by contrast, the adjective "particular" points to the various hidden "biases", which possibly undermine the legitimacy of supposedly universalistic claims. In this context, the term particular assumes a negative connotation. It represents the suspicion that allegedly universal human rights factually privilege certain particularistic (e.g., Eurocentric) standpoints, without openly admitting this. In spite of this fundamental difference, the two types of criticism often go hand in hand.[138] In the following sections, I will address the two types of criticism separately, first (in section 4.4.) the charge of anti-pluralism and subsequently (in section 4.5.) the problem of particularistic biases inherent in articulations of universal norms. While the charge of anti-pluralism (the type-A-objection) can actually be refuted, the eradication of biases (the point of type-B-criticism) is an ongoing task.

4.4 Freely articulated diversity – the antidote to uniformity

The first part of my response is comparatively simple and straightforward. It is actually easy to reject the equation of

[138] Again, Carl Schmitt gives an illustrative example. While deploring the threatened erosion of the plurality of particular political units, he at the same time suspects that supposedly universal standards factually always hide particular biases and interests.

universality with uniformity, which is the implicit assumption of type-A-criticism; it betrays a profound misunderstanding. What many critics fail to consider is the fact that human rights are rights to freedom. Human rights open up the space for a broad diversity of personal life plans, religious or non-religious orientations, individual and communitarian cultural practices, political convictions, forms of partnership and family life and many other manifestations of diversity. By guaranteeing freedom of religion, freedom of expression, freedom of assembly, freedom of association and other freedoms human rights bring to bear *freely articulated diversity,* thus actually serving as the very antidote to uniformity. The point is that the manifestation of such diversity should not remain the privilege of some people; it is the *right of everyone* and in this sense a universal demand.

Take the example of freedom of religion or belief. It is applicable to members of old-established organizations like the Roman Catholic Church, traditional Islamic Ulama organizations or Tibetan Buddhist monasteries as well as followers of new religions, like Baha'is or Cao Dai's. Respect of freedom of religion or belief is furthermore due to people belonging to majority religions as well as members of minorities – and not least minorities *within* minorities. In its General Comment 22, the UN Human Rights Committee points out that freedom of religion or belief "protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief".[139] This is a very broad interpretation, indeed; it accommodates a wide spectrum of diverse orientations in the vast area of religiosity. Moreover, freedom of religion or belief is not limited to issues of faith or inner conviction; it also deals with a broad range of individual and communitarian practices: dietary rules, fasting periods, religious holidays, personal pilgrimages, religious dress codes, initiation rituals, funeral rites, public processions etc. The right to freedom of religion or belief paradigmatically illustrates what human rights are all about. Qua their nature as *rights to freedom,* they broaden the space for manifestations of diversity in various spheres of society. For instance, human rights protect a pluralistic media landscape, they facilitate the expression of most different political views, they back up

[139] UN Human Rights Committee, *General Comment no. 22* (1993), paragraph 2.

the establishment of political parties with different programmatic profiles, and they give space to old as well as new forms of partnership and family life.

Human rights facilitate freely articulated diversity by *empowering human beings*. Again, freedom of religion or belief serves as an illustrative example. It empowers traditional believers just as well as critics or dissenters, including feminist theologians, while at the same time rejecting any coercive practices in the area of religiosity.[140] This peculiar empowerment structure defines the human rights approach broadly. For instance, rights in the area of culture, such as linguistic rights, back up members of minorities, who may wish to manifest their respective cultural practices and identities. Again, it is up to them to decide whether and how they want to develop their cultural or linguistic identity. To give yet another example, human rights foster political pluralism by protecting the political freedoms of citizens, including their rights to hold demonstrations, to set up political agendas, to join political parties or to establish new political associations etc. One could add many more examples that display this general empowerment structure.

Hence, the universalistic aspirations underneath human rights do not aim at a homogeneity or uniformity – far from it. Stephen Hopgood misses the mark entirely when attacking what he calls "the one-size-fits-all universalism of Human Rights".[141] Rather than promoting uniformity or homogeneity ("one-size-fits-all"), human rights empower people to pursue their *diverse* life plans, to express their *various* political opinions, to manifest their *different* faith-related convictions and communitarian practices, to maintain and cherish *particular* cultural traditions, to join *different* political parties or trade unions – always in conjunction with respect for the rights of others. As the 2001 Durban World Conference on Racism has

[140] See Heiner Bielefeldt/ Nazila Ghanea/ Michael Wiener: *Freedom of Religion or Belief. An International Law Commentary,* Oxford: Oxford University Press, 2016, pp. 92-305.

[141] Stephen Hopgood, *The Endtimes of Human Rights,* Ithaca and London: Cornell University Press, 2013, p. 2.

put it, "all peoples and individuals constitute one family, rich in diversity."[142] This nicely captures the overall purpose of human rights.

Universal rights to freedom are far from anti-pluralistic. Instead, they go against ideologies of "mute otherness", which typically aim to silence internal dissent and criticism. It is at this juncture that human rights unfold their critical, indeed "subversive" potential. Let us assume a government invokes the slogan *WE ARE DIFFERENT,* with the purpose of rejecting any form of human rights-based criticism from abroad. In that case, one should raise a number of critical questions. To start with, who is the "we", in the name of which difference is claimed? How internally pluralistic is that collective "we"? How open is it for critics, dissidents and members of minorities? Hegemonic or monopolized interpretations of collective identity, which refuse to accommodate internal dissent, criticism and open discussion, are inacceptable from a human rights perspective. To say it in positive terms, human rights do recognize an inexhaustible diversity – but always on the condition that such diversity can be articulated freely and broadly. They do accept the reality of different collective identities – but on the condition that there is space for *internal* diversity, too. They do appreciate difference, even radical difference – but they cannot recognize a "mute otherness", which is often just an ideological pretext for internal repression. These caveats are indispensable.

4.5 Inescapable biases?

The allegation that human rights fail to accommodate diversity is only one aspect within the panorama of anti-universalistic criticisms. Given overwhelming counterevidence, this type-A-critique can easily be refuted. Now, what about the type-B-critique, i.e. the argument that human rights, in spite of their claims to universal validity, are factually interwoven with all sorts of particularistic assumptions? This is a far more serious objection. At the end of the day, it is even irrefutable. The only question is which consequence to draw from the

[142] Durban Declaration and Programme of Action. Outcome document of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, available under: https://www.ohchr.org/Documents/Publications/Durban_text_en.pdf.

inescapable insight that universal standards are never, and will never be, entirely free from particularistic assumptions, influences and biases.

The problem is especially clear in historical retrospective. Early human rights documents of the 18th century more or less openly imagined the rights holder as having a particular sex (male), a particular skin color (white) and a particular social status (property owner). Unquestioned assumptions concerning religious beliefs or educational backgrounds likewise made it into historical human rights documents. In those days, few people challenged such presuppositions. Until a few decades ago, specific experiences of persons with disabilities used to remain outside of human rights debates, and it was just taken for granted that the imagined subject of human rights would not be lesbian, gay or transgender. The anti-discrimination provision in article 2 of the UDHR still shows no trace of discrimination based on disability or sexual orientation.[143] Rather than functioning as an all-inclusive normative matrix applicable to all human beings equally, many classical human rights documents, even the UDHR, factually excluded certain people from full and equal recognition. Surely, much of this has meanwhile changed. Yet given those past experiences, is it not reasonable to assume that our contemporary human rights conceptualizations, too, may hide tendencies of exclusion, due to particular prejudices or biases, which we are currently unable to detect or unwilling to admit? It would be naïve to answer this question with no.

Moreover, even with the best of intentions, we ultimately cannot escape all sorts of particularisms when formulating universal standards. To start with, we always have to use a particular language when voicing human rights concerns. Language is not a trivial issue; it transports concepts, experiences and priorities, and it contributes to shaping perceptions. In addition, there is the problem of linguistic power asymmetries. Those who can express their concerns in polished English usually have a much greater chance of being heard

[143] The non-discrimination clauses of the two overarching human rights conventions adopted in 1966, the International Covenant on Economic, Social and Cultural Rights as well as the International Covenant on Civil and Political Rights, still fail to mention disability, sexual orientation or gender identity.

that those who speak local languages or dialects. The UN knows six official languages (Arabic, Chinese, English, French, Russian, Spanish), four of which are of European origin. In daily negotiations, English continues to play the dominant role. When it comes to drafting human rights resolutions or strategy papers, native speakers of English thus have an advantage within and around the UN. In any case, the linguistic aspects of human rights articulations cannot be ignored. To acknowledge this, however, means to acknowledge one important facet of particularism implicitly present in any formulations of human rights. Knowing and accommodating different languages merely mitigates this problem.

Beyond the role of language, those who wish to articulate human rights concerns, inevitably do so against the background of particular experiences, all of which have their indexes of time, space and other contingencies. When using concepts such as "natural law", "inherent dignity" or "inalienable rights", they draw upon particular intellectual traditions. How could it be otherwise? Just as no one can avoid speaking a particular language – or at best a limited number of languages – no one can live in a cultural vacuum. When it comes to legal institutions, such as courts or monitoring agencies, they too have their historical path-dependencies. Wherever you look, there are all sorts of "particularisms", which permeate our languages, experiences, perceptions, assessments, concepts, priorities, expectations and institutions, thus inevitably impacting upon human rights theory and practice. Of course, the text you are currently reading is no exception. The reflections and observations presented in this book do not come "from nowhere"; they obviously display multifaceted biographical, cultural, religious and philosophical particularities, many of which the author may not even be fully aware of.

The question is: what follows from these critical observations? One possible consequence is to give up universalistic aspirations and discard the idea of equal rights for all as a hopelessly naïve or even hypocritical project. In the face of historical path-dependencies and contextual trajectories, some authors have actually come to the conclusion that human rights can never be more than just another set of particularistic norms. However, if we assume that the aspirations of normative universalism are from the outset doomed to collapse, the existing disparities of particularistic

positions, worldviews and interests would be the *ultimate and insuperable reality*. Based on this assumption there would be no possibility to appeal to any other norms or ideas than the customs, laws or standards that are predominant within the particular context, in which we just happen to exist. From the standpoint of anti-universalism, this may actually be the last word.

4.6 The role of human rights: strengthening communicative agency

At first glance, the skeptical rejection of universalistic normative aspirations seems to have a number of advantages, not least the advantage of epistemological modesty. To acknowledge that at the end of the day everyone will be hopelessly stuck in particularistic structures, perceptions and expectations, which they will never be able to overcome, may just sound realistic. However, to admit to each other inescapable particularisms may well be an honest starting point for a discussion; yet to conclude the discussion by declaring that, due to insuperable biases on all sides, the parties involved can do no more than merely "agree to disagree" usually indicates a diplomatic disaster, possibly even the collapse of further communicative efforts. The question is whether we can afford to let this happen.

In today's world, the experience of diversity is omnipresent; it can no longer be reduced to occasional encounters with "exotic" cultures, "foreign" religions or "remote" political views. For many people it is actually part of their daily life. However, this makes communicative efforts all the more important. While diversity enriches society's creative options, it can also lead to conflicts. Competing truth claims of different religions or belief systems can nourish tensions and mistrust. Different cultural concepts of honour, decency or politeness can cause misunderstandings. Controversial ethical issues like stem cell research or abortion can polarize populations. The competition of political parties can tear societies into hostile camps. Coexistence in pluralism is not always easy, let alone harmonious. It thus seems necessary that differences in worldviews, interests, cultural orientations etc. are *communicatively articulated* with a view to avoiding serious misunderstandings and negotiating productive coexistence. While overcoming all differences will be impossible, indeed not even desirable, what we can try to

accomplish is that such differences at least do not just remain "mute"; they should be voiced, articulated and exchanged in free and fair communication. Surely, such efforts can always fail; there is no guarantee of success. Lack of communication, at any rate, exacerbates the risks of mutual stereotyping, mistrust or even conflict escalation. The experience of deep diversity spreading both between and within societies can thus become a strong and in fact quite "realistic" incentive for taking the bumpy route and embarking on ever-new communicative endeavors.[144]

Meaningful communication must be more than just verbal noise or a series of unilateral "tweets"; it rests on certain preconditions, such as the willingness to listen, a general readiness to try to understand, basic skills of empathy and an interest in ongoing mutual engagement. The most elementary normative presupposition is *respect* accorded to each other *on an equal footing.* Without respect on an equal footing, meaningful communication would be from the outset impossible – even though we may continue to talk, babble, shout or tweet. However, showing respect to fellow humans as partners of communication is tantamount to ascribing them the *potential of responsible agency*, which can become the entry point for the understanding of human dignity, as pointed out earlier.[145]

I have now reached the final step of my argumentation: the role of human rights in supporting meaningful communication. The right that immediately springs to mind in this context is freedom of expression. Public discourse can only flourish where people have the possibility to express and exchange different positions free from fear. Freedom of expression best works in conjunction with other human rights, all of which reinforce each other. For example, to be able to manifest their positions publicly, people may also need the right to hold public demonstrations, which is part of freedom of assembly. This right in turn is closely related to freedom of association, which

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[144] See Jürgen Habermas, "The Concept of Human Dignity and the Realistic Utopia of Human Rights", *Metaphilosophy*, Vol. 41, No. 4 (2010), 464-480, at 478: "Since it is no longer realistic to follow Carl Schmitt in entirely rejecting the program of human rights, whose subversive force has in the meantime permeated the pores of *all regions* across the world, today 'realism' assumes a different form."

[145] For more details, see in chapter 2, section 2.

facilitates the development of political parties, civil society organizations and other associations. Freedom of religion or belief, too, has a strong communicative component. It inter alia protects people in their freedom to bear testimony to their profound convictions. Another example is minority rights. They entail specific positive guarantees for persons belonging to ethnic, religious or linguistic minorities to cherish their internal community life – always based on the freely articulated self-understanding of their members. Let me stop here. The briefly sketched examples, which are far from exhaustive, may suffice to illustrate the point that human rights improve the conditions for *free, respectful and inclusive communication,* which itself is indispensible for productive coexistence in our increasingly pluralistic and multicultural societies.

In my above response to type-A-criticism, I pointed out that human rights, far from fostering uniformity, actually appreciate diversity – provided such diversity can be articulated freely and broadly. When responding to type-B-criticism, I again refer to the communicative articulation of pluralism and diversity – now with an emphasis on the productive role of human rights in supporting meaningful communication across boundaries, always based on respect of everyone's dignity. Still, there is an important difference between the responses to the two types of human rights criticism. Unlike the false equation of universalism and uniformity, which is the hallmark of type-A-critique, the critical objections of type B ultimately cannot be refuted. At the end of the day, there is no way around the insight that human rights have never been, and will never be, entirely free from particularistic influences, interests, viewpoints, ways and modes of articulation.

Yet admitting the ultimate unavoidability of particularistic components in any formulation of human rights is not the end of the story. Instead of simply discarding universalistic aspirations, it is still possible to re-conceptualize the idea of universal rights in a more cautious and context-sensitive manner. The universalism of human rights does not necessarily presuppose an absolute vantage point "high above" the messiness of human life with all its particularisms. Rather, a critically reconstructed normative universalism will be a *"universalism from within"* – or as Linda Hogan has put it, "an

embedded universalism".[146] Universal human rights unfold their critical transformative force *within the particularistic contingencies* of human life. They contribute to broadening contextual options; they enhance the prospects for voicing criticism within as well as across political or cultural boundaries; they empower people to challenge traditional roles and expectations, including gender-related stereotypes; they help open up previously hermetic borders and facilitate meaningful exchanges across cultural boundaries. Human rights are always contextual, while at the same time contributing to making the existing contexts more open and more permeable. This is not just a theoretical postulate. It actually happens wherever people invoke human rights to protest against corruption of the local mafia, wherever employees insist on establishing an independent trade union, wherever an indigenous community defends one of its holy sites against threatened destruction, wherever people with hearing impairments demand a broader availability of sign language in daily life and so on.

4.7 Implications of a universalism "on probation"

Universal human rights do not originate from an absolute vantage point, high above contextual particularisms. Such a vantage point unaffected by the messiness of human life does not exist. After rejection the idea of a dogmatic "universalism from above", however, what still remains is a *"universalism from within"*. Universal rights are no abstract constructions of timeless validity. They empower people *within and across* their particular contexts, always in conformity with the self-articulated wishes of the concerned individuals and groups. This insight must have consequences for the idea of human rights, which itself must also remain open to changes, adaptations, reforms and reformulations, in response to ever-new articulations of experiences of injustice. Accordingly, any specific formulation of universal rights will be provisional, i.e. connected to indexes of time, space and other particularities. The universalistic aspiration, which belongs to the very definition of human rights, can make sense only

[146] Linda Hogan, *Keeping Faith with Human Rights,* Georgtown University Press, 2015, p. 112.

as a universalism in the making – in other words, a "universalism on probation".

In the first chapter of this book, I have emphasized the intrinsic authority of human rights. Indeed, human rights are not just another set of norms and entitlements; they do claim authority as universal and "inalienable rights". A critical awareness of various particularisms, which are inescapably interwoven in any articulation of universalistic normative ideas, however, should at the same time lead to modesty. This is no contradiction: genuine authority will always be connected to modesty. One aspect is epistemological modesty. The arguments, which I have presented when trying to promote a viable concept of human rights, do not "prove" their universalistic validity; at least, they do not work in analogy to a timelessly valid mathematical proof. Epistemologically speaking, arguments on behalf of universal human rights have the status of a *reasonable practical appeal,* not that of an irrefutable theoretical certainty. One can always try to convince those, who do not subscribe to human rights, by putting empirical and normative arguments on the table; one can appeal to the inherent persuasiveness of human rights as antidotes to repression, exclusion and discrimination; but people may still disagree, without being insane or wicked. Critical objections against universal rights deserve counter-criticism, and they certainly should receive responses. But those responses will not "refute" skeptical remarks once and for all. Maybe this is a good thing.

Moreover, normative universalism can never exist in a "pure and simple" format. Any formulation of universal validity claims will inevitably carry indexes of time, space, culture, language and other contingencies. Concepts like human dignity, responsible agency, inalienable rights, empowerment, egalitarianism or liberation can never be entirely free from particular historical legacies. The legal and political techniques of international standard setting likewise have their path-dependencies. What else should one expect? As I said, the present text is no exception. In this sense, we have in fact to overcome a *naïve universalism,* which simply takes a certain set of norms or principles for granted – as immediately applicable to everyone, everywhere and at all times. Criticism of human rights can serve as an antidote to such naivety, which confuses universalisms with "naturalness" and "trans-historicity", as Makau Mutua has put

it.[147] The critique of naïve universalism can support the human rights project by constantly reminding those involved how complicated the task is that they have undertaken and that this task will always remain unfinished business, not only in practice, but also at the conceptual level.

In retrospect we can see the various biases, which have permeated historical human rights documents. However, on a more promising note we can also say that the history of human rights has been a history of uncovering biases and tackling blind spots, with the purpose of achieving more credible reformulations of human rights. Women's rights activists have contributed to broadening the human rights discourse, for example by addressing violations occurring in the private sphere, which previously had largely been neglected. Persons with disabilities have articulated their experiences of exclusion and managed to establish a convention dedicated to the long-term purpose of a barrier-free society. More recent non-discrimination clauses include sexual orientation and gender identity within the lists of prohibited grounds of unequal treatment. Concerns of ethnic, linguistic and cultural minorities have also made it into the realm of international human rights instruments. To a certain degree, this is also true for the rights of indigenous peoples.[148] In any case, while changes within the human rights matrix are obviously possible, the formulation of human rights remains an unfinished business. It requires openness for further adaptations, modifications, amendments and reformulations.

Re-conceptualizations are also needed for a more adequate understanding of the historical genesis of human rights. Many accounts of the intellectual history or pre-history of human rights still look hopelessly Eurocentric. Textbooks often draw the historically flawed picture of a linear process, whose "roots" supposedly lie in

[147] See Mutua, op. cit. at p. 208: "Human rights bestow naturalness, transhistoricity and universality to rights." While I do not subscribe to Mutua's assessment that human rights per se presuppose claims of transhistoricity, there can be no doubt that such ideas exist in human rights literature.

[148] Whether and to which degree the categories of international human rights, e.g. freedom of religion or belief, are suitable to accommodating the needs and wishes of indigenous peoples is a contested issue in the current human rights debate.

European normative traditions – be it Ancient Greek philosophy, Occidental Christian teaching or the English *Magna Carta.* By implication, human rights thus appear to be a cultural accomplishment "made in the West" and subsequently spread in the rest of the world. However, as Amartya Sen writes, "In all this, there is a substantial tendency to extrapolate backwards from the present. Values that the European Enlightenment and other relatively recent developments have made widespread cannot be seen as part of a Western heritage as it was experienced over millennia."[149] A more realistic conceptualization of the history of human rights would have to do justice to political conflicts, contradictions and paradoxical trajectories, which from early on have shaped the development of human rights – in Europe no less than in other regions of the world.[150] Driving factors of the evolution of human rights were – and still are – *public articulations of experiences of injustice,* wherever they come from. In fact, experiences, ideas and critical contributions from different parts of the globe also influenced the drafting of the UDHR, which is not a monolithic manifestation of Western thinking.[151] This process goes on. In response to ever-new experiences of injustice, human rights remain an open framework and a historically unfinished project, not a particular cultural accomplishment of the West.

My last point concerns the outreach across boundaries, which is a crucial aspect of human rights practice. Such outreach presupposes normative clarity and empirical precision. Yet above all, it requires cultivating *the art of empathic listening.* To listen carefully is far more important than to teach and preach. Only through the willingness to listen can human rights commitment achieve its necessary context-sensitivity. Those who try to listen carefully may

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[149] Amartya Sen, *Human Rights and Asian Values,* New York: Carnegie Council on Ethics and International Affairs, 1997, p. 15, available under: https://www.carnegiecouncil.org/publications/archive/morgenthau/254.

[150] For more details, see Heiner Bielefeldt, "Historical and Philosophical Foundations of Human Rights", in: *International Protection of Human Rights: A Textbook,* Turku: Abo Akademi University, ed. by Martin Scheinin & Catarina Krause, 2009, pp. 3-18.

[151] See Kathryn Sikkink, *Evidence for Hope. Making Human Rights Work in the 21st Century,* Princeton University Press, 2017.

sooner or later come across situations where some people – for example, dissidents, critics, minorities or those living at the margins of society – do not dare to voice their concerns for fear of reprisals; or maybe they have given up any hope to ever receive a hearing. Depending on the circumstances, this may necessitate human rights interventions from outside – not in order to replace the local voices, but with the purpose of improving the conditions for an open articulation of their demands. Human rights interventions across boundaries can only make sense when finding resonance by local actors, who always are the important agents of change.[152] Such support can occur in various ways, for example, through solidarity campaigns, international protests, formalized monitoring or cross-border networks dedicated to protecting human rights defenders.[153] While human rights-based interventions can go wrong, non-intervention can be just as bad and sometimes worse. There is no easy way out of this predicament.

In any case, Gayatri Chakravorty Spivak's question of whether the "subaltern" can speak and will ever have a chance of being heard remains on the agenda.[154] But what does this mean in practice? The only viable path, it seems to me, is to improve the art of empathic listening, including by accommodating local languages or trying to secure some form of rough translation – to the maximum degree possible. What other options do we have? And yet, there is always the risk of missing important points. Misunderstandings easily occur, for example, if people prefer to communicate in indirect modes rather than voicing their standpoints in a straightforward manner. Modes of communication differ substantially. What if people keep silent?

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[152] For a detailed discussion on the support of local human rights defenders, see below, chapter 8, section 2.

[153] Let me reiterate that what I mainly have in mind when talking about interventions are public campaigns, media reports, critical assessments of monitoring agency and the like.

[154] See also Hogan, op. cit., p. 85: "Human rights discourse can no longer ignore the ethical responsibilities associated with rendering visible the experiences of those who are both unseen and excluded. (…) The critical question, then, is how human rights discourse can address this gap between the privileged world of advocacy and the world of those who are 'in the space of difference' (…)." The metaphor 'space of difference' stems is taken from Spivak.

Silence can carry very different meanings. It can be empty or full of significance. It can stand for silent agreement and a general satisfaction with the societal status quo; but it can also indicate a total lack of expectations. Sometimes silence is the result of policies of intimidation, which deprive people of their freedom to speak. Silence can stem from resignation of those who have been forcibly silenced and given up hope, but it can also be a form of protest. It can indicate the end of communication or a creative interruption. At any rate, to remain silent is not tantamount to being mute. Silence can be an alternative way of communication and convey messages that are not always easy to decipher. The line between these various possibilities may be thin. Yet at times, human rights practice has to move along such thin lines.

5. Tackling Inequalities and Power Asymmetries

5.1 Human rights as egalitarian rights

Human rights are egalitarian rights. Unlike privileges reserved for the circles of self-declared "distinguished" people, they belong to all human beings equally. It is no coincidence that the first sentence of the UDHR invokes "equal and inalienable rights" derived from everyone's inherent dignity. Given its foundational significance for any normative reasoning – be it in ethics or in law – the concept of human dignity does not allow for any internal differentiation. To postulate different "degrees of human dignity" would be absurd; it would betray the idea of our common humanity upon which the whole system of human rights protection rests. Human dignity can only make sense when being conceived as including everyone equally. Likewise, the various fundamental rights, which back up respect for human dignity, must be rights for all on the basis of equality. Human rights documents thoroughly profess such equality, for instance, when proclaiming that all human beings are "equal in dignity and rights".[155]

Any comprehensive human rights instrument contains a provision that highlights the egalitarian application of these rights. Usually this happens via double negation, i.e. through the prohibition of discriminatory treatment. In previous chapters, I have repeatedly quoted article 2 of the UDHR as an example. In the interest of change, let me cite here article 2 of the *African Charter of Human and Peoples' Rights,* adopted in Banjul in 1981: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status."[156] The wording used in the Banjul Charter is nearly identical

[155] Article 1, first sentence, of the UDHR.
[156] The text of the Banjul Charter is available under: https://treaties.un.org/doc/Publication/UNTS/Volume%201520/volume-1520-I-26363-English.pdf.

to the non-discrimination provision of the UDHR.[157] In both documents, the explicitly listed grounds of prohibited unequal treatment are *mere examples,* as indicated in the Banjul Charter, where the list concludes with "any status" (in the UDHR: "other status"). The list of prohibited entry points for unequal treatment remains open for further amendments. In recent decades we have actually seen a significant expansion of non-discrimination agendas, which nowadays also tackle discrimination on the ground of disability. Age-related discrimination is another example, although it has received less attention. The UN Committee on Economic, Social and Cultural Rights has interpreted the reference to "other status" so as to include different economic and social situations.[158] In 2016, the UN Human Rights Council created the mandate of an independent expert on violence and discrimination on the grounds of sexual orientation and gender identity,[159] thus formally recognizing the relevance of these issues for comprehensive non-discrimination agendas.

The non-discrimination provisions contained in the UDHR, the Banjul Charter and other human rights instruments have a direct bearing on the interpretation of all the rights contained in those

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[157] See article 2, first sentence of the UDHR: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The two overarching conventions of 1966 have adopted the list of prohibited grounds of unequal treatment as enshrined in the UDHR. See article 2, paragraph 2 of the *International Convention on Civil and Political Rights* and article 2, paragraph 2 of the *International Covenant on Economic, Social and Cultural Rights.*

[158] See UN Committee on Economic, Social and Cultural Rights, *General Comment no. 20*, UN Doc. E/C./12/GC/20 of 2 July 2009, paragraph 35: "A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places."

[159] For further information on the mandate of the independent expert, see: www.ohchr.org/en/issues/sexualorientationgender/pages/index.aspx.

instruments. They all should apply without discrimination.[160] The term "everyone", which appears in many articles generally means "everyone without discrimination" or "everyone equally". For example, everyone *equally* has the right to life, everyone *equally* has the right to freedom of religion or belief, everyone *equally* should receive fair treatment when standing before a court, everyone *equally* falls under the protection from torture and so on. The egalitarian thrust defines the human rights approach in its entirety. It becomes operational in practice through non-discrimination agendas.

Equality does not mean sameness. Many confusing, and indeed superfluous, debates on equal rights stem from a misconstruction of equality as sameness, homogeneity or uniformity.[161] Of course, people are different: they come from different cultural backgrounds, they pursue different life plans, they have different gender identities, they speak different languages and dialects, they cherish different religious or moral convictions and they belong to different political parties or to no party. Human rights accommodate those and other differences and facilitate their free and broad manifestation – mostly under the title of "diversity". In the context of human rights, equality can only mean a "diversity-friendly" equality, which is the opposite of sameness or uniformity. In a way, everyone is special. The point, however, is that this recognition of being special should not remain a privilege of the happy few.

Against another misunderstanding, it is worth emphasizing that not every right is equally relevant for everyone in each situation. For example, most people will fortunately never be in a situation, where they have to insist on their right to fair trial before a court of justice. Similarly, those who belong to a hegemonic religious majority will not need to resort to special legal safeguards for religious minorities. The right to asylum is another example of an entitlement, which for most people will remain without direct personal relevance. Situations of increased vulnerability obviously call for increased

[160] In addition, Protocol no. 12 (2000) to the European Convention of Human Rights enshrines non-discrimination as a freestanding claim, which applies independently of other human rights provisions. For the text of the protocol see: https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx.

[161] See also the similar discussion in chapter 4, section 4 on the misperception of universalism as allegedly leading to uniformity.

attention. Hence, it is for good reasons that human rights pay special attention to migrants, stateless persons, domestic workers, refugees, internally displaced persons, members of religious or ethnic minorities, unemployed workers, indigenous peoples, persons with disabilities, LGBTIQ persons, individuals in detention and other people who are exposed to situations of increased risks. Such *situational differentiations,* however, do not in any way call into question the egalitarian nature of human rights.

5.2 Egalitarian rights in a world full of inequalities?

Human rights norms obviously do not describe realities. There is always a gap between what is and what ought to be. However, in no area is the gap wider than when it comes to equality. In spite of the postulated equality between men and women, which was already enshrined in the 1945 *Charter of the United Nations,*[162] countless women across the globe continue to suffer systematic discrimination in schools, the labor market and not least the family. Domestic violence, which exists in all societies and across social milieus, is one of the most brutal manifestations of the ongoing power asymmetry between men and women. Another example of inequality is the treatment of ethnic or religious minorities in many countries. Apart from being denied equal access to public positions, members of minorities become targets of stigmatization, hostile stereotypes or weird conspiracy projections. Power asymmetries furthermore stem from gross economic disparities, especially where those in control of the necessary resources can dictate the terms of cooperation to those who have to fight day by day for the economic survival of their families. At the global level, the gap between wealthy and economically poor countries leads to vastly diverging degrees of average life expectancy, child mortality, vaccination rates or educational prospects. One should not forget linguistic inequality. In commerce, trade, employment, education, media, academia, politics, law, diplomacy and other important areas of life not all languages count equally. Native speakers of a predominant language, like

[162] See the preamble of the Charter of the United Nations, available under: https://www.un.org/en/sections/un-charter/preamble/index.html.

English, have a clear advantage over those who have to learn the *lingua franca* as a foreign language. This problem also manifests itself in the midst of human rights work, usually without receiving much attention.

It is not my purpose to go through the list of all the relevant factors underneath existing power asymmetries. One certainly would have to add the divide between urban and rural areas or between modern and traditional economic sectors, the impact of different educational opportunities, access to the internet and other modern technologies, issues like age or disability and many other factors. The point I want to make here is that there is a gross mismatch between the postulated equality of rights, on the one hand, and the complex reality of inequalities and power asymmetries, on the other. That mismatch goes beyond the usual gap between norms and reality that we tend to take for granted anyway.

Samuel Moyn, one of the most influential critics of human rights, has relentlessly exposed this discrepancy in a book titled "Not Enough. Human Rights in an Unequal World".[163] The equality provisions in human rights documents, he writes, merely postulate formal status equality, while ignoring the growing discrepancies between the rich and the poor. Even worse, by distracting from more radical egalitarian aspirations, Moyn contends, human rights function as a sort of "palliative ethics", which serves to calm down serious political opposition against worldwide capitalism.[164] Instead of challenging the global neoliberal hegemony, human rights activists inadvertently or knowingly stabilize the status quo. Moyn's criticism culminates in the verdict that human rights have become "a powerless companion of market fundamentalism".[165]

Representatives of postcolonialism and feminism have similarly questioned the viability and credibility of the human rights approach from their specific critical vantage points. In addition to expressing doubts about the effectiveness of implementation mechanisms, critics have wondered whether the idealistic language of equal rights within a supposedly "colorblind society" might not function as a cloak that conceals ongoing structural discrimination

[163] Moyn, *Not Enough …,* op. cit.
[164] *Ibid.,* p. 147.
[165] *Ibid.,* p. 216.

and power asymmetries. Lyn Ossome, for example, is convinced that "human rights have morphed into exclusionary instruments that account for some and exclude others".[166] Nikita Dhawan suspects that human rights often function like "alibis", which factually reinforce discriminatory structures and postcolonial exploitation.[167]

The question is: can human rights contribute to achieving more equality in a world characterized by gross inequalities and power asymmetries? Are they mainly a part of the problem, as Moyn and other critics seem to assume, or can they be part of the solution? In the following sections of this chapter, I try to present elements of a response. After briefly introducing some specialized human rights conventions, which focus on specific aspects of combating discrimination (section 5.3.), I describe the development of non-discrimination agendas, which in recent decades have moved far beyond the goal of mere formal equality (section 5.4.). Subsequently, I add observations concerning the empowerment function of human rights (section 5.5.) and their contributions to the culture of democracy (section 5.6.) to be followed by a few concluding remarks (section 5.7.).

5.3 Conventions specifically focusing on discrimination

In a general sense, all human rights instruments pursue non-discrimination agendas. The implementation of equality through combating discrimination belongs to the very definition of human rights. Within the broad list of international human rights declarations and conventions, however, some instruments stick out,

[166] Lyn Ossome, "Democracy's Subjections: Human Rights in Contexts of Scarcity", in *Decolonizing Enlightenment. Transnational Justice, Human Rights and Democracy in a Postcolonial World,* ed. by Nikita Dhawan, Opladen/Berlin/Toronto: Barbara Budrich, 2014, pp. 279-293, at p. 290.

[167] Nikita Dhawan, "Affirmative Sabotage of the Master's Tools: The Paradox of Postcolonial Enlightenment", in *Decolonizing Enlightenment. Transnational Justice, Human Rights and Democracy in a Postcolonial World,* ed. by Nikita Dhawan, Opladen/Berlin/Toronto: Barbara Budrich, 2014, pp. 19-78, at p. 49.

because they focus more narrowly on specific forms of discrimination. This is reflected in titles like *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), *Convention on the Elimination of All Forms of Discrimination against Women* (1979) and *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief* (1981). Although not carrying the term discrimination in its title, the *Convention on the Rights of Persons with Disabilities* (2006) too places strong emphasis on the eradication of discrimination. One could furthermore add the *Convention on the Rights of the Child* (1989), the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (1992) or the *Declaration on the Rights of Indigenous Peoples* (2007). It should be noted that all of the above instruments exist in the framework of the United Nations. The above list does not include the various instruments and documents elaborated at regional or national levels, which are no less important.

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD),[168] adopted by the UN General Assembly in December 1965, is the first legally binding human rights convention established in the context of the United Nations. It entered into force in 1969, after reaching the prescribed threshold of formal ratifications. The adoption of ICERD was a milestone in the history of human rights – not least because it tackled an important credibility issue in international human rights protection. When the UDHR was enacted in December 1948, large parts of Africa and Asia were still under the yoke of European colonial rule. This naturally casts a big shadow on the motives of those governments who officially endorsed the UDHR, while at the same time sticking to their political, economic and military control over "colonized" territories. To profess faith in the equality of all human beings while refusing to

[168] For the text of the convention see: https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx. See also the introductory note: https://legal.un.org/avl/ha/cerd/cerd.html. See also the short comment on ICERD by Gay McDougall, contained in the United Nations audiovisual library of international law (written in Februar 2021), available under: https://legal.un.org/avl/pdf/ha/cerd/cerd_e.pdf.

end practices of colonial exploitation is more than a contradiction; it borders on political schizophrenia.[169]

In the 1960s, the global landscape changed considerably, with more and more countries achieving political independence, in many cases after years of violent struggle with the colonial powers. It is in this historical context that ICERD came into existence. In his book "The Making of International Human Rights", historian Steven Jensen highlights the impact of decolonization on the development of human rights since the 1960s: "Decolonization was – through its structural transformation of international politics – a decisive factor that actually enabled human rights to emerge despite significant opposition to become a significant factor for international diplomacy and politics in the past decades."[170] Pointing to the strategic role of political actors from the global south – inter alia Jamaica, Ghana, the Philippines, Liberia[171] – Jensen challenges the traditional narrative that Western governments were the main driving forces in the enactment of international human rights. Especially in the 1960s, he says, the opposite was the case: "Human rights were coming in from the South."[172] ICERD is the most prominent case in question. Its preamble, ICERD cites the unambiguous condemnation by the UN of "colonialism and practices of segregation and discrimination associated therewith, in whatever form and wherever they exist". The preamble further states that "discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to

[169] Article 2, sentence 2 of the UDHR confirms that the Declaration includes people living in territories under colonial rule: "Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." Some delegates paradoxically rejected the explicit reference to people living under colonial rule as allegedly undermining the universal language of human rights. See Jessica Whyte, *The Morals of the Market. Human Rights and the Rise of Neoliberalism,* London/ New York: Verso, 2019, p. 137.

[170] Steven L.B. Jensen, *The Making of International Human Rights. The 1960s, Decolonization, and the Reconstruction of Global Values,* Cambridge University Press, 2016, p. 277.

[171] See ibid.

[172] Ibid., p. 7.

friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State".

Racism in its various manifestations turns certain factual or imagined characteristics, like different shades of skin pigmentation, into allegedly "essential" categories, which overshadow, obscure or even formally deny the common humanity of all human beings.[173] Individual persons – their faces, voices, convictions, family relations and biographies – disappear behind artificially constructed mega-collectivities called "races". Racism reduces human beings to mere "exemplars" of such predefined collective units, thus de-personalizing the person and de-individualizing the individual. In short: racism systematically de-humanizes humans. Racism furthermore produces the ideological tools for justifying large-scale exploitation by creating hierarchies between allegedly "superior" and "inferior" groups of people. In the era of European colonialism, the main dividing line was supposed to run between "civilization" and "barbarism". Those claiming to represent "civilization" enslaved fellow humans, many of whom they traded like cattle; they uprooted peoples by destroying their cultural heritages; and they committed atrocities of genocidal dimensions.[174] "Divide-and-rule" policies adopted by colonizing powers have had lasting effects on many formerly occupied countries; their impact is very much felt even generations after formal political independence. Moreover, racist stereotypes frequently demonize the target groups as allegedly dangerous, cunning or untrustworthy. One extreme form of demonization is anti-Semitism, with its weird and spiteful conspiracy projections.[175] Racist hatred culminates in extreme forms of violence, including "ethnic cleansing" and strategically

[173] See Albert Memmi, *Racism* (with a Foreword by Kwame Anthony Appiah), University of Minnesota Press, 1999.

[174] One example is the genocide of the Herero and Nama peoples in today's Namibia committed by German military.

[175] See the *Interim Report* to the UN General Assembly dedicated to the issue of anti-Semitism by the UN Special Rapporteur on freedom of religion or belief, Ahmed Shaheed, UN Doc. A/74/358 (9 September 2019).

orchestrated genocides, including the Holocaust perpetrated by Nazi Germany.[176]

In theory, human rights are the systematic antithesis to all forms of racism. Against the ideology of different human "races", they profess the essential unity of all members of the human family. Against the racist de-personalization of the person, they emphasize the dignity of each and every individual. Against ideologies of "mute otherness", they broaden the space for communicative outreach. Against collective superiority claims linked to artificially constructed hierarchies, human rights insist on the substantive equality in dignity and rights of all human beings. Against policies of hatred, they strengthen resilience by providing legal protection and judicial remedies. Now, the important point is to turn such principled opposition into a *credible, consistent and effective practice* of anti-racism. This is the purpose of ICERD.[177]

The states endorsing ICERD thereby "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms".[178] The Convention spells out some of the measures, which states must take when discharging their obligations. Particularly important is the obligation to adopt measures against the dissemination of racist ideologies.[179] Manifestations of racist hatred, especially when inciting acts of discrimination, hostility or violence, cannot be a legitimate use of freedom of expression; by systematically excommunicating the targeted groups from our common humanity, such hate manifestations undermine – or even formally deny – the necessary preconditions of legitimate communication.[180] States are

[176] See Raul Hilberg, *The Destruction of the European Jews,* three volumes, New York: Holmer & Meier, 1985.

[177] For more details see Morten Kjaerum, "Combating Racial and Related Discrimination", in *International Protection of Human Rights. A Textbook,* ed. by Catarina Krause and Martin Scheinin, Abo Akademi 2009, pp. 183-203.

[178] Article 2 of ICERD.

[179] Article 4 of ICERD.

[180] Given the significance of freedom of expression, the threshold for the imposition of legal sanctions against incitement to hatred must be adequately high and furthermore clearly defined. Criminal law can play only a limited role in combating hatred. It is all the more important to also make use of

furthermore obliged to provide effective judicial remedies against all forms of racist discrimination. This requires appropriate investments "in the fields of teaching, education, culture and information, with a view to combating prejudices."[181] Special measures – popularly known as "affirmative action" measures – may be needed to ensure "the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms".[182] By insisting on the appropriate application of special measures, the Convention tackles the issue of deep-seated structural inequalities. At the same time, the ICERD adds the warning that the adoption of special measures "shall in no case entail as a consequence the maintenance of unequal or separate rights"[183] for different groups of people. Special measures can cause unintended side-effects; when applied without due diligence, they can inadvertently reinforce segregation. This risk warrants critical attention. The goal of special measures remains *effective equality of rights* within an open and inclusive society.

States that have ratified ICERD are obliged to undergo a regular monitoring process aimed at measuring whether or not, or to which degree, they have actually fulfilled their obligations. A committee composed of independent experts from different regions (*Committee on the Elimination of Racial Discrimination* = CERD committee) has the mandate to carry out this periodic monitoring.[184] The first step within each monitoring cycle is a report produced by the respective state itself.[185] Naturally, this harbors the danger of covering up existing problems. The CERD committee therefore invites civil society organizations to submit their own independent findings and add critical comments on the official state report. The reporting cycle regularly finishes with a number of "concluding observations" elaborated by the CERD committee. These concluding

non-legal measures, including education, awareness-raising, dialogue initiatives and public solidarity campaigns.

[181] Article 7 of ICERD.

[182] Article 2, paragraph 2 of ICERD.

[183] Ibid.

[184] See article 8 of ICERD.

[185] See article 9 of ICERD.

findings and recommendations, plus the important materials on which they are based, are publicly available on the website of the UN Office of the High Commissioner for Human Rights. It should be mentioned in passing that the CERD committee also has a mandate to investigate individual complaints.[186]

I will say a bit more about the effectiveness of this type of international human rights monitoring in the last chapter.[187] Although its impact is far from satisfactory, one should not underestimate its long-term significance. Many of the effects are of an indirect nature. For example, the monitoring procedures carried out at the UN level, have created incentives for civil society organizations to better coordinate their efforts, with the strategic purpose of exercising more influence in international forums. The monitoring procedures have thereby improved the cooperation between civil society organizations within and across national boundaries. The periodicity of the monitoring can also contribute to keeping the issues on the political agenda. In any case, what is true is that none of these mechanisms operates in a "self-executing" manner. They all depend on lasting commitment of many people.

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)[188] adopted in 1979, in force since 1981, largely functions in analogy to ICERD.[189] The preamble notes with concern that "extensive discrimination against women continues to exist". For example, in the job market women across the globe receive less remuneration than men, even if their workloads

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[186] See article 14 of ICERD. The acceptance of individual communications by the CERD committee depends on the general recognition of that competence by the respective state.

[187] See below, chapter 8, section 3.

[188] For the text of the convention see: https://www.ohchr.org/documents/professionalinterest/cedaw.pdf. See also the introductory note: https://legal.un.org/avl/ha/cedaw/cedaw.html.

[189] For more details see Simone Cusack & Rebecca J. Cook, "Combating Discrimination Based on Sex and Gender", in *International Protection of Human Rights. A Textbook*, ed. by Catarina Krause and Martin Scheinin, Abo Akademi, 2009, pp. 205-226; Marsha A. Freeman, Christine Chinkin, Beate Rudolf, eds., *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary,* Oxford: Oxford University Press, 2012.

and their results are identical. This notorious pay gap exists in rural as well as in urban areas, including in highly industrialized sectors. Traditional gender roles request women to bear a much heavier burden with regard to family-related duties, including the care of elderly relatives in the aging societies of the West. The Covid-19 pandemic has reinforced gender-related divisions of labor in virtually all regions of the world. Practices like child marriage, although in principle affecting both girls and boys, usually have more dramatic impacts on the lives of women and girls. In many countries, women are in danger of losing even the rest of their limited economic independence when facing the situations of divorce or widowhood.

Through ratification of CEDAW states condemn all forms of discrimination against women and commit to adopt a number of duties. They are obliged "to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women".[190] In the face of deep-seated ideas of a supposedly "natural" role division between women and men, often anchored in religious or cultural traditions, this is a long-term task and an uphill battle. In the interest of substantive equality of rights, states should also take "temporary special measures", again in analogy to the ICERD provision.[191] Moreover, it would be insufficient to merely expand the existing standards of a male-dominated society to also include women within the established structures. Rather, women have to play an active role in redefining those standards and making necessary amendments based on their experiences, ideas and visions. This may also affect the interpretation the principles of equality and non-discrimination themselves, which remains historically open to adaptations and re-conceptualizations.

In its various articles, CEDAW goes through all relevant sectors of society, including school education, health care, the labor market, marriage and family issues and so on. The Convention furthermore pays special attention to the situation of women living in

[190] Article 5 of CEDAW.

[191] See article 4, paragraph 1 of CEDAW. Unlike the wording used in ICERD, CEDAW explicitly qualifies the measures as "temporary".

rural areas. Like ICERD, the CEDAW convention, too, mandates a committee of independent experts to carry out cyclical monitoring, in which states are obliged to participate – again with far-reaching opportunities for the participation of civil society organizations. The CEDAW committee can furthermore handle individual complaints, if the concerned state has ratified an option protocol dedicated to this specific function.[192]

Unlike the two legally binding anti-discrimination conventions just mentioned – ICERD and CEDAW – the *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief,*[193] adopted in 1981, does not have the status of a legally binding convention; nor is it connected with a specialized body in charge of monitoring state practices and handling individual complaints. Nonetheless, the Declaration has significance, not least by highlighting the *broad scope* of non-discrimination in the area of religion or belief. This clarification proves important against a tendency existing in many countries to relegate manifestations of religiosity to narrowly predefined societal niches or even turn them into mere "private affairs". Against such restrictive policies, the 1981 Declaration promotes a wide understanding of religious (or non-religious) beliefs and practices, with relevance for all areas of societal life, private life as well as public life. Accordingly, non-discrimination agendas have to be broadly designed. Article 4 clarifies that discrimination on the grounds of religion or belief can occur "in all fields of civil, economic, political, social and cultural life". For example, restrictive laws prohibiting the display of religious symbols in state institutions, schools or private enterprises constitute *prima facie* discrimination thus warranting critical scrutiny.

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[192] For the text of the Option Protocol to CEDAW (1999) see: https://www.ohchr.org/en/professionalinterest/pages/opcedaw.aspx. See also the introductory note: https://legal.un.org/avl/ha/opceafdw/opceafdw.html.

[193] For the text of the Declaration see: https://www.ohchr.org/EN/ProfessionalInterest/Pages/ReligionOrBelief.aspx. See also the introductory note: https://legal.un.org/avl/ha/ga_36-55/ga_36-55.html. See also the short commentary in the UN audiovisual library of international law, available under: https://legal.un.org/avl/pdf/ha/ga_36-55/ga_36-55_e.pdf.

Quite a number of states have declared one particular religion to be the "official religion" of the state. This often happens under the auspices of protecting the religious heritage of the nation. The flipside is systematic discrimination against people not fitting into the pattern of protected religion. Yet even in "secular" countries without an official religion, laws and customs often show the continued influence of predominant religious traditions, for example, the seven-day-week, whose origins lie in the Biblical book of Genesis. Other examples include religious holidays, dietary rules, dress codes or greeting rituals, many of which stem from particular religious traditions. The purpose of human rights is not to eradicate such traces of tradition in public life. Rather, their goal is a positive one: to create more space for all. This presupposes critical public debates on how to redefine the terms of coexistence between people of different faiths, with a view to broaden the space for manifestations of religious diversity, without fear and without discrimination. It furthermore requires challenging existing notions of "normalcy" or "neutrality", which possibly hide the ongoing hegemony of particular religious traditions, often at the expense of minorities, dissidents or non-believers.

The *Convention on the Rights of Persons with Disabilities,*[194] adopted in 2006 and entered into force in 2008, is one of the more recent international human rights instruments.[195] With its strong emphasis on structural forms of discrimination, CRPD has significance far beyond the specific area of disability. Structural discrimination includes barriers, which factually hinder persons with disabilities from fully participating in societal life, on the basis of equality with everyone else. While some of the barriers, e.g., physical obstacles for people moving in wheelchairs are openly visible, other mechanisms of exclusion and discrimination first need to be detected and exposed to critical scrutiny. For example, communication

[194] For the text of the CRPD see: https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf.

[195] For more details see Gerard Quinn, "Disability and Human Rights: A New Field in the United Nations", in *International Protection of Human Rights. A Textbook,* ed. by Catarina Krause and Martin Scheinin, Abo Akademi 2009, pp. 247-271; Peter Blank & Eilionóir Flynn, eds., *Routledge Handbook on Disability Law and Human Rights,* London: Routledge 2017.

technologies used in public administration or in schools and universities may fail to take into consideration the situation of persons with visual or hearing impairments. Quite often those running the respective institutions are not fully aware of the discriminatory practices, which they inadvertently reinforce.

In addition to postulating the long-term purpose of barrier-free societies, CRPD entitles persons with disability to insist on concrete adaptation measures in order to have effective access to certain institutions, for example, a public library or a classroom in school. The term coined for such adaptive measure is "reasonable accommodation". If it is true that many forms of discrimination have structural root-causes, it follows that those directly affected have a legal claim to have these structures changed – not only in the long run, but *immediately, that is, here and now*. The only caveat is that the accommodation of special needs must be manageable in practice. Measures taken for this purpose should not pose a disproportionate or undue burden on the concerned institution; for example, they should not drive a company into bankruptcy or lead to the closing of a school. Article 2 of CRPD defines: "'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms." The contextual implications of this definition have to be determined in a case-by-case approach.

Under CRPD, states are obliged to create adequate conditions for the application of reasonable accommodation, with a view to removing barriers of any kind and achieving substantive equality for persons with disabilities, wherever possible: "In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided."[196] Failure to employ measures of reasonable accommodation in cases where this would not lead to a "disproportionate or undue burden" henceforth counts as discrimination. What this means in practice will probably remain controversial in many cases and may lead to complaints and related litigation. Persons with disabilities will have to continue to fight for

[196] Article 5, paragraph 3 of the CRPD.

their rights. But the prospects for this fight to accomplish practical results have certainly improved. In this regard, CRPD represents a leap forward in designing effective non-discrimination agendas, by requesting adequate *changes of the environment* of a person who suffers from discrimination. It should be noted in passing that CPRD, too, has a monitoring committee, in analogy to ICERD and CEDAW, tasked with overseeing state practices and handling individual complaints.[197]

5.4 The goal of substantive equality

My sketchy description of some (not all!) of the specialized non-discrimination instruments at the UN level was not intended to give an overview of the international standards existing in this field. I merely wanted to demonstrate some of the far-reaching developments in the area of equality and non-discrimination. They do not only concern the list of prohibited entry points of unequal treatment, which has seen remarkable amendments in recent decades; the international debate has also led to a more analytical understanding of the phenomena of discrimination. Moreover, it is clear that equality requires the readiness to embark on serious political reforms. The goal must be *substantive equality,* not mere formal equality.[198]

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[197] The handling of individual complaints presupposes prior ratification of the Optional Protocol to CRPD by the concerned state party.

[198] For a definition of formal and substantive non-discrimination, see *General Comment no. 20* (2009) of the UN Committee on Economic, Social and Cultural Rights, paragraph 8. In this context the Committee states: "Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas." *General Comment no. 20* also defines other specifications of non-discrimination, such as direct and indirect discrimination, see paragraph 10.

More than a century ago, Anatole France unmasked the shortcomings of mere formal equality, when noting with unconcealed sarcasm: "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets and to steal their bread."[199] Whereas the prohibition to sleep under bridges is of no relevance for the vast majority of citizens, it deprives the poor of their last resort when searching for an urgently needed shelter. Even worse, legislators may actually know what they do when enacting such prohibitions, which *only on the surface* apply to everyone equally. Policies of formal equality can be an ill-disguised manifestation of political cynicism. The same is true if postulates of a "colorblind society", in which skin color and other ascribed ethnic characteristics should no longer play a role, are turned into an excuse for avoiding a serious analysis of ongoing patterns of discrimination, many of which may be hidden under the surface of seemingly "neutral" societal structures and "normal" societal practices.

In addition to open and straightforward forms of discrimination, which continue to occur all over the globe, members of minorities and other disadvantaged persons frequently face concealed forms of structural discrimination, some of which are not easy to detect. While in some cases identifiable perpetrators intentionally commit acts of racist, sexist, homophobic or other forms of discrimination, there are also situations, where identifiable individual perpetrators may not even exist. People may reproduce stereotypes in their daily language without being aware that they advertently reinforce structural discrimination. For example, in some languages, people with serious hearing impairments are called "deaf-mute",[200] which is an insult, because it ignores the fact that people who use sign language can be quite articulate. Sign language has a complex grammar and harbors enormous expressive potential. To label people using that language as "mute" merely demonstrates ignorance and disrespect. In the area of religion, public holidays and the seven-day week reflect the ongoing predominance of particular traditions in many countries. What from the standpoint of the majority population may seem just "normal" can pose an extra burden

[199] https://en.wikiquote.org/wiki/Anatole_France.

[200] The German language is one example. Until recently, it was customary to call deaf persons "taubstumm" (literally: "deaf-mute").

on members of certain religious minorities, if they wish to celebrate important holidays within their communities or if they feel religiously obliged not to work on specific days during the week. The fact that in many countries the majority of teachers in elementary schools are females, while the majority of teachers in high schools are males has an encouraging or discouraging impact on the career plans of girls and boys. When it comes to structural discrimination in the housing or the labor market, tests have repeatedly revealed that the success rates of applications for an apartment, a job or an internship heavily depend on the ethnic or religious background of the applicants.

In the 1980s, Kimberlé Crenshaw, a black feminist, coined the term "intersectional discrimination" to address the problem that some people suffer from various types of discrimination simultaneously.[201] Intersectional discrimination is not just a combination of two or more grounds of discrimination. As a black woman committed to fighting discrimination, Crenshaw herself felt she had always to make the strange choice between a feminist and an anti-racist agenda. While established feminism, she said, mainly reflected the experience of white women, anti-racism policies were usually modeled on male experiences and thus failed to take into account the specific situation of women. Accordingly, neither of the two non-discrimination paths would accommodate her specific needs and wishes as a black woman. This was Crenshaw's point.

Intersectional discrimination can exist in all sorts of constellations. In an international conference on freedom of religion or belief and gender issues, the spokesperson of an organization of gay Muslims from an Eastern European country reported that he frequently experienced discriminatory stereotypes within his own religious community. In the gay community, he often faced a total lack of understanding when saying that he was a practicing Muslim. It thus proved difficult for him to bring together the various issues, which jointly constitute his personal identity. Complex patterns of discrimination, for example, in the intersection of religious minority status and sexual orientation, often do not receive adequate

[201] See Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics", in *University of Chicago Legal Forum,* Vol. 1 (1989), pp. 139-167.

attention, because they somehow do not seem to "fit" into anti-discrimination programs that are designed chiefly from the experience of one particular type of discrimination. The discussion on intersectional discrimination has at least sharpened the awareness of existing gaps in this field.

In order to approach the goal of substantive equality for all, state and society have to make active investments. The concluding observations periodically presented by the monitoring committees linked to ICERD, CEDAW, CRPD and other conventions usually contain a list of tailor-made country-specific recommendations. One of the standard desiderata is solidly researched empirical data, which are needed to detect and tackle structural discrimination. Another area warranting special attention is textbooks and materials used in schools, which may need systematic overhaul in order to eradicate racist, sexist, homophobic and other stereotypes. Even in countries where a culture of public commemoration of gross human rights violations exists, atrocities like slavery, slave trade and colonialist repression so far have received little attention. Another request concerns overcoming the practice of "racial profiling" within law enforcement agencies, which often disproportionately target members of ethnic minorities when applying their "stop and search" measures. Temporary special measures in the labor market may be necessary to break through "fraternities" or other support networks, by which "old cronies" cling to their traditional privileges. It goes without saying that this list of examples is non-exhaustive.

5.5 Tackling power asymmetries through rights-based empowerment

Human rights both presuppose and strengthen agency. The "me-too" campaign, which exposed numerous incidents of sexual harassment to public criticism, illustrates how to make strategic use of one's freedom of communication. "Black Lives Matter" demonstrations triggered by acts of police brutality have sparked political discussions on systemic racist discrimination in law enforcement agencies. In the run-up to the drafting of the CRPD, people with disabilities

repeatedly held public "cripple tribunals"[202] aimed at raising awareness of structural discrimination experienced by persons with impairments. "Pride parades" organized in support of LGBTIQ persons send powerful signals against bigotry and repression in the areas of sexual orientation and gender identity. In a number of countries, people have protested against narrow-minded ways of politicizing religion, with its discriminatory implications for religious minorities or dissidents. Those engaged in such activities should not expect unanimous applause. Some may even experience threats or other acts of intimidation.

Human rights also support the ongoing fight against power asymmetries caused by gross economic disparities. One important contribution is the right to establish free and independent trade unions. This right has been the main strategic demand put forward by workers movements since the 19th century, because it is only through voluntary collective self-organizations that individual employees can mobilize the necessary resilience against pressure coming from powerful entrepreneurs or companies. Today, when fighting for independent self-organizations, employees can base their claims on the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 8 of the ICESCR formally confirms "the right of everyone to form trade unions and join the trade unions of his choice".[203] Trade unions furthermore have the right "to establish national federations or confederations", which themselves are entitled "to form or join international trade-union organizations".[204] Article 8 anchors the right to go on strike, without which trade unions would not be able to exercise any influence and start negotiations on an equal footing.[205] The UN Committee on Economic, Social and Cultural Rights monitors the implementation of these and other guarantees under the Convention.

The right to basic social security, enshrined in article 9 of the ICESCR, too, has a protective function against forms of unilateral economic dependency. As the ICESCR Committee has pointed out,

[202] The organizer deliberately chose the brutal term "cripple tribunal" to address the stigmatization of persons with disabilities.
[203] Article 8, paragraph 1, lit. (a) of the ICESCR.
[204] Ibid., lit. (b).
[205] Ibid., lit. (c).

"Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion."[206] Another example is the right to water, which the Committee has derived, by way of interpretation, from the ICESCR. Thus, questions of water management and water distribution have assumed an explicit human rights dimension.[207] The main purpose of the right to water is to overcome the power asymmetries between those who exercise control over water resources and those who, being utterly dependent on such resources, are exposed to economic exploitation or other forms of unilateral pressure. In his criticism on neoliberal privatization policies and the concomitant treatment of water as a mere commodity, the UN Special Rapporteur on the right to water and sanitation, Pedro Arrojo-Agudo, calls for redefining water as a public good, which requires democratic governance: "In short, it is necessary to develop democratic governance of water that guarantees human rights and environmental sustainability, with transparency and public participation as the keys to combating bureaucratic opacity and promoting efficiency."[208]

An area that has attracted increased attention in recent years concerns human rights obligations of business companies, especially transnational corporations. Economically powerful corporations exercise enormous influence, not only in their host countries, but also through international supply chains. In appreciation of their impact and potential, the UN Human Rights Council in 2011 adopted the *Guiding Principles on Business and Human Rights.*[209] In order not to compromise the overarching responsibility of states, the Guiding Principles first reiterate the state duty to protect human rights,

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[206] UN Committee on Economic, Social and Cultural Rights, *General Comment no. 19,* UN Doc. E/C.12/GC/19 of 4 February 2008, paragraph 3.

[207] See UN Committee on Economic, Social and Cultural Rights, *General Comment no. 15,* UN Doc. E/C.12/2002/11 of 20 January 2003.

[208] Special rapporteur on the human right to safe drinking water and sanitation, Pedro Arrojo-Agudo, *Risks and Impacts of the Commodification and Financialization of Water and the Human Rights to Safe Drinking Water and Sanitation,* UN Doc. A/76/159 of 16 July 2021, paragraph 35.

[209] See the principles with comments provided by the Office of the High Commissioner for Human Rights: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

including by providing an adequate legal framework for business operations. Subsequently, the Guiding Principles identify different areas of human rights responsibility for business corporations. Ten years after the adoption of the Guiding Principles, however, the UN Working Group on Business and Human Rights expresses profound dissatisfaction with the progress achieved so far and calls for the enactment of legally binding measures: "The persistence of business-related abuses is a major concern and a source of deep frustration, and should be a matter of urgent priority attention by States and business. The last decade has underscored the point made in the Guiding Principles: voluntary approaches alone are not enough. The rise of mandatory measures will undoubtedly accelerate both uptake and progress."[210]

5.6 Strengthening democratic culture

Human rights in general and non-discrimination agendas in particular also contribute to the flourishing of democracy. It may take a moment of reflection to understand this relationship. Human rights and democracy have much in common. It is more than a coincidence that the historical breakthrough of human rights occurred in the context of early modern democratic revolutions. More importantly, the democratic principle of "one person one vote" displays the same egalitarian structure, which also defines the ethos of human rights. I have repeatedly pointed out that equality does not mean sameness or uniformity. In the context of human rights, equality can only make sense as a "diversity-friendly" principle. The implementation of equal rights for all thus contributes to building a pluralistic society, where people feel free to manifest their various convictions, orientations, identities etc. without fear and without discrimination – at least, this is the aspiration. Such pluralism is also a precondition for democratic

[210] Working Group on Business and Human Rights, *The Guiding Principles on Business and Human Rights at 10: Taking Stock of the First Decade,* UN doc. A/HRC/47/39 of 22 April 2021, paragraph 114. On the prospects and difficulties on the way toward legally binding norms in this area see also Markus Krajewski, "A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty-Application", in *Business and Human Rights Journal*, Vol. 5 (2020), pp. 105-129.

discourse to flourish. Political rights like freedom of expression, freedom of assembly, freedom of association and the right to vote are the most obvious examples; they are indispensable structural components of any functioning democracy. At closer scrutiny, other human rights, which are usually not termed "political rights", are no less important for democracy. For example, school education enhances people's opportunities to gain relevant information and participate effectively in democratic debates. Freedom of conscience, religion or belief strengthens the position of the person as holder of profound convictions; this can have positive impact on public debates. Another example is the right to privacy, which on the surface may look like the opposite of a political right. However, as Hannah Arendt has demonstrated, without the integrity of the private sphere, where people can feel safe and at home, public debates would become predictable, shallow and sterile.[211] This is why the right to privacy – if indirectly – also contributes to democracy. Last, but not least: non-discrimination agendas, which are part and parcel of any human rights politics, help detect and remove obstacles to an open and inclusive democratic participation.

To highlight this positive interrelatedness of human rights and democracy has become increasingly important in the face of populist movements, which have gained influence in many countries. Populist parties like to stage themselves as the only "real" democrats, who dare to speak out on behalf of a "silent majority" within the population.[212] In their propaganda, however, democracy is usually just a proxy for unlimited majoritarianism, collective egoism and aggressive narrow-mindedness. According to such a strangely distorted understanding of democracy, largely modeled on the writings of Carl Schmitt,[213] political leaders who have managed to obtain the majority of votes should be free to do whatever seems opportune to them, including mobilizing resentment against minorities, intimidating dissidents and detaining members of the opposition. Aggressive polarization, to the detriment of minorities and critical voices, has actually become the political recipe of populist

[211] See Arendt, *The Human Condition*, op. cit., p. 71.
[212] See Jan-Werner Müller, *What is Populism?,* Philadelphia: University of Pennsylvania Press, 2016.
[213] See Dyzenhaus, ed., op. cit.

political parties worldwide. However, populist politicians paint a mere caricature of democracy, when advocating a "democracy" without normative boundaries, without respect for the rule of law, without sufficient space for critical dissent and without a spirit of solidarity with minorities.

Surely, the majority rule is an indispensable component of democratic procedures. It follows from the egalitarian principle of "one person, one vote". Since it would be naïve to expect unanimity in a pluralistic society, it is necessary to agree on a fair procedure for dealing with conflicts of interests or viewpoints, on the basis of equality. This is the reason why the majority rule plays such a strong role in democratic decision making. It is the most plausible decision-making rule within a modern pluralist society, in which all votes count equally. In spite of its undeniable significance, however, the majority rule does not exhaust the ethos of democracy. Rather, the majority rule – as a decision-making device – can only make sense *within a much broader democratic culture of respect for the equal dignity and equal rights of all.* At the end of the day, an aggressive hegemony of the political majority over individual dissidents, opposition groups or allegedly unwelcome minorities threatens to destroy the spirit and the future of democracy itself. Examples across the continents demonstrate that this danger is not merely hypothetical.[214] What we can see is that a "democracy" without respect of the rule of law and without cherishing equal rights of all quickly slips into just another type of authoritarianism, where people do not dare to voice critical positions publicly, where journalists fall prey to orchestrated resentments or violent attacks and where the fair functioning of the judiciary becomes increasingly precarious. While the façade of democratic institutions may still be in place, what remains may be just a caricature of democracy.

A human rights commitment can strengthen democracy; it can also help rescue democratic culture from the claws of populist

[214] Current examples include India under the Modi government, Turkey under Erdogan, Hungary governed by Victor Orbàn, Brazil under Bolsonaro and many other countries. The US society seems to have a long way to go to come to terms with the political devastation caused by the populist Trump administration.

distortions.[215] This pro-democracy potential of human rights in general and non-discrimination agendas in particular does not always come to the fore clearly enough. Human rights practitioners may even inadvertently play into the hands of populist propaganda when conveying the impression that human rights work exclusively concerns minorities and their specific interests. It would be more adequate to point out that by empowering members of minorities and other discriminated persons, human rights at the same time contribute to keeping the democratic space open for a broad participation of people with different viewpoints and from different strata of society. Just as democracy must be more than an unqualified hegemony of the majority, human rights practice must be more than support for discriminated minorities. Saying this, of course, does not in any sense downplay the significance of paying specific attention to the situation of people, who are exposed to increased risks of discrimination and exclusion.

Ultimately, human rights have a transformative impact on *society as a whole* – or this is their aspiration. For example, the goal of a barrier-free society does not merely concern people with disabilities. Although they are obviously the ones most directly affected by existing barriers and hence will be naturally interested in detecting and removing those barriers, improved accessibility also contributes to the betterment of the entire society.[216] The purpose of an inclusive society requires political commitment of many people, across milieus and party lines. Similarly, to overcome structural discrimination against religious minorities opens up the space for the unfolding of religious diversity in general. Majority churches or other predominant religious communities should reconsider their privileged position, which in the long run might cause a gradual decline of spiritual credibility. The respectful treatment of LGBTI people, on par with everyone else, encourages a more honest and open attitude toward sexuality in general – again to the advantage of society as a whole.

When pointing to this broad and inclusive perspective, I do not wish to postulate an easy harmony between privileged and

[215] See César Rodríguez-Garavito & Krizna Gomes, eds., *Rising to the Populist Challenge. A New Playbook for Human Rights Actors,* Bogotá: Dejusticia, 2018.
[216] See CRPD, preamble, lit. m.

discriminated people. Non-discrimination will always be a politically contested area, because it implies the willingness to challenge the status quo and remove existing privileges. My concern is to avoid the trap of juxtaposing human rights and democracy when emphasizing the need to support discriminated minorities. There are good reasons to highlight the pro-democracy potential of human rights in general and non-discrimination agendas in particular. Given the current distortions of democracy by populist movements, the understanding of democracy itself has become a politically contested issue. In such contestations, human rights can play – and must play – a crucial part.[217]

5.7 The need for concerted political efforts

Back to Samuel Moyn's objection that human rights are just "a powerless companion of market fundamentalism" and thus complicit in preserving the hegemony of global capitalism and neoliberalism. Moyn bases this charge on an allegedly "individualistic" and anti-state bias, as a result of which human rights cut back on state interventions. He fails to consider that the term individualism carries various and indeed often opposite meanings, as discussed in chapter 3 of this book. While human rights are actually held by each and every individual human being, they are typically exercised together with others; indeed, they facilitate communicative, social and political interaction in many ways.[218] When it comes to the alleged anti-state

[217] In this context, the slogan "nothing about us without us" may warrant a word of clarification. This motto was originally coined by the disability movement; it captures the anti-paternalistic thrust of social movements in general. The message is that when it comes to designing policies of equality and non-discrimination, those personally affected by structures of inequality, discrimination and exclusion should always be actively involved. To appreciate their specific expertise is in fact indispensable. While the anti-paternalistic motto of "nothing about us without us" adequately incorporates the empowering spirit of human rights, however, it would be wrong to infer that only those personally affected should feel entitled to talk about discrimination. Non-discrimination agendas are a political project that requires broad alliances of people from different backgrounds and with a variety of experiences and skills, also across the minorities-majorities-divide.

[218] See chapter 3, section 2.

orientation, Moyn ignores the fact that various human rights instruments demand pro-active interventions by the state to protect human rights against third-party interferences, including from the side of transnational companies and other powerful business agents. Since the 1990s, UN agencies have consistently clarified that the state, in addition to its duty to respect human rights, also bears protective and infrastructural duties.[219] In that sense, international human rights do presuppose active statehood – always in line with safeguards of the rule of law – rather than cutting back on state interventions into market forces. Moyn also seems unaware that "the move in human rights law from formal equality to substantial equality (a move fought for by social movements) has worked to redress material equality".[220] Most importantly, however, numerous human rights defenders certainly do not act as promoters of market fundamentalism. With regard to Latin American experiences, Kathryn Sikkink points out: "When neoliberalism emerged in the late twentieth century, human rights actors in some parts of the world began fighting in opposition to neo-liberal policies, not in complicity with it."[221]

Moyn's insistence that human rights are "not enough" is of course in a way correct. It is a truism that rights-based approaches, seen in isolation, do not suffice in the fight for equality and social justice worldwide. Today this may be more evident than ever, especially in the face of the devastating consequences of global warming: growing desertification, future climate change-induced mass migration and other crisis phenomena. This multidimensional crisis confronts humanity with unprecedented justice issues on a planetary scale. Those who have contributed the least to environmental damages, like indigenous peoples, are the ones most heavily affected by the disastrous consequences. Indeed, this is power

[219] On the state duties to respect, protect and fulfill see e.g. Michael Krennerich, *Soziale Menschenrechte. Zwischen Recht und Politik,* Frankfurt: Wochenschau-Verlag 2013.

[220] Margot E. Salomon and Martin Scheinin, Review of Moyn's book "Not Enough", in: *Leiden Journal of International Law*, Vol. 32 (2019), pp. 609-613, at p. 611.

[221] Sikkink, *Evidence for Hope,* op. cit., p. 40.

asymmetry taken to its extremes.[222] The concerted efforts needed to prevent mass-scale humanitarian disasters in the wake of rapidly accelerating ecological devastations certainly go far beyond what the international system of human rights protection will be able to accomplish. This does not alter the fact, however, that human rights have to play their part in designing and implementing policies aimed at achieving social justice within and across national boundaries. To adopt the gloomy view of human rights as an impotent philanthropic gesture, which allegedly merely distracts political attention from the real challenges, would be the wrong answer to the current global crisis; it would merely rob humanity of a source of hope, which in past and present has often demonstrated its potential to motivate people to jointly take action in solidarity.

[222] See e.g. the report to the UN Human Rights Council by the then Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz: *UN Doc. A/HRC/36/46* of 1 November 2017.

6. Restricting Freedom in the Name of Order? The Role of Limitation Clauses

6.1 The notorious "yes-but" attitude toward human rights

"Our government highly values freedom of expression, freedom of assembly, freedom of religion and other human rights. But the government has to safeguard public order, too, especially in the current situation, where we face terrorist threats. Hence the task is to find a viable compromise between freedom and security and to strike a good balance between individual rights and the preservation of public order." These sentences are taken from a fictitious statement issued by the fictitious press officer of a fictitious government. Nonetheless, I am sure it will look familiar to many readers. One of the most confusing experiences in the field of human rights is the observation that many governments, including notorious human rights violators, endorse human rights in theory, as long they can exercise far-reaching control over what this means in practice. This ambivalent attitude manifests itself in a typical "yes-but" rhetoric: *Yes,* of course we accept human rights; *but* we must not go too far. *Yes,* human rights are great; *but* we first have to provide the economic conditions for them to flourish. *Yes,* freedom of expression is important; *but* public criticism of the government should always be constructive. *Yes,* everyone should enjoy their freedom of religion; *but* this must remain within the confines of our national tradition. Countless political statements start with praising human rights in an abstract manner. Yet it often takes less than a minute before the press officer turns to the inevitable caveat: "yes, we generally support human rights, but …"

The problem with this notorious "yes-but" rhetoric is that it blurs the contours of human rights. What is the point of promising respect for human rights, if evasive governments can always slip through the backdoor when wishing to escape their obligations? In many cases, the "yes-but" attitude may be an ill-concealed attempt to get rid of human rights in general. Instead of openly saying "no" to human rights, it may just be more convenient to formally observe the

moral dress code that has become customary in international diplomacy and pay lip service to human rights, without actually meaning it.

There are good reasons to be suspicious of the "yes-but" rhetoric. Many human rights practitioners would certainly like to delete the "but" in the interest of preserving the full substance of human rights provisions. However, things are not so easy. Quite a number of human rights provisions contain limitation clauses, which governments can invoke under certain circumstances, when wishing to limit the application of the respective rights. Article 29, paragraph 1 of the UDHR is an example. After highlighting in paragraph 1 everyone's "duties to the community," paragraph 2 goes on to address possible limitations to human rights: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

While the UDHR has only one generic limitation clause, the *International Covenant on Civil and Political Rights* (ICCPR) contains a number of limitation clauses attached to specific rights, such as freedom of religion or belief, freedom of expression, freedom of peaceful assembly or freedom of association. The wording used in these limitation clauses roughly resembles the just cited formulation in article 29 of the UDHR. When it comes to certain rights of freedoms, the ICCPR thus *expressis verbis* opens a backdoor – or so it may seem. Even worse, article 4 of the ICCPR furthermore addresses the possibility of states derogating from certain human rights related obligations in extreme situations of emergency. Derogation from rights is much more than a limitation. In situations of public emergency, certain human rights may virtually disappear, at least for a while. Under the title of "derogation", the government can suspend some human rights and put them out of the way – or so it may seem at first glance.

Back to the "yes-but" rhetoric, which I criticized just a moment ago. With regard to various provisions contained in the ICCPR and other human rights instruments, it looks as if they themselves displayed such a "yes-but" structure. If this were true, however, governments would be perfectly justified when adding far-

reaching caveats to their formal endorsement of human rights. Why should they not make use of backdoors, which human rights conventions explicitly keep open? What seems convenient for authoritarian governments is a source of frustration for human rights practitioners. Whenever they insist on people's freedom of expression or freedom of assembly, the government may simply respond by pointing to limitation clauses *expressis verbis* contained in human rights conventions. "Yes, everyone is entitled to their human rights," the fictitious press officer may say, "but the government is entitled to limit these rights – just look at the UDHR, the ICCPR and other human rights documents."

6.2 Limiting the scope of permissible limitations

The good news is that our fictitious press officer is wrong. Rather than allowing states to impose limitations as they see fit, limitation clauses contained in the UDHR, the ICCPR and other human rights instruments pursue a different purpose: they link the imposition of limitations to a number of criteria all of which must be met for a limitation to be justifiable. Instead of providing a convenient back door for evasive governments, limitation clauses actually create a *threshold,* which governments first have to overturn when wishing to restrict human rights.[223] While it is true that most human rights provisions do not have the status of "absolute" norms, which stand above any justifiable infringements or limitations whatsoever, restrictive interferences into the substance of human rights must always remain *strictly exceptional;* this is the reason why they are connected to a high threshold. It is the purpose of limitation clauses to define that threshold and thereby preserve the exceptional status of limitations. In other words, rather than permitting the imposition of limitations, they actually *limit the application of permissible limitations.* If one reads the respective clauses carefully, one can hardly overlook this critical function.

Surely, limitation clauses do not remove the "but" that frequently accompanies human rights provisions. Instead, what they

[223] The ICCPR employs the terms "limitation" and "restriction" without clearly differentiating between the two. In the following, I use these two words as equivalent.

do is add a second "but" as it were – or a caveat to the caveat. In response to the "yes-but" language employed by our fictitious press officer, one might for instance say something like the following: *Yes,* it is true that the government has to protect public order; *but* this does not entitle those in power to restrict people's freedom in an arbitrary manner. *Yes,* the country faces threats of terrorism; *but* before imposing limitations the government has to explain in which way these limitations can actually serve the purpose of combating terrorism. *Yes,* in the situation of a pandemic, political demonstrations may pose a danger to public health; *but* instead of prohibiting public assemblies in general, the government could also adopt a policy of fine-tuned stipulations, for instance by insisting on people wearing masks. Bearing in mind that the propositions made by the fictitious press officer added a caveat to human rights guarantees, the responses just sketched out actually function like a caveat to that caveat – or a second "but" by which to contain the consequences of the first "but". So, it looks like we are left with a general structure of "yes-but-but".

After these brief general reflections, let us have a second look at the limitation clause contained in article 29 of the UDHR. Here it is again: "In the exercise of his rights and freedoms, everyone shall be subject ***only*** to such limitations as are determined by law ***solely*** for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." This time, I have highlighted two little words, on which the appropriate interpretation of the limitation clause mainly depends: "only" and "solely". Article 29 of the UDHR specifies two conditions which need to be fulfilled for a limitation to be justifiable. First, a limitation must have a clearly formulated legal basis. It cannot be left, say, to an immigration officer, a police officer or someone else operating in the administration to restrict the exercise of a specific human right. After all, human rights are fundamental rights. They enjoy an elevated rank within the legal order. Whenever a limitation is deemed necessary, the democratically elected legislator has to step in and specify that limitation. Without a formal legal basis, enacted by the legislator, a limitation imposed on a human right would per se be illegitimate. In addition to this, the limitation must serve an important purpose, for example, the protection of public order,

public health or the fundamental rights of other people. This insistence on the important purpose is the second explicit condition mentioned in the above wording. The formulation goes a bit further when additionally specifying that the invocation of public order should meet the standards of "just requirements". Likewise, the invocation of "general welfare" is linked to the standards of "a democratic society".

The limitation clause formulated in article 29 of the UDHR is generic; it applies to various rights listed in the Declaration. By comparison, the limitation clauses contained in the ICCPR are more specific.[224] For example, the article guaranteeing freedom of religion or belief (article 18) stipulates that manifestations of religiosity or belief "may be subject ***only*** to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".[225] I have again highlighted the little word "only", without which the limitation clause would be unable to fulfill its critical role. The subsequent article 19, which deals with freedom of opinion and expression, has a similar formulation. It specifies that the exercise of freedom of expression "may therefore be subject to certain restrictions, but these shall ***only*** be such as provided by law and are necessary: (a) for respect of the rights and reputations of others; (b) for the protection of national security or of public order (*ordre public*), or of public health or morals".[226] The critical thrust in article 21 of the ICCPR, which enshrines freedom of assembly, sticks out even more clearly: "No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interest of national security or public

[224] It should be mentioned in passing that regional human rights instruments likewise contain limitations clauses. Much of what I have just demonstrated with regard to UN instruments, in particular the ICCPR, is applicable to regional systems of human rights protection, too. Moreover, national courts often operate in a similar way when testing the justifiability of infringements on fundamental rights anchored in national constitutions.

[225] Article 18, paragraph 3, of the ICCPR.

[226] Article 19, paragraph 3, of the ICCPR. Instead of using the term "limitation", article 19 refers to "restrictions". The reasons for this terminological difference remain somewhat unclear, as both terms fulfill the same general function.

safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."[227]

It is a truism that limitation clauses do not rule out the possibility of imposing limitations. There can be situations, where limitations are plausible and indeed inevitable. The starting point, however, is the assumption that limitations are *generally impermissible, unless proven otherwise* in a specific situation. The critical function of limitation clauses receives additional clarification in two General Comments issued by the UN Human Rights Committee, i.e. the expert body in charge of monitoring the ICCPR. While General Comment no. 22 deals with freedom of religion or belief, General Comment no. 34 addresses freedom of expression. The points elaborated in those two General Comments have significance beyond the two specific rights, which they undertake to interpret.

According to the UN Human Rights Committee, the limitation clauses attached to freedom of religion and freedom of expression, respectively, contain three main components. In addition to, first, stipulating a clear legal basis and, second, insisting on an important goal, limitation clauses also prescribe a *proportionality test;* this is the third component. In its General Comment no. 22 (1993), the UN Human Rights Committee insists on a strict and narrow interpretation of the limitation clause contained in article 18, paragraph 3 of the ICCPR (freedom of religion or belief): "restrictions are not allowed on grounds not specified there [...]. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner."[228]

The proportionality test has a number of sub-criteria: suitability, necessity and adequacy.[229] Let me briefly illustrate this with regard to freedom of religion or belief. The *suitability* criterion

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[227] Article 21, second sentence, of the ICCPR. The wording used here comes close to the formulation in article 22, which is about freedom of association.

[228] UN Human Rights Committee, *General Comment no. 22* (1993), paragraph 8.

[229] See George Letsas, "Rescuing Proportionality", in *Philosophical Foundations of Human Rights,* ed. by Rowan Craft, S. Matthew Liao and Massimo Renzo, Oxford University Press, 2015, pp. 316-340.

aims to prevent measures, by which the government may wish to "show off" and demonstrate its strength or resolution, without thereby actually tackling the problem at hand. For example, when it comes to preventing terrorist violence committed in the name of a particular religion, a government may be tempted to prohibit the public display of symbols of that religion, thus encroaching on many people's religious freedom. However, the suitability of this kind of prohibition has often proved questionable, because there is usually no clear link between the adopted restrictive interference and the purpose – public safety from terrorism – this is supposed to serve. In that case, the imposed limitation would fail to meet the suitability criterion and thus be unjustified. The second sub-criterion within the proportionality test is the *necessity* of a particular limitation. In the interest of preserving the substance of human rights, the government, when imposing a limitation, should never go beyond what is strictly needed in order to achieve an important goal. For example, in order to prevent mass infections with the Covid-19 virus, the government may see the need to limit community-related forms of religious worship, which typically bring together many people. While the purpose – public health – is doubtlessly important, the government should always resort to the least far-reaching infringement from the list of available options. For example, instead of issuing a blanket prohibition of all community-related worship, it may be possible to achieve the same result by observing certain stipulations, like keeping distance, opening windows and wearing masks. In that case, the government has to prescribe the less-restrictive measure; this is what the necessity criterion requires. Another example is the political fight against religious extremism, which in many countries has become the pretext for imposing far-reaching restrictions on religious communities broadly – frequently in breach of the necessity criterion. The last sub-criterion is *adequacy*. It requires a broad impact analysis of the likely outcomes, including unintended side-effects of restrictive legislative measures.

In General Comment no. 34 (2011), the Human Rights Committee adds more details on how to interpret the various components of the limitation clause, which in this case is attached to freedom of expression. Against the background of widespread misunderstandings, the Committee firstly highlights the exceptional nature of restrictions: "(…) when a State party imposes restrictions on

the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed."[230] In the interest of preserving that relationship between rule and exception, a diligent and precise handling of the proportionality test is of the essence: "When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[231]

People who have reasons to believe that their human rights – e.g. freedom of religion or belief, freedom of expression and other rights to freedom – have been unduly infringed upon have the right to resort to judicial remedies and bring their concerns before a court. When deciding on limitations or infringements, courts have to go through a list of questions – along the line of the criteria just mentioned: Is there sufficiently clear and specific legal basis? Do limitations enacted by the state pursue an important goal from the list of legitimate purposes? Are the restrictive measures adopted by the government suitable for achieving the said goal? Do they remain within the realm of strict necessity? Can they be considered adequate, not least with regard to possible side-effects? The point is that limitations need to be justified against *all* of these criteria. The criteria apply cumulatively. Without a sufficient clear and specific legal basis, an imposed limitation would be unjustified. The same is true if the government cannot come up with a legitimate goal or if the adopted restrictive measures fail to meet the proportionality test, with all its sub-criteria.

As mentioned before, derogation goes much farther than limitation; it amounts to the temporary suspension of certain human rights-related obligations in extreme situations of emergency, such as violent conflict. Article 4 of the ICCPR provides: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present

[230] UN Human Rights Committee, *General Comment no. 34* (2011), paragraph 21.
[231] Ibid, paragraph 35.

Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation (…)".[232] Article 4 goes on to specify certain conditions, including the maintenance of equality and non-discrimination in the application of fundamental rights. Some human rights provisions are explicitly exempted from the possibility of derogation.[233]

Derogation is a highly delicate issue, because it can become the entry point for far-reaching encroachments of human rights. This problem is not merely hypothetical. Autocratic governments across the globe have frequently invoked a national emergency as an excuse to rid themselves of human rights-related obligations broadly. Some governments have imposed a permanent state of emergency, by which they factually suspend respect for human rights as long as they wish.[234] The UN Human Rights Committee is anxious not to lend legitimacy to such abusive practices. In its General Comment no. 29 (2001), the Committee therefore insists on a *narrow and precise interpretation* of the derogation clause contained in article 4 of the ICCPR. According to the Committee, this article "subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards".[235] The General Comment emphasizes the "exceptional and temporary nature" of derogations, the duty of formal notification of the international community by the respective state and "the maintenance of the principles of legality and rule of law".[236] It also qualifies the term public emergency in order to avoid its wide and trivializing invocation. The precondition for imposing the state of emergency is that no less than "the life of the nation" is seriously in danger. Any adopted measures must be "limited to the extent strictly required by the exigencies of the situation".[237] While derogation should not be confused with restrictions or limitations of human rights, the principle of proportionality applies here as well.[238]

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[232] Article 4, paragraph 1, of the ICCPR.
[233] See Article 4, paragraph 2, of the ICCPR.
[234] See below, chapter 7, section 4.
[235] UN Human Rights Committee, *General Comment no. 29* (2001), paragraph 1.
[236] Ibid., paragraph 2.
[237] Ibid., paragraph 3.
[238] See ibid., paragraph 4.

Above all, the purpose of derogation must be to return to "a state of normalcy where full respect for the Covenant can again be secured".[239] By emphasizing these and other obligations, the Committee upholds a clear understanding of state accountability vis-à-vis human rights also in situations of public emergency – or this is the aspiration.

6.3 Strict justification requirements rather than vague "balancing"

The interpretation of limitation clauses attached to human rights provisions involves many technicalities like the various sub-criteria of proportionality testing. For those unfamiliar with legal reasoning this may look like a dry and complicated theme. However, the general purpose of those clauses is easy to understand. They serve as critical reminders that any limitation imposed on human rights, if deemed necessary, must remain an exception. The same is true, when it comes to derogations, whose impact can be much more dramatic. While situations may emerge, in which limitations or even derogations from certain rights are factually unavoidable, the task remains to preserve the substance of human rights to the maximum degree possible in the specific context. Formally mandated monitoring agencies, like the UN Human Rights Committee, as well as civil society organizations have a critical "watch dog" function in this regard.

I have already quoted the UN Human Rights Committee's warning "that the relation between right and restriction and between norm and exception must not be reversed". From this warning, it follows that in case of restrictions the onus of argumentation systematically falls on the side of those who deem the restrictions necessary. It falls on them to provide plausible reasons that the restrictions, which they wish to see enacted, serve an important goal (e.g. public order or public health) and are actually proportionate (suitable, necessary and adequate) for achieving that goal. Those wishing to exercise their human rights or promote the enjoyment of human rights by others, by contrast, do not have to justify their position. No one should end up in a situation where they have to

[239] Ibid., paragraph 1.

present arguments as to why they wish to make use of their freedom of expression or their freedom of religion. These and other rights to freedom have a particularly high normative status within the legal order. While their full enjoyment is the rule, for which no one is supposed to provide a justification, limitations are exceptional and do require a justificatory argumentation.

Unfortunately, this structure – although clear in theory – gets frequently blurred in practice. In numerous countries, especially those governed by authoritarian regimes, the enjoyment of fundamental freedoms appears to be a sort of "luxury", which citizens may at best receive in exchange for political loyalty. While the government takes the liberty to restrict human rights whenever this seems politically opportune, people are largely dependent on the good will of those in power. In such situations, no one can actually rely – let alone insist – on respect of their rights. Yet even in liberal democracies, the relationship between rights to freedom and their limitations is often less clear than it should be. A frequently used metaphor, which can create a lot of confusion in this regard, is the word "balancing". It is no coincidence that the fictitious press officer cited in the beginning of this chapter also invoked the need "to strike a good balance between individual rights and the preservation of public order".

Balancing is a popular metaphor. In situations of conflict, when different interests collide, the term seems to have an intuitive plausibility, because it emphasizes the task of finding some sort of compromise. There seems to be something inherently compelling in that terminology, because it alludes to intellectual virtues like sophistication, nuanced thinking and careful positioning. A "balanced" approach thus represents the aspiration to accommodate diverse perspectives and to do justice to different interests. This may account for the extraordinary popularity of the term, not least in the context of human rights. Even courts surprisingly often resort to the language of "balancing".

However, the widespread "balancing" semantics warrants a word of caution because it can undermine the strict criteria set out to test the justifiability of limitations. Those using that language thereby explicitly or implicitly invoke the metaphor of the weighing scales. When embarking on a "balancing" exercise, we usually measure conflicting things – interests, concerns or values – by putting them on

the two opposite scales, in order to find out which one carries more weight. The main problem is that the two scales are imagined as being symmetrical; otherwise the metaphor would not make sense. The picture of the weighing scales furthermore nourishes the expectation that the adequate solution will somehow lie in the middle ground between the two conflicting goods. Rather than keeping the burden of justification systematically on *one side only,* as requested by the critical function of limitation clauses, balancing processes amount to sharing that burden between the two sides. This is a serious problem. Guglielmo Verdirame is right when warning that an unqualified use of the balancing metaphor invites trade-offs, which in the long run would jeopardize the elevated normative rank of human rights: "A right that is balanceable (…) cannot be fundamental."[240]

In the interest of preserving the critical function of limitation clauses, it seems advisable to insist on strict justification requirements, which systematically fall on those arguing for limitations; it is up to them – and only them – to carry the burden of providing plausible arguments to justify infringements. The strict logic of justification requirements thus differs essentially from putting competing arguments on the weighing scales, and it is important to be clear about that conceptual difference.[241] An unqualified invocation of the balancing metaphor poses a threat to

[240] Guglielmo Verdirame, "Rescuing Human Rights from Proportionality", in *Philosophical Foundations of Human Rights*, op. cit., pp. 341-357 at p. 354.

[241] The situation is more complicated if human rights concerns are on both sides of the equation. Limitations on the enjoyment of a human right can also be imposed in the interest of protecting the human rights of others. For example, the legislator may wish to restrict certain manifestations of freedom of religion or belief in order to promote gender equality against religiously colorized patriarchal values. Even in such cases of conflicting human rights concerns, however, the language of "balancing" can be misleading, since it seems to suggest that the solution must somehow lie in the middle ground between the two colliding concerns. Instead the task remains to do justice to the maximum of all human rights concerns that are relevant in a particular case. For a thorough discussion of this problem (with regard to the example of freedom of religion or belief), see Heiner Bielefeldt, "Limiting Permissible Limitations: How to Preserve the Substance of Religious Freedom", in *Religion and Human Rights,* Vol. 15 (2020), pp. 3-19.

human rights. In the long run, it can blur the status of human rights norms by exposing them to all sorts of trade-offs or wishy-washy compromises. By contrast, justification requirements, as prescribed by limitation clauses, call for conceptual precision and diligent application.

Moreover, justifiability has its inherent limitations. Practices like torture, enslavement or brainwashing can never be justified – not even in extreme situations of emergency. Such practices do not allow for any comprises, let alone "balancing" exercises. The only possible answer is crystal-clear rejection. The ICCPR provides a number of examples. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[242] "No one shall be held in slavery; slavery and the slave trade, in all their forms shall be prohibited."[243] "No one shall be held in servitude."[244] "No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice."[245] Absolute prohibitions like these define the "red lines", which can never be legitimately crossed. In addition to functioning as practical safeguards, such absolute prohibitions also have an important symbolic significance for the understanding of human rights in general. They remind us that, notwithstanding a certain degree of pragmatic elasticity, human rights epitomize the due respect for everyone's human dignity. This respect is axiomatic; it is neither negotiable nor balanceable.

6.4 Why it is important to deal with limitation clauses

At first glance, limitation clauses seem to be a somewhat unpleasant theme. Not only do they presuppose a certain familiarity with the technicalities of legal reasoning; they may even become a source of serious disappointment. I remember expressions of frustration coming up in human rights training courses. After learning that human rights are politically important and that they carry a peculiar normative authority within the legal order, participants had to face

[242] Article 7, first sentence, of the ICCPR.
[243] Article 8, paragraph 1, of the ICCPR.
[244] Article 8, paragraph 2, of the ICCPR.
[245] Article 18, paragraph 2, of the ICCPR.

the sobering insight that most human rights norms are not absolute. Under certain circumstances, they can be limited. Even worse, governments have the possibility to derogate from certain rights in situations of emergency. Authoritarian governments when imposing broad limitations might thus feel invited to cite international human rights instruments to back up their restrictive policies. What an absurdity!

At closer scrutiny, however, the picture changes thoroughly. Limitation clauses do not open the proverbial backdoor, which authoritarian governments may find convenient when wishing to escape human rights-related monitoring. The opposite is true. Limitation clauses pursue the purpose of safeguarding the substance of human rights guarantees also under circumstances of conflict, crisis or emergency. Human rights are not a luxury for times of peace and tranquility; they also apply under complicated circumstances when they are most needed. They are particularly valuable in situations of conflict or emergency. For example, to make use of freedom of expression can help counter spiteful disinformation campaigns, which in a political crisis would otherwise spike violent escalation. During a life-threatening pandemic, too, people should always be free to voice their concerns and priorities in public. And never is access to legal remedies more precious than in a situation of political turmoil. In other words, the monitoring of human rights proves particularly important under circumstances of conflict, crisis or emergency. Limitation clauses and the safeguards attached to the derogation clause of the ICCPR are supposed to provide guidance in this regard. Few issues are more important for the practice of human rights than a precise and diligent handling of limitation and derogation clauses.

Human rights are not a utopian dream; they apply in the real world. That is why they have to accommodate the experience that rights of freedom can occasionally collide – or seem to collide – with important interests of public safety, public health or other societal goals. This requires a certain degree of pragmatic flexibility. However, instead of permitting governments to impose blanket restrictions in such conflict situations, limitation clauses are a tool by which to hold governments *strictly accountable* for what they do. Any limitation to a right of freedom, when imposed by the government, requires ongoing justification, measured against a list of binding criteria set

out specifically for that purpose. Moreover, the onus of justification always falls on the side of those who argue for limitations. This is also true and even more important when it comes to invoking derogation from certain rights. Based on such an understanding, monitoring agencies – both formally mandated committees and self-mandated civil society organizations – can carry out their critical work. Moreover, whoever feels that their rights have been unduly infringed must have access to judicial remedies.

The limitation clauses and the derogation clause formulated in the ICCPR and other human rights instruments are quite short. For a comprehensive understanding one also has to consult interpretative tools like General Comments and look into the development of case law. This is a task for specialized lawyers. Yet the general idea underneath the said clauses is easy to comprehend. The role of limitation clauses can and should be a subject in human rights education and human rights training broadly. To learn about principles and norms is not enough; one also needs a general understanding on how to apply them in the real world, especially under complicated circumstances. Hence, it would be good if many people learned how to counter the notorious "yes-but" language described at the beginning of this chapter. Governments should not get away with that kind of evasive rhetoric. And the fictitious press officer should certainly not have the last word.

7. Corruption, Scapegoating and the Politics of Fear: Political Root-Causes of Human Rights Violations

7.1 Actors, factors and phenomena

Violations of human rights take place in detention camps, police cells, immigrations offices, boot camps, private and public companies, railway stations and airports, refugee camps, court yards, church buildings, shopping malls, prisons and youth correction centers, hospitals and psychiatric clinics, neighborhoods, public and private media, chat-rooms and dating portals, sports compounds, schools and kindergartens and not least in private homes. In short, they can occur everywhere. Configurations of perpetrators and victims are as manifold as are internal motives and external factors. Violations can originate from actions or omissions or – in many cases – a combination of both. Among the perpetrators are state agencies as well as non-state actors. As already discussed in the chapter on discrimination,[246] some of the obstacles to substantive equality originate from societal structures that most people may just take for granted. While in theory everyone can become a victim of human rights abuses, individuals living in situations of increased vulnerability – refugees, internally displaced persons, immigrants, stateless persons, children, religious or linguistic minorities, LGBTIQ-persons, economically poor people etc. – bear disproportionate risks. Human rights violations furthermore show a broad variety of patterns and quite different degrees of intensity, ranging from mobbing among colleagues and spiteful smear campaigns to targeted political repression and orchestrated massacres.

A comprehensive list of the various factors underneath human rights abuses would be hopelessly long and at the same time hopelessly abstract. It would have to include militant nationalism, ideological fanaticism, lack of social empathy, political control obsessions of autocratic regimes, misogynic family structures, traditional gender clichés, economic power asymmetries, old and new

[246] See above, chapter 5, section 4.

racist stereotypes, aggressive marketing strategies of social media, invisible societal barriers, religious hegemonies and many other things. A detailed analysis of the phenomena, root-causes, factors and actors can only make sense within a specific context. Obviously, this cannot be the purpose of a short introduction like this one. Still, I felt it was necessary to say something about root-causes of violations. In the following sections, I describe three structural patterns, which exist in different countries across the globe. While I cannot go into contextual specificities, my purpose is not to remain entirely abstract. This is why I have chosen a typological approach. I am confident that readers will be able to connect many of the described features to their own context-specific observations and experiences.

7.2 Poisonous effects of endemic corruption

A main factor causing or exacerbating human rights violations is corruption. What I have in mind is not the occasional act of bribery, which can occur everywhere, but *endemic corruption,* which penetrates all spheres of society, including state institutions. Where endemic corruption permeates societal relations, habits and expectations, people may feel they have no choice. Even if they personally despise corruption and hate themselves for being complicit in it, they may feel they cannot help it. Without providing the proverbial "little gifts", they would risk getting molested by the local police, they would face unnecessary hurdles in the administration and their children could get bad marks in school – or this is what they fear. Corruption can become a force of habit. Assuming that everyone else is involved, those trying to resist would have to take risks. They may end up isolated. Even worse, it can happen that their dearest and nearest, too, will suffer the consequences. This makes it difficult to break through the vicious circle of ascribed expectations, silent shame and ubiquitous complicity. While it is easy to reject corruption in theory, it is quite complicated to fight it in practice.

Endemic corruption has many negative effects. Peter Balleis compares it to a "cancer … that causes metastases at all levels thereby threatening the moral and social fabric of entire communities".[247] To

[247] Peter Balleis, *Seht den Menschen,* op. cit., p. 77.

start with, corruption deepens the gap between those who can afford the required extra payments and those who cannot. Whereas affluent people can purchase privileged treatment for themselves and their families, economically poor people are all the more dependent on the good will of those in power. To be exposed to daily little acts of extortion or blackmail is humiliating for everyone – but not for everyone equally. One of the worst consequences of endemic corruption is that it undermines trust in the fair functioning of public institutions. In extreme situations, the institutions of the state no longer deserve to be called "public", because they mainly cater to private interests of influential people and their networks. While the façade of statehood may still be in place, the administrative and legislative institutions of the state may have factually fallen prey to the predominant influence of oligarchs and their clientele or to otherwise "important" persons. In some countries, even the judiciary may be just another mafia institution.[248]

Endemic corruption and respect for human rights mutually exclude each other. As briefly discussed previously, a culture of human rights presupposes a by-and-large functioning statehood.[249] The institutions of the state should at least deserve a minimum of trust – always in conjunction with critical monitoring, mechanisms of checks and balances and critical public discourse. For instance, no one can feel safe in the enjoyment of their basic rights, unless they have access to judicial remedies in case of unjustified infringements. It is the task of the state to provide such remedies through a judiciary that is free from corruption and effectively accessible to all. By eroding the principles and institutions of the rule of law, endemic corruption amounts to a de-facto denial of human rights. While this ultimately affects society as a whole, the effects are particularly pernicious for those who lack the necessary resources and connections. They may end up in a situation characterized by daily

[248] I remember discussions with civil society organizations in an Eastern European country. We also talked about the role of the national judiciary. The comments were mostly sarcastic, and one person said: "the only court with trust is the European Court of Human Rights in Strasbourg".

[249] See above, chapter 2, section 2. I am using the formulation "by-and-large functioning statehood" to indicate that one cannot expect perfection in this regard.

humiliation, exposure to arbitrary decisions, feelings of helplessness and systematic discrimination. In his reports to the UN General Assembly, Diego García-Sayán, UN Special Rapporteur on the independence of judges and lawyers, calls upon the international community to pay more systematic attention to the perilous effects of corruption. In his view, "corruption should not only be understood as affecting human rights, but also as a human rights violation in itself."[250]

With the erosion of trust in public institutions, a society is in danger of falling more and more apart into different segments, milieus and groupings. Depending on the specific context, societal fragmentation can occur along the urban-rural divide, thereby also fueling conflicts between modern and traditional sectors of society. In addition, corruption always exacerbates the division between the rich and the poor. Yet the fault-lines can also run along ethnic or religious boundaries or a combination of both. In that case, the result may be an increasing "ethnicization" or "religionization" of politics, which we actually see occurring in quite a number of countries across the continents.[251] In the face of endemic corruption and the concomitant erosion of trust in public institutions, people may see no alternative to managing their lives by clinging all the more to their own ethnic or religious groupings. This creates the fertile ground for collective "narrow-mindedness", i.e. an inward-looking mentality of people who feel under siege in an unreliable and hostile environment, thus all the more sticking to an "iron-hard" internal loyalty. Whereas the expectation of loyalty toward one's own group becomes nearly absolute, people have low, if any, expectations with regard to the state, especially if state institutions are mainly run – or perceived to be run – by a competing group.

To be sure, competition is generally healthy; it is part and parcel of a functioning democracy. However, for competition to be productive, it presupposes the possibility for people to meet one another free from fear, across party lines and across ethnic, religious or other boundaries. The idea of a *public space* represents this possibility. The public space provides opportunities for people to

[250] Report of the UN Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, UN Doc. A/76/159 of 9 June 2017, paragraph 75.
[251] See Bielefeldt & Wiener, *Religious Freedom …*, op. cit., pp. 180-184.

actually experience pluralism, to get to know different perceptions, to exchange competing viewpoints and to negotiate the basic terms of coexistence. Under today's conditions, the public space obviously does not function in analogy to a big square, like the *Agora* in ancient Athens or the *Forum Romanum* in ancient Rome, where representatives of the society used to meet on a regular basis. In a modern state, no single physical square would be sizeable enough to bring together all relevant sectors, interests and views of the population. Moreover, today's complex landscape of media, political parties, civil society organizations, interest groups and others actually manifests itself in a *broad plurality* of different real and virtual meeting places, not least internet-based chat-rooms. This has many advantages. However, it is all the more necessary to also overcome the boundaries of particular groupings and exchange different viewpoints and interests. The idea of a common public space represents this aspiration, upon which the flourishing of democracy hinges.

Back to the issue of endemic corruption: Without by-and-large functioning public institutions, it is difficult to cherish a culture of public discourse. The public space, where public discourse can take place, is not a physical or geographical reality; it is a *political accomplishment,* which requires ongoing political investment and cultivation. With the erosion of trust in public institutions this becomes more and more precarious. The increasing fragmentation of a society torn between different groupings can culminate in the breakdown of any meaningful communication across political viewpoints or across ethnic, religious and other boundaries. This creates a dangerous situation, where negative rumors, disinformation campaigns and conspiracy projections can rapidly escalate into violent conflict. Examples from all over the world demonstrate that this danger is not only hypothetical. So called "communal conflicts" typically occur in countries with dysfunctional state institutions, often as a result of large-scale corruption.

At the end of the day, people may even find it impossible to agree on certain elementary facts.[252] Without the common

[252] It is remarkable that Hannah Arendt described this problem already in the 1960s. See e.g. Hannah Arendt, "Truth and Politics", originally published in *The New Yorker* (25 February 1967), pp. 49-88.

denominator of broadly shared basic facts, however, different viewpoints become more and more hermetic. Hence, each of the competing groups or camps clings to their own "facts", for example concerning the outcome of a political election. Donald Trump's disinformation campaign about an allegedly "stolen election", after his loss of the US presidency in 2020, is the most prominent recent example of what can happen in many countries, even old-established democracies. It looks like any society can lapse into the downward spiral of endemic corruption, political cronyism, loss of trust in public institutions, fragmentation of society, erosion of the public space, decline of public discourse, breakdown of inter-group communication, violence and so on.

7.3 Scapegoating and conspiracy projections

Scapegoating is a well-known psychological mechanism. It means projecting feelings of frustration, mistrust, fear or even paranoia upon an easy target: the "scapegoat". A psychology website defines: "Scapegoating serves as an opportunity to explain failures or misdeeds, while maintaining one's positive self-image."[253] To know – or rather to *pretend* to know – who is behind all the negative developments, which one may find disturbing, can provide a short-lived emotional compensation. At least, one feels capable of putting the blame on someone, who allegedly benefits from the various ills of society. Scapegoating furthermore facilitates sharing hostile projections within groups of like-minded people. It can evoke emotions of togetherness and collective willpower and has an enormous potential to mobilize people. In fact, it is a much-used tool in the hands of populist political leaders and autocrats, who frequently base their campaigns on collective resentment and stoked hysteria.

Abstractly speaking, scapegoating may be a temptation for any society. It can actually occur in all countries and across different milieus. Yet a societal climate of deep-seated mistrust sharply increases the danger of scapegoating gaining political influence. This brings us back to the phenomena just described: loss of trust in

[253] http://psychology.iresearchnet.com/social-psychology/social-psychology-theories/scapegoat-theory/.

public institutions and erosion of public discourse, often in the wake of endemic corruption. In societies, where a culture of public discourse no longer exists (or has never existed), people will all the more listen to their own internal networks and echo chambers. Adverse rumors, gossiping, personal fears and negative expectations largely remain unchecked; they are hardly ever exposed to counter-narratives and fact-based counter-evidence. This can further nourish the prevailing atmosphere of collective narrow-mindedness, i.e. a mistrustful attitude of groups of people who feel they are under siege in an unreliable, unpredictable or even hostile environment. When trying to "comprehend" why this is so, they may succumb to the temptation to blame it all on the scapegoat. At the end of the day, there must be someone who clandestinely works "behind the scenes" – or this is the typical assumption.

The usual targets of scapegoating are political, ethnic, religious or other minorities. Although vulnerable in many regards, targeted minorities are imagined as posing a serious threat to society. One widespread assumption is that minorities allegedly operate as "fifth columns" in the interest of hostile foreign powers. Sometimes, minorities are associated with collective historical traumas, for example, the violent partition of the Indian subcontinent during the struggle for independence, whose adverse impact on the situation of minorities in India, Pakistan and Bangladesh is still very much felt today. To a certain degree, this may also echo divide-and-rule policies of former colonial powers, which used to pit various groups against each other in order to preserve their political hegemony. Resentments between different ethnic or religious groups can have a long and confusing history.

It nonetheless remains a paradox that tiny minority groups, which often lack real influence or resources, should become targets of orchestrated political paranoia. How is that possible? One hostile metaphor sometimes occurring in this regard is the virus. This may be the reason why conspiracy projections may receive an additional boost with the spread of a pandemic, like Covid 19.[254] Tiny and

[254] See the summary of the results of a conference held by the Organization for Security and Cooperation in Europe (OSCE) in May 2020: "Minorities have found themselves scapegoated in the wake of the COVID-19 outbreak, with people of Asian backgrounds and other marginalized groups, including

invisible though the virus is, it does have the potential of causing multiple deaths and far-reaching economic and political devastations. Similarly, the limited visibility of small minorities within a country may even confirm existing suspicion. Rather than indicating their actual powerlessness and vulnerability, their lack of visibility perfectly fits the ascription of secret intentions and clandestine maneuvers. Scapegoating does not require facts; it actually functions best under conditions where people have given up the search for reliable information, evidence and counter-evidence. In a hysterical climate of "post-factuality", scapegoating does not meet with any serious obstacles. It thus easily escalates into fully-fledged conspiracy theories.

Hostility toward targeted minorities often combines the two emotions of fear and contempt. This is a strange combination, indeed yet another paradox. People usually fear those who are superior and more powerful, at least in some important strategic aspects. When it comes to contempt, it is the other way around; people typically look down on those they despise. So one may wonder how it is possible to look up and down simultaneously and mobilize the somewhat contradictory emotions of fear and contempt in close conjunction. The answer is that the specific strategic superiority ascribed to the scapegoat displays features of a *"despicable superiority",* as it were. The scapegoat seems to epitomize a power allegedly derived from a thoroughly dishonest collective mindset. Negative stereotypes, as they occur in scapegoating projections, usually include components like "cunning", "clandestine networks" or "acting secretly behind the scenes", possibly in cooperation with powerful foreign agents. A case immediately coming to mind is anti-Semitism. The fabricated "Protocols of the Elders of Zion"[255] are the most notorious example of paranoid conspiracy projections, which to this day constitute the nucleus of anti-Semitism.

Roma and Sinti, refugees, and migrants, facing a surge in discrimination and hate-motivated attacks." Available under:
https://www.osce.org/odihr/453207.

[255] See Norman Cohn, *Warrant for Genocide. The Myth of the Jewish World Conspiracy and the 'Protocols of the Elders of Zion',* New York: Eyre and Spottiswood, 1967.

One should not forget the gender component, which *always* plays a crucial part in collective hate propaganda. Spiteful images of sexually aggressive minorities combine the contemptuous ascription of "primitive" instincts with the no less negative allegation of a long-term strategic purpose to change the overall demographic patterns of society.[256] This is a toxic mix, which has the potential of mobilizing extremely aggressive collective reactions. It evokes traditional expectations of male protection of female family members, in conjunction with conspiracy theories about the cunning of the "internal enemy" who allegedly attacks society's most vulnerable members. This pattern exists in many variations. I once heard bizarre rumors about an underwear factory run by Muslims in a south Asian country. The story was that the owners would allegedly insert a chemical substance into the female underwear they produce in order to manipulate the fertility rate of the majority population with the long-term purpose of tipping the demographic balance in favor of Islam. Far-fetched though these rumors sound, they certainly have the potential to drive the targeted company into bankruptcy.

Such hostile images typically play upon atavistic male worries about an alleged lack of protection for their wives, mothers, sisters and daughters, while at the same time mobilizing collective concerns about the long-term survival prospects of one's own ethnic community. To portray targeted minorities as being simultaneously "primitive" and strategically "cunning" furthermore erodes any moral obstacles to taking violent action allegedly conducted in collective self-defense. Hate propaganda thus culminates in thoroughly de-humanizing the human scapegoat and removing any barriers against violent aggression. Adama Dieng, former advisor to the UN Secretary General on the prevention of genocide, again and again pointed to this danger when spreading the warning that "words kill as bullets".[257] Spiteful propaganda and disinformation campaigns have the potential to trigger mass-scale atrocities.

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[256] See Mohan Rao, "Love Jihad and Demographic Fears", in *Indian Journal of Gender Studies,* Vol. 18 (2011), pp. 423-430.

[257] See Adama Dieng's video message: https://www.facebook.com/unitednations/videos/words-kill-as-bullets/2069836236456392/.

7.4 Autocracies, one-party regimes and the politics of fear

Autocratic governments are regimes of fear. They are *based on fear,* they *spread fear,* and they are *driven by fear.* These aspects are interwoven in various ways.

Like other governments, autocratic regimes, too, face the need to somehow "justify" their politics.[258] Those in power may claim a superior wisdom, by which they – and only they – can guarantee the flourishing of the nation; they may invoke an inherited mandate deeply anchored in the history of the country; or they may build their authority upon the self-declared task to defend the purity of religious dogmas against "heretics" and "unbelievers". In any case, what is hardly ever missing in the justification rhetoric of authoritarian governments is the alleged necessity to defend the people against external and internal enemies. The imagined imminence of serious threats seems to justify draconian measures, including systematic censorship of the media, the use of police violence against peaceful demonstrators, detentions without charge and the repeated postponement of political elections.

Today, autocratic governments, too, often profess an appreciation of human rights *in theory*, as long as they have sufficient leeway to define what this means *in practice.* To declare a state of emergency provides the most convenient pretext for limiting or suspending human rights in practice – in many cases far beyond what limitation and derogation clauses actually permit.[259] While the limitation clauses attached to freedom of expression, freedom of assembly or other rights of freedom define a *high threshold,* which the government first has to overturn, before imposing specific contextual restrictions,[260] autocratic regimes tend to turn those clauses upside down in order to use them as convenient entry points for getting rid of rights-based obligations in general. At the end of the day, it is not the government providing plausible justification for

[258] See Johannes Gerschewski, "The Three Pillars of Stability: Legitimation, Repression, and Co-optation in Autocratic Regimes", in *Democratization,* Vol. 20 (2013), pp. 13-38.
[259] See chapter 6.
[260] These restrictions should always be linked to critical monitoring.

limiting human rights in a specific exceptional situation; instead, the citizens find themselves in a position where they generally have to present "excuses" when wishing to exercise their fundamental freedoms. Absurd though this may sound, it is reality in many countries.

To be sure, any government, whether democratic or autocratic, can actually face threats to which those in charge must respond: terrorist groups, violent separatist movements or rapidly spreading diseases, like the Covid-19 pandemic. However, while respect for human rights and the rule of law requires that the government is always *precise* when identifying imminent dangers and specifying the necessary and proportionate measures, autocratic governments strategically *avoid any precision* in this regard. Autocrats like Putin or Erdogan use the language of "terrorism" vaguely and broadly, in order to create a political climate of fear or hysteria. Whoever dares to question the wisdom of the government will quickly face charges of terrorism, high treason and collaboration with the enemy. The said offences often lack a clear definition, thus giving the government maximum leeway to stigmatize and criminalize whomever they wish. Following the example of Russia under Putin, some right-wing European governments, like Victor Orbán's Hungary, have introduced laws that oblige independent civil society organizations to label themselves "foreign agents", whenever they are – or are said to be – somehow in touch with organizations abroad.[261]

As pointed out above, scapegoating is a mechanism that occurs in all societies. However, in countries that are in the grip of an autocratic regime, the likelihood, the intensity and the adverse effects of scapegoating achieve new dimensions. To stoke collective fear is one of the typical ingredients of authoritarian political rhetoric. Thus, the regime has to present a target group, on which to blame all the problems the society is confronted with. What then usually happens is that the government systematically utilizes the formal and informal instruments of the state to persecute its alleged internal enemies. While trying to silence independent voices, the government at the

[261] See the critical documentation enacted under the auspices of the European Parliament: https://www.europarl.europa.eu/doceo/document/TA-9-2019-0108_EN.html.

same time may use its control over media to drum up collective hatred. Criminal laws linked to vaguely circumscribed "offences" provide convenient options for detaining people without due process. Legally prescribed self-stigmatization of groups – e.g. as "foreign agents" – systematically exacerbates their societal isolation. Tax laws provide the pretext for confiscating property and imposing arbitrary fines. Critics lose their jobs, their private enterprises are driven into bankruptcy, and their children may face difficulties in school or do not obtain admittance to higher education. Restrictive regulations for public assemblies create unpredictable risks for the organizers of demonstrations, who may end up in a situation, where they have to pay for the damages caused by others, possibly even by thugs employed by the government itself.

Autocratic regimes do not only create a climate of fear within society; quite often they are themselves driven by fear. The absence of "visible" opposition, notably in one-party systems, like North Korea, Eritrea, China or Vietnam, causes those in power to suspect "invisible" opposition or "clandestine disloyalty" anywhere and everywhere. The more they wish to ensure maximum loyalty, the more they experience that an *enforced loyalty* will inevitably remain dubious. There is something utterly artificial in the orchestrated parades in Khartoum, Minsk or Moscow, let alone the publicly staged unanimous applause as predictably performed in the Chinese "People's Chamber". Enforced loyalty actually borders on an oxymoron. Even ideologically convinced functionaries of one-party systems may somehow feel, possibly without ever clearly admitting it even to themselves, that the coerced façade of unanimity remains unreliable. This explains the insatiable control obsessions of authoritarian governments. Some regimes go so far as to infiltrate all sectors of the society with cameras and spies to prevent people from experiencing independent societal life. This can include pitting colleagues and friends against each other, even children against their parents. The purpose is to actively entangle as many people as possible in control practices, by which they become politically and morally complicit in the regime. State authoritarianism usually does not work on a top-down basis only; it also needs to mobilize broad peer pressure. Yet even the combination of top-down restrictions and politically instigated peer pressure will most likely not suffice to put the governing elites at rest.

By declaring any genuine political opposition as illegal, those in office furthermore deprive themselves of the possibility to give up power in a peaceful transformation and to anticipate a possible future role of respected opposition. The persecuted and detained members of the current opposition thus symbolize the regime's own potentially dire future. Once out of power, they themselves might end up in a prison or even worse. Examples from the past and present demonstrate that this can happen rather unexpectedly. The more an autocratic regime employs the arsenal of political repression in order get things fully under control, the more those in power will fear that whatever they do may sooner or later backfire against them. The typical answer is to tighten control measures even further. At the end of the day, the addiction to maximum political control destroys any viable exit options.

Autocratic regimes are politically weak, even though they insinuate the opposite always trying to radiate authority, expertise, strength and resolution. Yet much of this is just a glossy façade, which can quickly collapse. In Hans Christian Andersen's fairytale *The Emperor's New Clothes*[262] the ruler is actually naked – a fact strangely hidden from him. No one dares to speak openly about the emperor's nakedness. Instead, those around him unanimously praise his majesty's "beautiful new clothes". Many people are complicit in perpetuating the big lie, and after a while some may actually believe in what they have grown accustomed to say. This strange ritual goes on and on, until all of a sudden a child starts laughing. "But the Emperor has nothing at all on", the child says. This breaks the spell: People spontaneously join in ridiculing the emperor whom they had venerated – or rather *seemed* to venerate – over years. "He has nothing at all on!" they all shout.

This fairytale illustrates the structural weakness of autocratic governments. By repressing public criticism, preventing fair political competition, postponing or manipulating elections or eroding institutional checks and balances, those in power ultimately perpetuate their own illusions. They systematically shun any "reality test" of transparent opinion polls, open parliamentary debates, uncensored media reports, public discourse or fair elections. The

[262] See https://etc.usf.edu/lit2go/pdf/passage/5637/fairy-tales-and-other-traditional-stories-035-the-emperors-new-clothes.pdf.

flipside is that they will constantly feel threatened by whatever might jeopardize the glossy façade of authority: unpleasant facts not matching the fabricated political self-image, manifestations of independent thinking, organized and unorganized opposition, sarcastic comments, possibly even the innocent remarks of a child. Andersen's fairytale concludes: "The Emperor was upset, for he knew that the people were right. However, he thought the procession must go on now! The lords of the bedchamber took greater pains than ever, to appear holding up a train, although, in reality, there was no train to hold, and the Emperor walked on in his underwear."

7.5 Tackling structural root-causes

In an interview, the British philosopher Raymond Geuss criticizes human rights as "an attempt to shift from politics to legalism".[263] The language of rights, he says, is "a trap because it tries to construe political situations as apolitical".[264] Rather than mobilizing people to take collective political action against the perilous effects of globalized capitalism, human rights organizations are obsessed with normative standards, judicial mechanisms and moralistic naming-and-shaming campaigns – or this is what Geuss assumes. Accordingly, he rejects human rights as "a very bad idea".[265] The ascription of an anti-political abstract normativism plays a major role in contemporary criticisms of human rights, which in Samuel Moyn's view are but a "minimalist utopia of antipolitics".[266] In the eyes of critics like Geuss or Moyn, human rights activists too narrowly focus on individual cases: they fight for the rights of individual victims by trying to bring individual perpetrators to court.

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[263] "Human Rights: A Very Bad Idea", interview of Raymond Geuss by Lawrence Hamilton, in *Theoria: A Journal of Social and Political Theory,* June 2013, pp. 83-103, at p. 90.
[264] Ibid.
[265] See the title of the interview.
[266] Samuel Moyn, *The Last Utopia. Human Rights in History*, Harward University Press, 2010, p. 218. For a thorough counter-criticism, see Heiner Bielefeldt, "Human Rights as a 'Substitute Utopia'? Questionable Assumptions in Samuel Moyn's Work", in *Nordic Journal of Human Rights,* Vol. 38 (2020), pp. 1-17.

The brief typological observations just presented, however, illustrate the significance of a *structural and thus political analysis* in human rights work. Human rights violations do not only stem from personal intentions; they usually have structural causes, too. For example, endemic corruption creates a structure of broad complicity, which those involved cannot easily overcome – even if they would wish to do so. Likewise, scapegoating is more than just a spiteful personal attitude; it has much to do with the culture of public discourse – or rather the lack of it. With the decline of public discourse exacerbated in the absence of trustworthy public institutions, the perilous impact of scapegoating increases sharply. Things get even worse, if autocratic regimes use the scapegoating mechanism in an attempt to "justify" their politics of intimidation marked by censorship, administrative detention or the manipulation of political elections.

It is true that human rights practice frequently focuses on individual cases. Human rights organizations conduct campaigns in support of individual human rights defenders, prisoners of conscience or other targeted persons. Courts, ombuds-institutions and national human rights commissions handle individual complaints. The media report about specific incidents of corruption and abuse of power. Yet each individual case has a broader political context, which should come into focus as well. The suffering of an individual person may be indicative of the general climate in a society; to file a case in support of an individual under pressure can assume a political role as "strategic litigation"; and to provide international support for human rights defenders can have an impact on the broader political situation, within which they live. While solidarity with individual victims of human rights violations should always be a purpose in itself, at the same time it provides opportunities to analyze the broader political environment, within which such abuses occur.

It usually requires far-reaching structural reforms to improve a country's human rights situation in a thorough and sustainable manner. At the same time, human rights themselves can play an active role in such reform policies. One example is the right to freedom of expression, which backs up investigative journalism aimed to unmask cases of political corruption and challenge conspiracy projections through solidly researched facts. It seems impossible to embark on serious political reform agendas against

corruption without appreciating the strategic role of independent media based on their freedom of expression. Moreover, academics using their right to free scientific research can play an important role in detecting structures of discrimination beyond mere anecdotal evidence. Freedom of thought, conscience, religion or belief empowers people to manifest their critical convictions and share them with others, including in the public sphere. Those who want to voice their political concerns visibly and audibly can make use of their freedom of peaceful assembly. Freedom of association entitles people to build civil society organizations or political parties, by which to exercise a more sustainable political influence. Anti-discrimination agendas help discover the various ways in which racist stereotypes and gender-issues are interwoven in collective hate propaganda. A better understanding and handling of limitation clauses attached to human rights may critically thwart the self-serving invocation of emergency situations by autocratic regimes.[267]

The procedural mechanisms attached to international human rights can likewise play a part in promoting political reforms. Their main purpose is to hold governments accountable for their actions and omissions, thus fostering institutions based on the rule of law. To strengthen the rule of law is the systematic answer to endemic corruption and many other structural ills. True, international monitoring mechanisms, as they currently exist in the framework of the UN, can only play a limited role in this regard; they cannot compensate the lack of domestic monitoring. Yet international monitoring can give encouragement to people in their ongoing domestic political fight of a culture of public accountability. Periodic monitoring procedures provide opportunities for civil society organizations – both domestic and international ones – to submit their own findings and participate in the agenda setting of formally mandated UN human rights bodies. These procedural mechanisms can amplify domestic voices and give them international resonance. Thus, human rights instruments harbor political potential for the fight against corruption, scapegoating and autocratic tendencies. As we will see in the last chapter of this book, the effectiveness of these instruments is yet far from satisfactory. However, to dismiss their

[267] See above, chapter 6.

political potential would be the wrong reaction; even worse, it would betray a lack of political judgment.

8. Solidarity across Boundaries: Instruments of International Human Rights Protection

8.1 Local versus global human rights commitment?

In his monograph provocatively titled "The Endtimes of Human Rights", Stephen Hopgood compares the evolving international human rights regime to the Biblical Tower of Babel, the proverbial symbol of human hubris.[268] According to the book of *Genesis,* God punished the people engaged in this overambitious enterprise; the Tower of Babel eventually collapsed. In Hopgood's view, the creation of human rights instruments at the global level is likewise doomed to fall apart. This project, he says, epitomizes "pride, arrogance, an overestimation of one's capabilities" – in short: hubris.[269] Whereas the official human rights mechanisms and forums, as they exist in the context of the United Nations, are mostly detached from the suffering of the people on the ground, international non-governmental organizations (INGOs), like *Amnesty International* or *Human Rights Watch* have become self-serving big enterprises – or this is Hopgood's perception. Not only are global human rights institutions and networks largely ineffective; they may actually weaken local social movements by imposing questionable priorities and donating money linked to programs usually designed by professionals residing in Western capitals.

Throughout his book, Hopgood differentiates between "Human Rights" (with capitalized initials) and "human rights" (non-capitalized). He thereby constructs a clear-cut dichotomy between top-down implementation mechanisms ("Human Rights") and bottom-up initiatives ("human rights"). In the same vein, he pits a patronizing global bureaucracy against people's spontaneous uprisings at local levels. Hopgood is convinced that what he calls "the

[268] See Hopgood, *The Endtimes …*, op. cit., p. 2.
[269] Ibid., p. 142.

one-size-fits-all universalism of global Human Rights"[270] will never be able to meet the contextual demands, needs and wishes that grassroots movements bring to the fore. His diagnosis culminates in an irresoluble antagonism: "The tension between top-down fixed authority [i.e. "the authority" in the singular] and bottom-up authorities [here he uses the plural] is exactly between Human Rights [capitalized initials] and human rights [non-capitalized]."[271] Just as the Biblical Tower of Babel had to fall apart, the idea of global normative standards is bound to collapse, because it nourishes self-deceit, hypocrisy and false expectations; this is Hopgood's point. He seems convinced that the era of global "Human Rights" is approaching its end; it has already reached its final phase. In his opinion, this is good news. The crisis of multilateralism and international law, he thinks, may provide an opportunity to throw off the yoke of the patronizing global system of "Human Rights".

I do not wish to embark on a detailed discussion of Hopgood's position. His book suffers from a number of grave methodological flaws, mainly due to his habit of ignoring any counter-arguments and counter-evidence to his own viewpoints. The simplistic dichotomy, which he constructs between a global infrastructure of "Human Rights" (with capitalized initials) and local initiatives of "human rights" (non-capitalized), lacks the very sensitivity for contextual specificities, which he otherwise demands. At the end of the day, Hopgood's charge of abstract and lofty generalizations, which he launches against INGOs and UN institutions, backfires against his own artificial construction.[272] Nevertheless, I would like to take up his provocations. While the answers he provides are mostly unconvincing, some of the questions he raises are actually necessary. Can the international infrastructure of human rights protection contribute to improving the situation of

[270] Ibid., p. 2.

[271] Ibid., p. 2.

[272] In her response to Hopgood's antagonism between global "Human Rights" and local liberation movements, Kathryn Sikkink invokes a development of "creole legal consciousness", within which global and local experiences become more and more merged. See Sikkink, *Evidence for Hope,* op. cit., pp. 85-87.

people within their specific contexts? And how can these people voice their concerns with a chance to be heard and receive adequate, contextualized support from international organizations? These are the leading questions for this final chapter.

In my sketchy response, I first point to the need to support local human rights defenders (section 8.2.). Subsequently, I explore the contribution of civil society organizations, in particular local NGOs, to the regular monitoring processes at UN level (section 8.3.). I also describe a new trend toward supporting the development of a national human rights infrastructure closely linked to international supervision (section 8.4.). My general message is that through cooperation of different types of organizations in conjunction with a systematic coordination of activities at national, regional and international levels, human rights practice can achieve meaningful results (section 8.5). The chapter concludes by reiterating the need to bring to bear the intrinsic persuasiveness of human rights (section 8.6.).

8.2 Protecting local human rights defenders

Sustainable political changes toward a better human rights situation presuppose concerted efforts of many people. Contextual sensitivities and networks matter a lot and it is usually the locals who are best equipped in this regard. Over the last decades, international human rights politics has actually paid increasing attention to the strategic significance of local human rights defenders. This has become a dominant issue in UN-based mechanisms as well as the policies of various human rights NGOs. Human rights defenders can come from all strata of society. Quite a number of defenders work as journalists, lawyers, physicians or social workers; some of them regularly deal with human rights issues within their professional surroundings. Others come from professions without obvious linkages to human rights issues. Agendas can either cover a broad range of different human rights concerns or focus on specific themes, like indigenous rights, fair public water management or the schooling of refugee children. Some defenders operate with the backing of established institutions, like national trade unions, political parties or religious communities; others act on their own, without any institutional

support or networks. Yet a common feature is that human rights defenders typically work within their own societies.

The crucial role of human rights defenders has received official acknowledgment through a UN declaration specifically dedicated to their cause. It was on the occasion of the 50th anniversary of the UDHR that the UN in December 1998 adopted the *Declaration on Human Rights Defenders.*[273] Article 1 proclaims: "Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels." The Declaration spells out a number of specific entitlements, such as the rights to meet and assemble peacefully, to form NGOs, to communicate, to seek and impart relevant information, to discuss and propose new human rights themes, to get in touch with international human rights bodies and so on. None of these rights are generally new. Yet the point is that the Declaration formally corroborates their specific relevance for human rights defenders.

Based on the 1998 Declaration, two years later the UN created the mandate of the Special Rapporteur on human rights defenders. Supported by staff from the Office of the High Commissioner for Human Rights, the mandate holders[274] so far have dealt with thousands of cases worldwide of human rights defenders under threat.[275] International NGOs, like *Amnesty International* (AI),

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[273] Its official title is *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*. It usually figures under the name of *UN Declaration on Human Rights Defenders.*

[274] Since 2000, four people held this mandate: Hina Jilani from Pakistan, Margaret Sekaggya from Uganda, Michel Forst from France and Mary Lawlor from Ireland (i.e. the current rapporteur), who took up her mandate in 2020. For more information on this mandate see Fact Sheet no. 29 issued by the Office of the High Commissioner for Human Rights titled *Human Rights Defenders: Protecting the Right to Defend Human Rights, available under: https://www.ohchr.org/Documents/Publications/FactSheet29en.pdf.*

[275] See Janika Spannagel, *Can International Attention Protect and Enable Human Rights Defenders? Quantitative and Qualitative Evidence from UN Special Procedures and the Case of Tunisia.* Unpublished PhD Thesis submitted to the University of Freiburg/ Germany, 2021. For her quantitative analysis, Span-

Human Rights Watch (HRW) and *Fédération internationale des droits de l'homme* (FIDH) have likewise focused political attention on human rights defenders. An NGO with a particularly high profile in this area is *Front Line Defenders* (FLD) based in Ireland. FLD was founded by Mary Lawlor, the current UN special rapporteur on human rights defenders, who took office in May 2020.[276]

Some human rights defenders have publicly appreciated the significance of international solidarity campaigns. In an interview with *Front Line Defenders,* Moncef Marzouki, former president of the *Tunisian Human Rights League* confessed that "the feeling that you are supported, even from outside – of course it is much more important to be supported from within the country – but even [...] to know that you are supported by friends, that is extremely important for your high spirits".[277] Beyond moral support, international public attention can have a protective function. Governments are generally aware that harassing critics who are internationally known can get them in political turmoil. To provide effective protection for defenders in risk situations is the main purpose of the UN Special Rapporteur on human rights defenders and the international NGOs operating in this field. Public attention can furthermore amplify the voices of local human rights defenders; it can give them a broad, possibly even worldwide echo. This is yet another potential advantage of international public attention.

At any rate, it is remarkable that quite a number of human rights defenders are actually interested in getting in touch with UN bodies and international NGOs. While generally working within their own communities, they at the same time make use of opportunities offered by international human rights institutions, which can provide moral support, political protection and broader attention. Hopgood's artificially constructed antagonism between top-down implementation strategies and bottom-up grassroots activities fails to take into account those many local defenders who themselves do not

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nagel got hold of more than 12,000 individual cases, which the mandate of the Special Rapporteur adopted between the years 2000 and 2016.

[276] See https://www.frontlinedefenders.org/sites/default/files/fld_global_analysis_2020.pdf.

[277] Cited from Spannagel, op. cit., p. 65.

seem to see that contradiction. As Steven Crawshaw has observed, "activists from some of the most perilous countries in the world risk harassment, arrest or even their lives to go to Geneva and bear witness, for example in advance of their country's Universal Periodic Review at the Human Rights Council. They would hardly do so, if they thought that this whole dry-as-dust procedure was meaningless."[278]

Notwithstanding the said advantages, it is true that international support for local human rights defenders harbors risks; it can cause negative side-effects. For example, while professionals working in international organizations can easily get in touch with university educated people who live in urban areas, are fluent in English and know how to use modern communication technologies, they often face huge obstacles when trying to approach people in rural areas who lack the required linguistic and technological skills. This is an obvious problem. International human rights advocacy can thus inadvertently deepen the urban-rural divide and exacerbate existing patterns of linguistic and educational discrimination. There is also the danger of grave miscommunication. When lacking contextual knowledge and sensitivity, international solidarity campaigns can miss important points. For instance, an advocacy campaign in support of critical bloggers in a south Asian country was based on the assumption that these people were atheists and thus in conflict with the country's religious majority. However, on closer inspection it turned out that some of them were actually practicing members of the majority religion, which did not prevent them from being quite vocal in their criticism of religious authoritarianism.[279] International support can even play into the hands of autocratic regimes, who generally like to portray critics as puppets manipulated by foreign powers. The fact that some governments force civil society organizations to stigmatize themselves as "foreign agents" exemplifies political adaptation strategies, by which those in power try to turn

[278] Steve Crawshaw, "Neo-Westphalia, So What?", in *Debating the Endtimes of Human Rights. Activism and Institutions in a Neo-Westphalian World*, ed. by Doutje Lettinga & Lars van Troost, Amsterdam: Amnesty International Netherlands, 2014, pp. 33-38, at p. 38.

[279] This was my experience when conducting a formal UN visit in my then capacity as UN Special Rapporteur on freedom of religion or belief.

international support campaigns upside down and utilize them to their own advantage. Without a clear awareness of such dangers, advocacy for human rights defenders can cause serious damage; it can expose local human rights defenders to unwanted risk situations and undermine their credibility in the eyes of their fellow citizens.

In spite of such dangers, it would be wrong to terminate international support for local human rights defenders. Instead, what is needed are strategies based on contextual knowledge and sensitivity. Above all, no individual or organization should ever be drawn into the public limelight without their explicit and informed consent. Safety for human rights defenders must always enjoy priority; it must never be compromised for international publicity or the marketing interests of certain organizations. When asked about this issue in an interview, Navanethem Pillay, former UN High Commissioner pointed out: "My staff at the office at the UN High Commissioner for Human Rights were extremely skilled, committed and very enthusiastic, but I always cautioned them: Watch your enthusiasm before you put a human rights defender at risk. I knew the value we had in helping these frontline human rights defenders. And the best approach was always to ask them how far we could go, without endangering them."[280]

It certainly would be wise to also strengthen local or regional networks in their protective function on behalf of defenders. There is also a potential of domestic religious communities in this regard. For example, some Catholic parishes in Vietnam have regularly hosted meetings of human rights defenders on their premises. One of the advantages is that these parishes themselves are well-connected not only within the countries; they also cherish close ties to international partners within the global church. They can thus contribute to a more complex communication flowing from the local to the global level. Last but not least, it is imperative to try to on overcome linguistic barriers in human rights practice. As pointed out earlier, any meaningful human rights intervention requires the art of emphatic listening, which in turn presupposes the readiness to move beyond the comfort zone of established professional partnerships and

[280] https://menschenrechte.freiheit.org/2020/interview/.

to be open to many voices, including voices previously unheard.[281] Surely, this is much easier said than done.

8.3 Civil society contributions to international monitoring

In previous chapters, I have repeatedly cited international human rights conventions, which emerged in the wake of the UDHR. When ratifying these conventions, states formally accept substantial as well as procedural obligations.[282] The most important procedural obligation concerns their participation in regular monitoring processes carried out by independent expert committees. Each of the core human rights conventions mandates such a committee. The expert committees are also generically known as "treaty bodies". Their specific names usually reflect the convention to which they are attached: *Committee on Economic, Social and Cultural Rights, Committee on the Elimination of Discrimination Against Women, Committee Against Torture, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities, Committee against Enforced Disappearances* and so on.[283] Apart from being in charge of conducting regular monitoring processes, the treaty bodies also handle individual complaints.

This is not the place to go into technical details on how the various treaty bodies operate.[284] One general point I would like to stress is that civil society organizations, including local NGOs, can play an active and influential role within the monitoring at the UN level. The monitoring cycle regularly starts with the official self-evaluation of the respective state (the "state report"). To counter the

[281] See above, chapter 4, section 5.

[282] For an overview, see Walter Kälin & Jörg Künzli, *The Law of International Human Rights Protection,* Oxford: Oxford University Press, 2009, pp. 206-238.

[283] The one exception is the expert committee attached to the International Covenant on Civil and Political Rights, which carries the prestigious title *Human Rights Committee.*

[284] For an overview, see Fact Sheet no. 30/Rev. on *The United Nations Human Rights Treaty System,* issued by the Office of the High Commissioner for Human Rights, available under: https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf.

temptation for states to succumb to an easy-going self-marketing, the UN treaty bodies have issued guidelines on how to compose the requested state reports. Governments are expected to provide detailed legal and empirical information, which they should present in a well-structured and transparent manner, in line with the various articles of the respective convention. More importantly, the UN treaty bodies invite civil society organizations to provide their comments on the state report and submit their own independent findings. This invitation is open for broad participation; it addresses international as well as local NGOs and single-issue organizations as well as movements working on a broad range of themes. The "alternative reports" submitted by NGOs (often nicely termed "shadow reports") play a crucial role within the monitoring cycle. Given procedural and financial constraints, the treaty bodies themselves generally do not have the capacity to conduct *in situ* visits and thus depend on information coming from different sources. Obviously, it would be absurd if they were to base their assessments exclusively on the official self-evaluation of governments. It is at this juncture that NGO participation and their "shadow reports" unfold critical significance. It is no exaggeration to say that it is largely due to the contributions submitted by NGOs that the whole procedure of state monitoring has brought about tangible results. Based on the information provided from different angles, the treaty bodies produce their assessments, which always contain a list of country-specific concerns and recommendations. With these "concluding observations", a reporting cycle comes to its end. At the same time the outcome document provides the basis for starting a new cycle, which usually happens a few years later. The results of the monitoring cycle, including the materials and steps leading to the assessments, are publicly available on the website of the *UN Office of the High Commissioner for Human Rights*.[285]

This system of state monitoring suffers from a number of obvious shortcomings. One major problem is fragmentation. Each of the UN conventions has its own monitoring body, leading to a total of currently nine specialized committees, all of which have developed their own jurisdiction. The independent experts sitting in these committees usually meet two or three times per year, with each

[285] See www.ohchr.org.

session lasting about two weeks. Committee members work on a *pro bono* basis. Hence, their capacities are limited. Proposals to streamline the different bodies into one comprehensive permanent body have so far been unsuccessful. Strictly speaking, neither the committees' assessments published on individual cases nor the list of recommendations contained in their country-specific concluding observations has legally binding force, even though it contributes to the clarification of legal standards. The need for a thorough reform to make the system more efficient is clear.

It would nevertheless be wrong to dismiss the existing system of treaty body monitoring as irrelevant. One of its advantages is continuity. It means that issues of concern come up regularly. The periodicity of the monitoring keeps important issues on the agenda on a rather permanent basis. Treaty body monitoring thus serves as an antidote to the volatility of media attention. Public attention concerning human rights often focuses on just a handful of themes, which can quickly lapse into oblivion as soon as new issues emerge. While relying on the media in many regards, human rights commitment at the same time needs resilience against the pitfalls of the notorious "attention economy". The frequently scolded bureaucratic nature of treaty body monitoring thus also has its advantages by adding a much-needed component of stability and continuity to human rights work. This is an obvious advantage.

Another asset is the broad civil society involvement, as already mentioned. The possibility of exercising meaningful influence in all phases of the reporting cycle – from the agenda setting to the outcome document – creates an incentive for NGOs, including local organizations, to play their part within the monitoring process. They can comment on the state report, they can present their own alternative findings, and they can raise issues, which otherwise might go unnoticed. The better the various NGOs cooperate with each other in their alternative "shadow reporting", the higher the likelihood is for them to effectively impact the outcome document. Local NGOs operating under intimidating circumstances sometimes prefer to leave the agenda setting to international counterparts, who feel less threatened. International NGOs in turn are well-advised to remain closely in touch with local organizations. The incentives for better cooperation and more coordination among NGOs exemplify the *indirect effects* of human rights monitoring, which one should not

overlook. Even if the short-term *direct* impact of treaty body recommendations on the human rights situation in a country is often quite limited, the long-term *indirect* effects can nonetheless be significant.[286] More intense cooperation between civil society organizations is a case in question.

Treaty body monitoring furthermore illustrates the cooperation between formally mandated institutions and self-mandated civil society organizations. To say it with a grain of salt, without the involvement of NGOs, the institutions and procedures of international human rights protection would be empty shells. Civil society organizations are often the ones who provide critical information, raise issues of concern and bring up new themes. Yet it is also the other way around that the NGOs benefit from the official mechanisms at the UN level. These mechanisms can serve as "focal points" in the literal sense, thus contributing to a much more focused human rights commitment. The reporting cycle furthermore provides "windows of opportunity", which open up regularly and in a predictable manner. This creates opportunities for long-term coordination between different civil society actors, not least between international and local NGOs. Although most organizations from economically poor countries will not be able to have a permanent office in Geneva or New York, they can team up with partners who are closer to the UN headquarters and willing to host them on strategic occasions. Tailor-made recommendations coming from an officially mandated UN committee lend additional legitimacy to the work of local human rights activities. It may be slightly more difficult for an autocratic regime to stigmatize local NGOs as "foreign agents", if its activities explicitly rely on standards, which the government itself had solemnly signed and ratified.

8.4 National infrastructure with international supervision

Some of the more recent UN human rights instruments go an important step farther by formally requesting governments to make

[286] In his polemical attack on international human rights, Posner ignores such indirect effects. See Eric A. Posner, *The Twilight of Human Rights Law,* Oxford: Oxford University Press, 2014.

investments in domestic infrastructures thereby strengthening the linkages between international standards and human rights protection "on the ground". One example is the *Optional Protocol to the Convention against Torture*. The Optional Protocol represents the move from prohibition to prevention. The *Convention against Torture* (CAT), adopted in 1984, has a clear focus on the prohibition of torture.[287] It outlaws the use of torture or any other forms of cruel, inhuman or degrading treatment of people. The ban on torture is unconditional; it is not subject to any limitation or derogation: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[288] States ratifying CAT, furthermore accept positive obligations, such as combating a culture of impunity in the area of torture. They also submit to the kind of periodic monitoring just described, which takes place under the leadership of the specialized treaty body, i.e. the CAT Committee.

The Optional Protocol to CAT (adopted in 2002) builds upon the prohibition of torture by adding a preventative component.[289] When ratifying the Optional Protocol to CAT, states take the obligation to establish a "national preventative mechanism" (NPM) composed of experts from different disciplines: medicine, psychology, pedagogy, law etc. The NPM expert committee conducts unannounced visits to institutions, where people are typically kept against their will: detentions cells at police stations, prisons and youth correction centers, psychiatric clinics and similar institutions. The idea is not merely to react to public scandals or to respond to specific complaints, but to detect in advance structural risks of torture or other forms of mistreatment. Rather than mainly working retrospectively, the focus is on the *anticipation* of potential risk

[287] See Convention Against Torture and other Forms of Cruel, Inhuman and Degrading Treatment of Punishment, adopted on 10 December 1984: https://www.ohchr.org/en/professionalinterest/pages/cat.aspx.
[288] Article 2, paragraph 2 of CAT.
[289] See https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/OPCATIndex.aspx.

situations, as a result of structural shortcomings.[290] Thus, the overall purpose is to reduce risk factors through preventative scrutiny. The interesting point for the context of this chapter is the systemic link between international and national level. With the Optional Protocol to CAT we have a UN instrument, which formally obliges states to make their structural investments *"at home",* i.e. at the domestic level by establishing the said National Preventative Mechanisms. These NPMs in turn should comply with criteria set up internationally, and they are furthermore subject to supervision at the UN level. This also facilitates an exchange of experiences across national boundaries.

This type of coupling instruments at the global and the national level has become a new model. My second example is the *Convention on the Rights of Persons with Disabilities* (CRPD), which the General Assembly adopted in December 2006. Like other international human rights conventions, the CRPD mandates a treaty body operating at the global level. However, the text of the convention furthermore obliges governments to build an infrastructure at the national level: states have to develop national focal points, in order to concentrate responsibilities for disabilities issues in a transparent manner; they have to establish independent national monitoring institutions tasked with the oversight of national implementation strategies; and they have to cherish a culture of regular consultation with specialized domestic NGOs.[291] Again, the interesting point for the purpose of the present chapter is that all these investments occur at the national level, while the convention itself has a global outreach. The CRPD thus illustrates the way in which international instruments can contribute to strengthening the linkages between global and domestic levels of human rights practice. All in all, this has become a success story.

In this context, one should at least briefly look at the strategic potential of *National Human Rights Institutions,* which have seen a boost since the turn of the century. National Human Rights Institutions (NHRIs) can carry different names: *National Human Rights Commission, Human Rights Institute, Defensor del Pueblo* and other names. Some of these institutions also function as ombuds-

[290] To give just one example, in the absence of professional interpreters misunderstandings in stress situations can quickly escalate to violence.
[291] See article 33 of the CRPD

institutions, which are in charge of non-judicial conflict settlement. Currently (May 2021), 84 NHRIs have full accreditation status, with an additional 33 institutions holding observer status.[292] According to the "Paris Principles",[293] the guidelines for this type of institution, an NHRI is inter alia characterized by an official status (i.e., being anchored in the constitution or established by an act of law), independence from any direct governmental interference and a broad mandate to protect and promote human rights at the domestic level. The increasing significance of NHRIs is one of the most remarkable aspects of the recent human rights infrastructural development. From the perspective of the global human rights protection system, NHRIs appear as national actors. When seen from the domestic perspective, however, they actually function as representatives of international human rights protection, which can only become effective when being "domesticated" in a systematic and reliable manner. In this sense, NHRIs have a strategic role to play in any attempts to coordinate global, regional and domestic/local human rights protection.[294] They also symbolize the increased awareness of the significance of human rights institutions that are close to the people and thus approachable and easily accessible.

[292] See the website of the Global Association of NHRIs: https://ganhri.org/nhri/.

[293] These principles were first developed in 1993 by a conference held in Paris and later adopted as the guiding framework for NHRIs.

[294] One interesting example illustrating the potential of NHRIs is the complaint about human rights violations potentially caused by carbon and industries submitted in 2018 to the Human Rights Commission of the Philippines (i.e. the country's NHRI) by human rights advocates and environmental NGOs, with support of the regional and global forums of National Human Rights Institutions. The fact that the Commission accepted the complaint is an encouraging political signal. See https://www.business-humanrights.org/en/philippines-commission-on-human-rights-reveals-at-cop-25-worlds-most-polluting-companies-can-be-sued-for-contributions-to-global-warming.

8.5 On the path toward a "human rights ecosystem"?

For readers unfamiliar with international law, the landscape of various institutions as just briefly sketched out may look confusingly complicated. I agree: it *is* complicated. We meanwhile have nine core human rights conventions at the UN level, each of them linked to specialized monitoring bodies. In addition, there are UN working groups and special rapporteurs, periodic monitoring procedures, preventative mechanisms in charge of conducting announced visits, NGOs and NHRIs and much more. Like in previous chapters, I have actually limited myself to sketching out just a few examples in order to highlight structural developments. In reality things are much more complex. For instance, states decide for themselves which of the existing UN human rights conventions they wish to ratify; this leads to a confusing pattern of ratifications and concomitant legal obligations. Moreover, when ratifying a human rights convention, governments sometimes enter certain reservations or add declaratory statements, thus widening the space of interpretative contestation. Those governments that want to move farther ahead set up optional protocols, like the Optional Protocol to CAT, as just mentioned. Meanwhile nearly all of the UN human rights conventions have a number of optional protocols attached to them. For a comprehensive analysis, one would also have to integrate the regional level of human rights protection, which is quite complex in itself. In this book, I have taken the – certainly questionable – decision to leave out regional instruments.[295] Otherwise the picture would have become hopelessly complicated, at least for the purpose of a short introduction.

Why this labyrinth? Do the multiple standards, institutions and procedures existing at various levels not prevent many people from making use of a system, which they feel unable to comprehend? This is a legitimate question. The answer is: yes, a more consolidated, more transparent and somewhat simpler system of international human rights protection would certainly be desirable. But to accomplish this will not be easy; it will take time. In this context, one

[295] This decision is certainly questionable given the practical significance of regional human rights protection, which at least in some regions is far more effective than the UN human rights system.

has to appreciate the specific features of international law. In contrast to the national level, international law cannot rely on a comprehensive legislature comparable to a national parliament. In the absence of a consolidated legislature at the global scale, international human rights law inevitably evolves *gradually,* i.e. step by step and often in a somewhat piecemeal fashion: through resolutions, conventions, ratification procedures, optional protocols, the interpretative work of expert committees, a bulk of case law, assumptions of customary law and other mechanisms. The resulting multiplicity of norms and institutions is a challenge even for experts. International human rights jurisdiction is no less fragmented.[296] Treaty bodies play an important role in this regard. Apart from conducting the regular state monitoring, as described above, treaty bodies also handle individual complaints, even though the precise legal authority of their decisions remains contested. Comprehensive human rights courts in the narrow sense currently only exist at the regional level, not at the global level.[297]

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[296] Whereas human rights courts exist at the regional level (see the short overview in the subsequent footnote) a global human rights court at the UN level does not yet exist. The two international courts based in The Hague do not have this function. The *International Court of Justice* (ICJ) is chiefly in charge of handling legal conflicts between states, which usually do not have an explicit human rights dimension. By contrast, the *International Criminal Court* (ICC) dealing with various atrocity crimes has an obvious significance for fighting impunity, which is a major human rights concern. However, apart from its very limited mandate, which merely covers a few mega crimes, the ICC does not handle individual complaints. It is not a court to which individuals could resort when wishing their human rights concerns to be assessed. When it comes to taking up specific crimes falling within the mandate of the ICC, the initiative lies with the general prosecutor.

[297] Regional human rights courts have been established notably in the frameworks of the *Council of Europe,* the *Organization of the American States* and the *African Union.* The European Court of Human Rights based in Strasbourg meanwhile functions as a permanent body with full-time judges who come from all the 47 member states of the Council of Europe. With thousands of judgments per year, the Strasbourg Court has developed a rich jurisprudence, especially in the area of civil and political rights. The Inter-American Court of Human Rights based in San José cooperates with the Inter-American Human Rights Commission, which decides which cases should be brought before the Court. A similar mechanism exists in the African Human Rights system,

In addition to the lack of consolidated lawgiving and jurisdiction at the global level, we face the problem of fragmentation and limited efficiency concerning the implementation of human rights standards. It is disturbing to see that even gross human rights violations frequently remain without adequate answers, to say the least. Dictators unleash police brutality against peaceful demonstrators; populist parties polarize societies by drumming up hatred and spiteful conspiracy theories; civil wars escalate into mass-scale violence; refugees are forcibly deported back or end up in detention camps. Atrocities continue to occur in spite of solemnly adopted resolutions and formally accepted international obligations. This is an unbearable situation and a de-facto betrayal of numerous people in need of support. To make things worse, international human rights protection often proves particularly weak where it is most needed, for example, in situations of violent conflict and warfare.

And yet, it would be a mistake to dismiss the international system of human rights protection as a mere "paper tiger". While the international human rights infrastructure has its obvious gaps and shortcomings, one should not ignore its – admittedly limited – potential. International human rights protection operates on the pragmatic assumption that most states have a natural interest to be regarded as trustworthy partners in international affairs. With the ratification of an international convention they formally accept certain obligations, in conjunction with regular monitoring processes, whose results are publicly available, with the official stamp of an internationally mandated monitoring body. To be exposed in public as a government that fails to honor its formally undertaken international obligations is more than just an embarrassment; it can seriously shrink the space of maneuver, which a government may need to pursue all sorts of interests, for example in areas like economic cooperation, trade, scientific exchange, environmental politics and the like. Notwithstanding the peculiar moral authority that human rights issues claim, there are also quite pragmatic reasons for a government to play its role as a law-abiding and trustworthy

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which is also connected to a court based in Arusha. The *Arab Charter of Human Rights,* although legally binding, is not linked to a regional human rights court.

partner in the international arena – or at least to pretend to do so. Here human rights monitoring sets its incentives; it can motivate states, including somewhat reluctant states, to improve their human rights record. Surely, there are exceptions to this rule. Some governments may think they can afford to ignore any international obligations, because of their political or economic power; others may feel they have nothing to lose. However, it is realistic to assume that most governments do care about their international reputation. The fact that some of them have established their own fake-NGOs (often sarcastically termed GONGOs for "government-organized non-governmental organizations") speaks volumes; it demonstrates their interest to uphold at least a humanitarian façade. NGOs take the pro human rights statements of governments strategically seriously, with the intention of entangling governments systematically within their own rhetoric. The political interest to at least show a humanitarian façade can thus provide entry points for human rights organizations to submit their critical information, to raise credibility issues and to exercise public pressure.

On the long path toward a more consolidated system of human rights protection, it is advisable to strive for synergies, wherever possible, by strengthening systematic cooperation between the various components of the evolving infrastructure. The task is to enhance cooperation between formal and informal actors and accomplish a better coordination between different levels (global, regional, national and local levels) of human rights activities. When using the available instruments in a coordinated manner, human rights politics can achieve meaningful results. In her study titled "Evidence for Hope", Kathryn Sikkink concludes: "An examination of global human rights trends reveals that the record is far more positive than current pessimism suggests."[298] Her findings cover a broad range of different issues, from the abolishment of capital punishment in most states to lower rates of child mortality to improved educational prospects for women and girls in nearly all parts of the world. While rejecting any complacency in human rights work, Sikkink argues for reasonable hope. "We need our anger about injustices and about human rights violations. But we also need hope, resilience, and the

[298] Sikkink, *Evidence for Hope,* op. cit, p. 141.

belief that we can make a difference."[299] In times of growing fatalism and cynicism, this is an important message.

When describing the task of creating synergies between various forums, organizations and mechanisms, César Rodríguez-Garavito has coined the metaphor of an evolving "human rights ecosystem". What defines an ecosystem is the complementarity of different components with different comparative advantages, all of which should be seen together. The point Rodríguez wants to make is that we should learn to see and utilize the various institutions and mechanisms within the emerging human rights infrastructure in a holistic manner and strive for a maximum of synergy. While some monitoring bodies have the advantage of periodicity, others have the advantage of speed; while some types of activity may help evoke broad publicity, others add the necessary normative and empirical precision; while local organizations operate close to the people, international organizations facilitate exchange of experiences across borders. For the time being, striving for synergies seems to be the most promising course to take when wishing to overcome to dangers of fragmentation and creating incentive for states to honour their obligations.

The idea of an emerging human rights ecosystem is also an answer to Hopgood's artificially constructed divide between global top-down architecture ("Human Rights") and local grassroots initiatives ("human rights"). In his response to Hopgood, Rodríguez insists that "the boundaries of the field must be expanded to include both, and open spaces for new actors, themes and strategies that have emerged in the last two decades. To capture and maximize this diversity, I have suggested that the field of human rights should be understood as an ecosystem, more than as an institutional architecture or a unified movement (…). As with every ecosystem, the emphasis should be on the highly diverse contributions of its members, and the relationships and connections among them."[300] While the attractive metaphor of an evolving human rights ecosystem is new, many human rights practitioners have actually been on that

[299] Ibid., p. 248.
[300] César Rodríguez-Garavito, "Towards a Human Rights Ecosystem", in: *Debating the Endtimes of Human Rights*, op. cit. pp. 39-45, at p. 44.

track for many years. Rodríguez, a well-known human rights defender from Colombia, is one of them.

8.6 Solidarity in a spirit of respect

For readers not familiar with international law and international institutions, this final chapter may have been a tough reading. But even a short introduction to the foundations of human rights cannot afford to leave out altogether the complicated institutional aspects of human rights protection. The details are certainly an area for specialized lawyers. At the same time, it is important to broaden the general understanding of how human rights conventions and other mechanisms work in practice. Against the ever-lurking temptations of fatalism and cynicism, it seems necessary to spread the message broadly that it does make sense to defend and further develop the emerging human rights infrastructure. Exposing the existing gaps and bitter shortcomings to an honest criticism is necessary. But the answer can only be to strive for further improvements, not to destroy what we have.

Toward the end of the introductory chapter of this book, I pointed to the paradox that human rights are easy and at the same time difficult. Obviously, one cannot avoid the difficult features. The study of human rights brings together a number of academic disciplines: international law, sociology, political science, philosophy, theology, history and pedagogy. There is a lot to learn and discover – far beyond the issues briefly raised in this short introduction. However, we should not forget that human rights are at the same time an easy subject. They ultimately depend on a few elementary insights. Human rights rest on their own intrinsic persuasiveness – or they would be doomed to collapse. I believe that there is actually something inherently compelling in the idea of equal dignity and equal rights to freedom for all humans across boundaries. The good thing is that this foundational idea of human rights is easy to comprehend. It unfolds its appealing force far beyond the limited circles of experts. It is no less a matter of the heart than a matter of the mind.

Human rights competence ultimately rests on the awareness of our common humanity: the dignity we all share as human beings. More “elementary” than institutional knowledge and technical

expertise is the spirit of respect for human dignity – our own dignity and the equal dignity of everyone else. The awareness of human dignity can motivate us to jointly take action. In order to make a difference, human rights practitioners should certainly be strategic and use all the available avenues and mechanisms. Yet it is no less important to cultivate the sense for the conundrum of human dignity, in a spirit of admiration and humility. When searching for the ultimate source of solidarity, this is where we have to turn.

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[301] To avoid confusion, one should bear in mind that the time of adoption of a convention differs from the time of the entering into legal effect.

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List of abbreviations

AI = Amnesty International

CEDAW = Convention on the Elimination of All Forms of Discrimination Against Women

CRC = Convention on the Right to the Child

CRPD = Convention on the Rights of Persons with Disabilities

FIDH = Fédération internationale des droits de l'homme

FLD = Front Line Defenders

GONGOs = government-organized non-governmental organizations

HRC = Human Rights Council

HRW = Human Rights Watch

LGBTIQ = lesbian, gay, bisexual, transgender, intersex and queer persons

ICCPR = International Covenant on Civil and Political Rights

ICERD = International Convention on the Elimination of all Forms of Racial Discrimination

ICESCR = International Covenant on Economic, Social and Cultural Rights

ICPPED = International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)

INGOs = international non-governmental organizations

JWL = Jesuit Worldwide Learning

NHRIs = national human rights institutions

NGOs = non-governmental organizations

NPM = national preventative mechanism

OHCHR = Office of the High Commissioner for Human Rights

UDHR = Universal Declaration of Human Rights

UN = United Nations

UNHCR = United Nations High Commissioner for Refugees

Human rights are not just another set of legal tools, norms and entitlements. Rather, they radiate the authority of „inalienable rights“, which all human beings equally possess - simply because of their humanness. This is the foundational idea.

Although human rights are a beacon of hope for numerous people in all continents, they remain politically contested in many ways. Critics have questioned the effectiveness of human rights campaigns as well as the legitimacy of promoting universal rights across political and cultural boundaries. In order to respond to critical objections, one has to tackle stereotypical misperceptions, such as the false equation of human rights with an „individualistic“ lifestyle. In fact, human rights facilitate political solidarity based on universal respect.

Unlike other introductions to human rights, which usually focus on legal standards, procedures and institutions, this book mainly explores the foundational principles, which jointly define the human rights approach: inherent dignity, freedom, equality and solidarity. The purpose is to trigger curiosity, critical questions, debates and personal discoveries.

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