

## Introduction

### *Navigating Deep Waters: The Problems of Human Rights and New Perspectives of Inquiry*

The far-off blackness ahead of the ship was like another night seen through the starry night of the earth – the starless night of the immensities beyond the created universe, revealed in its appalling stillness through a low fissure in the glittering sphere of which the earth is the kernel.

“Whatever there might be about,” said Jukes, “we are steaming straight into it.”

Joseph Conrad, *Typhoon*

#### I.1 CRITIQUE AND DEFENSE

In 1945, humanity had sailed through a profoundly dark night. The victims had yet to be counted, but the lessons to be drawn already seemed to be indisputable. One important conclusion was to reassert with sober but unflinching determination an old, revolutionary idea – the idea of every human being’s fundamental rights and equal intrinsic worth. The *Universal Declaration of Human Rights* is the flourish, heralding many following attempts to give these rights a new standing, to make them the mandatory standards for the treatment of humans in ethics and in law, in nation-states, regional organizations and the global community. Some of these attempts met with astonishing success, others were a tragic failure. So far, however, none have achieved the respect that human beings truly deserve.

This inquiry hopes to shed some new light on the content, history, justification and cognitive foundations of this remarkable idea. It argues that a theory of human rights has to engage with these different perspectives to do justice to its subject, in particular if it aims at understanding something meaningful about the relation between human rights, moral cognition and the law. This study intends to identify in a theoretically unconventional and perhaps illuminating way the place of human rights in the human form of life. It will outline why it is crucial to understand the meaning of human rights for humanity’s mode of existence not only for the sake of

analyzing the phenomenon of human rights itself more deeply, but also if we want to fathom what kind of creatures we humans really are. It attempts to rescue the idea of human rights in ethics and law from being washed away by a torrent of critique from history, philosophy, legal theory, moral psychology and neuroscience. It argues that rather than subverting the idea of human rights, the history of this idea and its traces in social practices, as well as normative theory and what is currently known (and not known) about the structure and evolutionary origin of human moral cognition, all only strengthen the case for human rights.

There is a long tradition in philosophy, science and, perhaps most importantly, art that, while devoid of any comforting illusions and bitterly honest about the sinister sides of human emotions, beliefs and actions and the suffering they cause, is driven by a deeply conceived and passionately felt respect for what it means to be human. For these thinkers and artists, humans appear as surprisingly richly endowed beings, with characteristics defying simple explanations, bringing something new and unprecedented to the natural world, radically and rapidly transforming life on Earth by ever new forms of living, insights and the astonishing pursuit of beauty. There is true awe in many voices in philosophy, science and art, expressing the perception that there is a spark of something lovely and sublime in human beings. One of the central reasons for this attitude towards humans is their capacity to act under moral laws with genuine concern for others, to submit to principles of justice, to respect others and their rights and to attempt to build social orders of decency – moved not by the commands of secular or religious superiors, the threat of sanctions, the prospect of direct or indirect personal gains or the hidden, innate machinery of selfishness, but by the autonomous exercise of their moral judgment and the intimate but powerful calls of their conscience. The many other impulses and ideas that drive humans forward, the broad trail of crime and folly in human history and what it says about us, only increase the importance of this often feeble, regularly neglected, occasionally gleefully derided and still sometimes strangely powerful, very peculiar capacity of human beings.

This inquiry will align itself with this tradition with due modesty, maintaining that the idea of human rights expresses a remarkably magnanimous and gentle side of the better parts of human thought and feeling that a human culture disregards to its own detriment. This study will try to show that this idea has deep roots in the history of ethical and legal thought and that it stands up to critical scrutiny of its claim to normative justification both in the ethical and the legal sphere. Its arguments challenge a certain cluster of assumptions about morality in some parts of philosophy, psychology and cognitive science that has become influential over the last decades in a range of different variations and that, for some, defines the hard scientific knowledge of the age. From this point of view, there is no such thing as genuinely selfless morality under principles of justice with a content that is justifiable by convincing reasons, has motivational force and includes all humans or even all sentient beings. Only a life in competing moral clans, guided by a small set of

emotions that are the true core of human morality, comes naturally to human beings. One influential explanation for this is that concern for others beyond limited communities is irreconcilable with the way the human mind has been structured by the forces of evolution. The conclusions drawn from this common point of theoretical departure are diverse: some infer that the best one can hope for is some kind of prudential modification of the natural moral world of human beings to make life on this planet livable, while others are more optimistic and argue that, despite these constraints of human nature, just and caring social and political arrangements are achievable – always threatened, however, by humans' narrow natural moral concerns, which are limited to kin, moral clan members and the well-being and reputation of the agents themselves.

Such theories fail to convince on their own ground, we will argue, if one interprets the empirical evidence of moral psychology and neuroscience within convincing theoretical frameworks and draws plausible conclusions from a sufficiently complex theory of natural evolution's intricate machinery. Even if these theories do not succeed in achieving their theoretical aims, and even though one is well-advised not to draw any normative conclusions from facts of psychology or natural history, such visions can still have substantial harmful effects if sufficiently many people form their idea of the prospects of human morality according to what these theories assert. Such theories can discourage people from pursuing the idea for which a morality of human rights stands – which is not limited to one's own tribe but demands respect, liberty and equality for all human beings, therein lying its whole point and its appeal – by making them lose hope that human beings could be guided by such broader-minded, exacting and generous moral precepts. Such psychological theories may breed cynicism, docile acquiescence to power and self-righteous resignation in a time when a spirited resistance against the dismantling of human rights as an idea, moral practice and legal institution is of central importance if new forms of post-truth political authoritarianism, destructive ethno-nationalism and contempt for human worth are not to win the day. They may also provide an exceedingly and much-desired good conscience for those who have a keen interest in shaking off the shackles of moral principles and weakening the project of human rights because it challenges their power, interests and self-serving actions.<sup>1</sup>

A good starting point to indicate in sufficient detail the cognitive interests and the potential novelty of this study's approach is the simple question: What is the idea of human rights about? Answering this question will identify what the object of inquiry is understood to be and what the main aims of this inquiry are.

<sup>1</sup> As Noam Chomsky observed in his reflections about psychology and ideology, two sorts of questions need to be asked if we are presented with claims about the nature and psychology of human beings: "What is the scientific status of the claims? And, What social or ideological needs do they serve? The questions are logically independent, but those of the second sort naturally come to the fore as scientific pretensions are undermined," Noam Chomsky, *For Reasons of State* (New York: The New Press, 2003), 318.

## I.2 REASON, CONSCIENCE AND RIGHTS

The *Universal Declaration of Human Rights*, which set the example for the attempts to bring the human rights idea into life in the post–World War II era, famously begins with an anthropological assumption: All human beings, it asserts, “are endowed with reason and conscience.”<sup>2</sup> Its text does not draw any explicit conclusions from this, but it is clear that these assumed properties are taken to be relevant to the idea of human rights that the *Universal Declaration* restates so powerfully after the cataclysm of World War II. One underlying idea appears to be that *because* of these properties of human beings, alone or in conjunction with others, we justifiably can conclude that humans are endowed with certain inalienable rights. From this perspective, reason and conscience are *justificatory reasons* for the belief that human beings in fact enjoy human rights. Furthermore, all human beings share these attributes. While the meaning of these attributes may raise substantial questions, the general thrust of the statement thus seems sufficiently clear: Human rights are the birthright of thinking and moral beings.

Another dimension of the meaning of this prominent passage is that because of “reason and conscience,” humans are in fact in an epistemic position to *understand* that their human rights are justified, that they are not doomed to ignorance, and consequently they should take action to protect these rights.<sup>3</sup> Reason and conscience are the means of identifying human rights as well-justified fundamental claims that human beings are entitled to pursue. Reasoning and moral thought are the epistemic keys that unlock the door to the cognition of human rights.<sup>4</sup>

<sup>2</sup> UN General Assembly, *Universal Declaration of Human Rights* (UDHR), Resolution 217 A (III), December 10, 1948, Art. 1.

<sup>3</sup> The preamble of the UDHR states, after all, that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the *conscience of mankind*” (emphasis added).

<sup>4</sup> For a detailed account of the drafting process of the *Universal Declaration*, cf. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 4 ff.; Mary Ann Glendon, *A World Made Anew: Eleanor Roosevelt and the Universal Declaration* (New York: Random House Publishing Group, 2001). The first draft was written by John P. Humphrey, head of the UN Human Rights Division, William Anthony Schabas, ed., *The Universal Declaration of Human Rights: The Travaux Préparatoires*, Vols. I–III (Cambridge: Cambridge University Press, 2013), 281 ff. (E/CN.4/AC.1/3). This draft formed the basis of René Cassin’s new draft, printed in Mare Agi, *René Cassin (1887–1976), Prix Nobel de la Paix: Père de la Déclaration universelle des Droits de l’homme* (Paris: Perrin, 1998), 359 ff. The term “reason” was included in Cassin’s draft by the working group on the *Universal Declaration*, cf. Schabas, *The Universal Declaration*, 788 f. (E/CN.4/AC.1/W.1). The term “conscience” was the end result of an initiative by the influential Chinese delegate Chang to add a Chinese term that he translated literally as “two-man mindedness,” proposing that “sympathy” or “consciousness of one’s fellow man” might be English equivalents, Schabas, *The Universal Declaration*, 800 f. (E/CN.4/AC.1/SR.8). The British delegate Wilson later proposed using the term “conscience,” supported by Chang, among others, Schabas, *The Universal Declaration*, 853 (E/CN.4/AC.1/SR.13). In the final

Interestingly, the foundational role of reason and conscience is more than hortatory rhetoric in the text of the *Universal Declaration*. As was pointed out during a self-reflective moment in the drafting process, the reliance on reasons and arguments was constitutive of this process itself.<sup>5</sup> To be sure, drafting the *Universal Declaration* was a highly complex affair, embedded in the many conflicting aspirations of the most powerful political forces of the time, not all of these agents devoted to anything remotely resembling obedience to the commands of reason, let alone to a moral cause. After all, this was the time of the twilight of the falling European empires, a time when the dice of future world power were cast and the contours of a new epoch overshadowed by the threat of total nuclear destruction were slowly emerging from the political haze. Nevertheless, and perhaps oddly enough given this historical setting, arguments clearly counted in the drafting process. There is very little in the *Declaration's* final text that mirrors only naked power politics and cannot, despite all its flaws, at least in principle be defended by something like universalizable arguments, controversial as these arguments may be in detail. Clear examples of such power politics, such as the attempt to leave scope for the nonapplication of human rights in the colonies that still existed, were even rebutted – a success that initially was not achieved in other cases such as the *European Convention on Human Rights and Fundamental Freedoms* (ECHR), where champions of this kind of exemption, like Great Britain's governments of the time, had more of a say.<sup>6</sup>

discussion on the matter, Chang argued for dropping “reason and conscience” again. In the discussion about retaining or deleting this clause, Charles Malik, as the clause's most outspoken defender, related it to central properties of human beings, arguing that the drafting Commission “should mention somewhere in the Declaration, perhaps in the Preamble, the qualities which essentially characterized man, since man and his rights were the Commission's main concern.” Cassin had made a similar argument on the importance of clarifying the particular characteristics of human beings in relation to the earlier draft, Schabas, *The Universal Declaration*, 801 (E/CN.4/AC.1/SR.8). The Human Rights Commission voted to retain the clause, Schabas, *The Universal Declaration*, 1673 (E/CN.4/SR.50).

There is much debate about the reconstruction and translation of the meaning of concepts such as reason and conscience, especially in different cultural contexts. Equally rich is the discussion about how to interpret the meaning of a legal term after it has been included in a legal document (or, as in the case of the UDHR, a nonbinding document, albeit with clear legal significance), especially concerning the issue of whether or not any of the meaning associated with it by some of the drafters is relevant for its interpretation or not. Despite these legal hermeneutic intricacies, it seems clear that the passage refers to the rational and moral capacities of human beings, taken as central properties, foundational both for the attribution of their particular moral status and for the possibility of understanding this status and its normative consequences in the form of rights. On the debate and for a predominantly epistemological reading, cf. Morsink, *Origins*, 296 ff.

<sup>5</sup> Cf. Schabas, *The Universal Declaration*, 1671 (E/CN.4/SR.50), where Charles Malik is quoted as saying: “Without reason, the very work they were engaged in would be impossible; what, then, more ‘reasonable’ than the explicit mention of the factor that constituted the basis of their work, in the very first article?”

<sup>6</sup> Cf. on Art. 2 UDHR, Glendon, *A World Made Anew*, 149 f., 162, on Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (ECHR), ETS 5, November 4, 1950, Art. 56 (former

To the average observer, the two ideas of reason and conscience as justificatory reasons and means of normative cognition that underpin the human rights project according to this central statement by international actors may appear a truism and of no particular concern.

What else, one may be tempted to say, was to be stated in a document intended to revive human moral, legal and political life at a time when half the world and the ethical foundations of an epoch still were lying in smoking ruins? Should the *Universal Declaration* have taken the view that human beings are beastly predators driven by the irrational will to power? Protean beings,<sup>7</sup> “*nicht festgestellte Tiere*,” animals without a fixed nature,<sup>8</sup> which are the mere playthings of historical and social change? Shrewd calculators of self-interest following the sole motive of maximizing their own idiosyncratic preferences?

After the Nazi *danse macabre* of murderous folly, after the reign of their abstruse, cruel and deadly ideas about human life, its meaning and the ethical parameters that guide human beings, could one rely on anything other than reason and conscience? After this cataclysm of horrors, which washed away traditions, beliefs and centuries-old cultural assets, turning the supposedly impregnable walls of the institutions of human legal orders into meaningless rubble – at this moment, when it was absolutely necessary that humanity (for once) got it right, because human life for a few precious and awful moments was visibly naked in all its painful vulnerability, fragility and suffering greatness – what should have been endorsed other than the capacity for reasonable thinking and ideas of basic human decency provided by human moral understanding (for whatever they are worth) to lead the way into

Art. 63 ECHR) and background, Alfred William Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2001), 288 ff., with the following illuminating comment on the “dogma” of Colonial Application Clauses and the policies of human rights: “The Colonial Office dogma was sometimes relaxed in special circumstances. Thus the *Universal Declaration* on Human Rights of 1948 did not contain a colonial application clause, and a Circular Dispatch from the Colonial Office of July 20, 1948 even stated that the UK could not therefore accept it unless all colonial government did so. This would have entailed the odium of abstaining in the final vote on December 10, with no later opportunity to come on board. In the event the UK did not secure agreement from the colonies before voting for the Declaration, and made it clear that it did indeed apply to all its dependencies. Since it did not bind anyone to do anything and in any event was not a treaty, this was not viewed by the Colonial Office as presenting a real problem.” Britain extended the rule of the ECHR to most colonies in 1953. Official records note that “one of the main objects in inducing colonial territories to apply the convention was for publicity purposes at the United Nations in connection with the draft Convention on Human Rights,” quoted in Simpson, *Human Rights*, 829, among substantial doubts about the political usefulness of this move, given the constraints that the ECHR was feared to impose on colonial rule.

<sup>7</sup> Cf. Richard Rorty, “Human Rights, Rationality and Sentimentality,” in *On Human Rights: The Oxford Amnesty Lectures*, eds. Stephen Shute and Susan Hurley (New York: Basic Books, 1993), 115.

<sup>8</sup> Friedrich Nietzsche, *Jenseits von Gut und Böse*, in *Friedrich Nietzsche: Sämtliche Werke*, Vol. 5, eds. Giorgio Colli and Mazzino Montinari (Munich: Deutscher Taschenbuch Verlag, 1999), 81.

something resembling a bearable future? Would anything else not have fallen short of the lessons and demands of this pivotal historical moment?

The theoretical rationale underpinning these thoughts about the justification of human rights and the epistemic condition of human beings is far from clear, however, when we consider contemporary debates about rights, their justification and their epistemological foundations, as well as the many questions they raise.

### 1.3 THE PROBLEM OF RIGHTS

The foundations of rights are debated as much as their content or the claim that there are universal rights pertaining to every human everywhere, a conclusion that the *Universal Declaration* draws as one of its defining elements, echoing the universalistic hopes of the past. To be sure, serious questions are implied by this stance, the answers to which are far from obvious. What does it mean that they are rights that humans are supposed to enjoy *by virtue of their humanity*, as an almost canonical view puts it? If “humanity” refers just to a set of biological characteristics of a biped with a large brain that walks upright, how can rights be derived from such contingent facts? Is there a plausible concept of humanity that does something other than impose parochial views about human existence on others? And even if there is such a concept, are reason and conscience really part of what humanity means? What about emotions or the totality of our bodily existence? Do they not count as well?

Furthermore: What is the stuff that human rights are actually made of? Are human rights part of a Natural Law permeating the cosmos? Are they part of the mind-independent fabric of the world, like the Higgs boson? Or are they a tissue of beliefs woven by the hidden operations of the human mind? What are the reasons for their justification? Are they necessary preconditions of human autonomy and action and thus justified because we should not and indeed cannot give up our autonomy? Does a qualified need or interest in the objects protected by human rights give rise to these rights? Or is it an (imagined) contract or consensus? What do these approaches imply for the universality of human rights?

Other questions are no less difficult, not least concerning the precise content of human rights, the exact group of rights-holders, the duty-bearers or addressees of rights and the nature of rights. What is the final criterion that makes a right a *human* right? Not every legitimate human concern has found its way into the bills of rights that determine the current content of human rights. There was no question that the right to life should be included in the *Universal Declaration*. It was equally obvious that a right to be loved would not be included. Why?<sup>9</sup>

<sup>9</sup> Cf. on the paradoxical, inalienable but unenforceable right to be loved, Theodor W. Adorno, “Minima Moralia,” in *Theodor W. Adorno: Gesammelte Schriften*, Vol. 4, ed. Rolf Tiedemann (Darmstadt: Wissenschaftliche Buchgesellschaft, 1998), 187. An attempt to defend a right of

Humans are regarded as rights-holders. Does this mean every human being, or are certain groups to be excluded – infants, perhaps, because they lack certain properties that would make them fully human in the normatively relevant sense, as some argue?<sup>10</sup> Can groups be rights-holders? Can corporations enjoy human rights? All or just some? What about animals? Or robots? A self-learning algorithm?

The question of the addressees of human rights raises similar problems. Do the addressees of human rights also include private individuals, or are they only legal entities that exercise public power, most importantly states? What about corporations? Finally and importantly: Are human rights moral, legal or both? If the latter, do they mean the same in the moral and in the legal sphere? If not, what are the differences?

The assumption of human beings' shared capacity to understand the point of human rights that underpins the *Universal Declaration* leads us into no less troubled theoretical waters than the questions about the nature, content and justification of human rights. Reason has become a notoriously contentious concept, and conscience, as a human property of constitutive importance for moral orientation, does not necessarily fare better. To be sure, there are many references to reason in the debates about human rights. But what does reason mean in these contexts? A Platonic capacity to access ideas that exist independently of the mind? An Aristotelian understanding of forms or capacity of practical cognition? A natural light that pierces the darkness of error and ignorance, providing cognition that is distinct and clear? A Kantian capacity of principles constituting human understanding? A Hegelian spirit whose might irresistibly wrenches the last secrets from nature's grasp? Something else?

Reason was traditionally thought to be an attribute of human individuals, the epitome of a human being's ability to think and, by thinking, to arrive at conclusions that were insights, not false opinions. Should this idea of subjective reason perhaps be abandoned? Should reason be freed from its incarceration in the human individual because it is actually found somewhere else? Is thinking in fact taking place not "in the head" but in social practices, in *Lebensformen*, which change "as we go along" but whose nature we nevertheless can and must make explicit? Or is reason embedded in specific *Lebenswelten*, lifeworlds, in forms of cooperative communication, where better arguments reign rather than force?

Many people have sought and continue to seek to answer these questions. But is it really worth pursuing them at all? Has the reference to reason not proven to be a dead end? Have we not learned much about the dark side of reason, its immanent dialectic and contingent construction by social forces and narratives woven over time? Have concepts of reason not been tainted by partisan perspectives – of gender,

children to be loved is S. Matthew Liao, *The Right to Be Loved* (Oxford: Oxford University Press, 2015).

<sup>10</sup> Cf. e.g. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 95.

of social groups defined by skin color or religious outlook, for instance? Are ideas of reason not forged by hidden forces of social power that model them after their own image? What is conscience supposed to mean, apart from highly personal, historically and culturally contingent and subjective perspectives on matters of right and wrong that cannot have any possible claim to objectivity?

The seriousness of these questions and the difficulties in answering them are of some importance. The assertion that there is something about humans that entitles them to certain rights and that they are capable of insight in these matters is not an accessory part of the fundamental claims implied in the ethical and political project that the *Universal Declaration* stands for, but rather it lies at its very core.

The project presupposes that human beings are never again to be treated in the way they had been in the dire epoch preceding the *Universal Declaration*. Its starting point is that the imperative to treat human beings with respect had been well understood before and now has become common knowledge and nothing less than a matter of the very basic moral and legal self-understanding of humanity. The real task therefore is to build institutions that put these insights into practice, arduous and difficult as this may be. Fortunately, this endeavor is able to rely on a firm, normative, reflectively secured foundation that has stood the tough test of time.

Are these assumptions flawed? Are they the ephemeral offspring of a certain moment in history that now has passed? Are they only ideological machinations that should no longer occupy serious thought in a more mature age? Or are they expressions of appropriate respect for the autonomy of human thought and the well-warranted belief that the free exercise of human thinking would lead ultimately to insight into the justifiedness of human rights?

The historical record of human rights does not make the assessment of such claims much easier. Human rights have a very rich and complicated history. They are not an uncontested, self-evident companion of human practice and thought. As Thomas Paine dryly remarked after underlining the universal nature of the French Revolution and in particular of the *Déclaration des Droits de l'Homme et du Citoyen*, "but the governments of all those countries are by no means favourable to it."<sup>11</sup> Armies marched to quell this idea, and powerful structures of suppression were erected to counter its threat to power and material privilege. Many arguments were formulated that criticized this idea. There is no lack of countertheories to the idea of human rights, vividly summed up in Edmund Burke's attack upon rights and the idea that these rights could form the yardstick for legitimate forms of government:

<sup>11</sup> Thomas Paine, "The Rights of Man," in Thomas Paine, *Common Sense and Other Writings* (New York: Barnes & Noble Classics, 2005), 103.

We have not (as I conceive) lost the generosity and dignity of thinking of the fourteenth century; nor as of yet have we subtilized ourselves into savages. . . . Atheists are not our preachers; madmen are not our lawgivers. . . . We have not been drawn and trussed, in order that we may be filled, like stuffed birds in a museum, with chaff and rags and paltry blurred shreds of paper about the rights of man. . . . We are afraid to put men to live and trade each on his own private stock of reason; because we suspect that this stock in each man is small, and that individuals would do better to avail themselves of the general bank and capital of nations, and of ages.<sup>12</sup>

Over time, such criticisms of human rights as an idea and political and legal practice came from different political camps, from the right and from the left, from crude ideologies and the commanding heights of philosophy. And human rights have continued to be an embattled idea, from Bentham's passionate critique of the egoistic, destructive, licentious behavior he thought they would breed<sup>13</sup> to the attack on abstract and general norms under the theoretical auspices of a negative dialectics<sup>14</sup> or post-modernity.<sup>15</sup> The rich array of human rights skepticism in current normative reflection will be discussed in some detail over the course of this inquiry.

Some of these theoretical attacks were backed by important social forces and religious creeds. This is hardly surprising. After all, fundamental rights have played many roles in human history, but not least among these is that of an ethical idea and legal instrument subversive to political power. Moreover, fundamental rights are inconvenient not only for those who aspire to unfettered might, because they draw limits to its exercise; they are inconvenient for others, too, not least for (often comfortably self-righteous) social majorities. Human rights draw lines that limit such majorities' capability to impose their view of what is right and proper on other people as well. Human rights are therefore a precious asset for any minority, for dissidents and outsiders or simply for the weakest members of human associations. That which is inconvenient for political power and social majorities inevitably will have its enemies, and human rights have attracted plenty of such to the present day.

Consequently, there is much to be said about the trajectory, roots, ruptures, discontinuities and tentative approximations to the idea of human rights in theory and practice through human history. What is clear, however, is that by the eighteenth century, this idea had been formulated precisely and become not only

<sup>12</sup> Edmund Burke, *Reflections on the Revolution in France* (London: Penguin Books, 1968), 181 ff.

<sup>13</sup> Jeremy Bentham, "Nonsense upon Stilts," in *The Collected Works of Jeremy Bentham: Rights, Representation and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, eds. Philip Schofield, Catherine Pease-Watkin and Cyprian Blamires (Oxford: Clarendon Press, 2002), 317 ff., 321, 398 ff.

<sup>14</sup> Theodor W. Adorno, "Negative Dialektik," in *Theodor W. Adorno: Gesammelte Schriften*, Vol. 6, ed. Rolf Tiedemann (Darmstadt: Wissenschaftliche Buchgesellschaft, 1998), 281.

<sup>15</sup> Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'," in *Deconstruction and the Possibility of Justice*, eds. Drucilla Cornell, Michel Rosenfeld and David Gray Carlson (London and New York: Routledge, 1992), 13 ff., 59 ff.

common currency, but a powerful political force that made history, ultimately profoundly influencing the course of affairs in many parts of the world. Many saw it as a precise expression of justified normative principles, an insight finally attained after centuries of thought with a good claim to it lasting and standing further critical reflection by the generations to come.

The idea of human rights is thus not simply a given. It was not easy to get to the heart of the matter. It took a long time to formulate clearly. It is still in need of much clarification. It is contested at its very core, in theory no less than in politics. Consequently, neither the idea nor the reality of human rights has been fully fathomed theoretically, nor are human rights uncontroversial or politically secured. A theory of human rights needs to avoid any naivety in this respect. Glossing over any of the problems identified does not foster the cause of human rights. The only way ahead is their critical debate.

#### 1.4 HUMAN RIGHTS INSTRUMENTS AND HEURISTICS OF LAW

When embarking on the project of contributing to a theory of human rights, legal instruments can serve a very useful heuristic function and help us to find our way through the maze of issues at stake.

After all, the *Universal Declaration* is, for instance, a crucial embodiment of the idea of human rights in the current era. It is not a binding legal instrument. However, major parts of it are now rightly regarded as customary international law. In addition to its direct legal effects, it constitutes an epochal element of moral and legal history, doubtlessly on a par with other legal documents of this quality, such as the *Codex Iuris Civilis*, the *Hindu Code of Manu*, the continental European medieval legal books such as the *Sachsenspiegel* and the *Magna Carta* or, in modernity, the *American Declaration of Independence*, the *US Constitution* and the French *Déclaration des Droits de l'Homme et du Citoyen*, which, for better or worse, made legal history.

This is because it attempts to formulate the conditions necessary for a human civilization<sup>16</sup> that respects the standards indispensable to a decent form of human life. It does so not only for one country or community, but for humanity in general and in the concrete, tangible form of a set of rights. This project mirrors a central aspiration of human beings from many countries and all walks of life that was felt to be of existential importance because of the experience of what new meanings war and crimes can acquire in a technologically advanced world even after centuries of

<sup>16</sup> “Civilization” is a term misused in some contexts, not least in colonialism and imperialism, including theories about higher and lower forms of human life, often with racist implications. Here it is used to mean something quite different, namely incrementally created forms of human culture that embody human achievements in all forms imaginable. It is thus an egalitarian concept of cultural development. Cf. for some comments on the concept, David Graeber and David Wengrow, *The Dawn of Everything* (London: Penguin Books, 2021), 432 f.: “[T]hings that really go to make civilization” are “mutual aid, social co-operation, civic activism, hospitality or simply caring for others,” creating “extended moral communities.”

cultural development.<sup>17</sup> It is the symbol of a particular insight into the conditions of human life and the urgent need to take action to shield human beings from at least some of the most destructive forces unleashed by none other than themselves.

The *Universal Declaration* is a recent, authoritative summary of global human rights thought and the foundational document for the postwar development of human rights. However, it is, like other legal instruments, only a part of wider historical, political and cultural movement. Taking such instruments as a central heuristic tool to grasp the core content of the idea of human rights therefore does not mean reading the idea of human rights only through the lens of any specific legal text that makes up the current form of human rights protection. It only means that it may be worth considering the tenets of such a document very closely.

### 1.5 THE LAW: IN SPLENDID ISOLATION FROM THE TROUBLES OF THEORY?

There are two important features of constitutive legal instruments that need to be addressed, because they may seem to speak against reading any particular theoretical stance into legal instruments, even for heuristic purposes, and particularly in the case of human rights:

Firstly, one common feature of the drafting processes of constitutive legal texts is the need to bridge the many divided perspectives that necessarily exist among the drafters, who inevitably come from very different political, religious or cultural backgrounds. This need was evident in the *Universal Declaration's* drafting process as well, and pointedly so, given that the conflicts of the epoch between constitutional democracy and dictatorship, between capitalism and communism, between European colonial power and decolonization, between independence-seeking in the Global South and old and new hegemonic aspirations in the Global North, between racism and yearnings for equality, between patriarchy and women's liberation, between religious creeds and secularism were among the many subtexts and sources of political strategies of the deliberation.

Jacques Maritain famously reported about postwar discussions on human rights: "It is related that at one of the meetings of a UNESCO National Commission where Human Rights were being discussed, some expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. 'Yes', they said, 'we agree about the rights but on condition that no one asks us why.' That 'why' is where the argument begins."<sup>18</sup> The perception that there was a

<sup>17</sup> Cf. on the process of civilization, Norbert Elias, *Über den Prozess der Zivilisation* (Frankfurt am Main: Suhrkamp, 1976). The reference to such a process should not be taken as an endorsement of Elias' particular notion of the forces driving the process.

<sup>18</sup> UN Educational, Social and Cultural Organization (UNESCO), *Human Rights: Comments and Interpretations, A Symposium Edited by UNESCO*, UNESCO/PHS/3(rev.), July 25, 1948, I.

consensus about the content of human rights but not about the reasons for this consensus is widely taken as a proper description in a nutshell not only of the background of the drafting process of the *Universal Declaration*, but also of an important feature of the human rights project in general: This project needs only limited consensus to get off the ground. It is sufficient if the consensus extends to the content of rights. There is no need for further background assumptions to be shared as well, in particular about the ultimate justification of the content of human rights.<sup>19</sup> Disengagement with deeper theoretical questions – the difficult sphere of the “why” – may thus be regarded as a piece of legal wisdom.

Secondly, constitutive legal instruments such as legal bills of rights are not political or philosophical treatises. Their point is to state a set of ideally concise, enforceable and justiciable norms, not the outline of their defense. Only texts such as preambles often elaborate in more detail on the spirit of the bare set of norms, but usually without much concrete legal effect. Consequently and unsurprisingly, no particular political, religious or philosophical standpoint – say Kantianism or Christian personalism, Confucianism, socialism or secular humanism – forms part of the *Universal Declaration's* content. This feature of the *Universal Declaration* thus is not an astonishing oddity, but rather mirrors a common property of central legal instruments, such as national constitutions, and of laws in general.

However, these observations should not give rise to the impression that such constitutive legal texts are entirely neutral on these matters despite this healthy theoretical abstinence. A text such as the *Universal Declaration* obviously is incompatible with numerous background theories – say, a strong collectivism that negates the worth of the individual, authoritarianism with its contempt for individual liberty, a repressive theocracy, the idea that the true end of any body politic is the aggrandizement of a particular family (the Windsors or the Hohenzollerns, for example) or racism that defends an imaginary hierarchy of groups of humans. Otherwise, it would be a text devoid of meaning. The set of background theories that can be mustered in defense of a human rights bill therefore clearly is limited. The drafters of such instruments consequently have to agree on the importance of equality, liberty and the supreme, inalienable worth of human beings that such instruments are designed to protect. There is nothing self-evident about this consensus, as the bloodshed before the *Universal Declaration* and the conflicts since its creation amply illustrate.

Furthermore, it is useful in this context not to mistake what the drafters might have thought reconcilable with a human rights catalogue, with what can in fact be

<sup>19</sup> Today, John Rawls' idea of an “overlapping consensus” may come to mind, John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 144. Maritain, however, maintains that – in the long run – some agreement on the “scale of value” is necessary to make human rights operative, UN Educational, Social and Cultural Organization (UNESCO), *Human Rights: Comments and Interpretations, A Symposium Edited by UNESCO*, UNESCO/PHS/3(rev.), July 25, 1948, VIII f.

reconciled with such. Some of the drafters may have had unclear, perhaps even confused ideas about the idea of human rights. There are perhaps some deep psychological reasons for this, as we will see in Part III. Some of the drafters may have had an entirely tactical relation to the legal text, endorsing it not because of any conviction or theory about its deeper justification, but simply as a matter of political expediency – for example, because they lacked the power to oppose it or expected it to be practically meaningless.<sup>20</sup> Ultimately, what matters for legal bills of rights is the text itself, not the passing thoughts and intentions of those participating in the drafting process, not the least because of their great diversity. It is no accident that even the smallest small print of legal text is disputed so hotly: After becoming legally valid, the text gains a life on its own, one that may take a course quite different from what its drafters anticipated.

These observations lead to the following conclusion: Neither the factual diversity of opinions about the deeper reasons justifying a foundational legal text and the sources for the understanding of its normative content nor the lack of explicit endorsement of any such theory in a legal text alone means that there are no such deeper reasons for its legitimacy or that such reasons, if they exist, are irrelevant for the understanding of the legal instrument. Philosophical agnosticism is no good option for serious legal work.

## 1.6 HUMAN RIGHTS AND THE EMANCIPATION OF HUMAN THOUGHT

From a certain perspective, the reference to the double role of reason and conscience (which may reinforce each other) at a turning point of history strikes a traditional chord of the history of thought about human rights. The idea that exercising reason will lead to insights about rights not only was a basic tenet of the reflection about rights at the time when the *Universal Declaration* was drafted, but also echoes many ideas in the history of human thought. These ideas have very important consequences for the political standing of human beings and their role in political affairs.

Let us take just some examples of very different thinkers from another pivotal period in which the contemporary human rights project took concrete shape: the eighteenth-century reflection about rights. William Blackstone succinctly summarized the idea of natural rights, the “rights of mankind,” absolute in the sense of not being created by state or society: “The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind.” The protection of these rights is nothing less than the “principal aim of

<sup>20</sup> Cf. for an example, the British attitude towards the UDHR, n. 6.

society.”<sup>21</sup> Around the same time, from a republican perspective that in many ways was radically opposed, Thomas Paine made an early case against slavery because “the slave who is proper owner of his freedom, has a right to reclaim it” from the “Men-Stealers,” and this revolutionary idea relied on nothing else but “the dictates of natural light, and Conscience, in a matter of common Justice and Humanity” to justify this fundamental “natural, perfect right of all mankind.”<sup>22</sup> The conservative Blackstone came to the same conclusion – the “rights of mankind” made every slave “the moment he lands in England . . . a freeman”<sup>23</sup> – an interesting example for the potential of human rights to create common ground for in other respects opposed visions of the law.

For Kant, the natural right to equal freedom under a universal law was a necessary insight attained by the autonomous exercise of reason – if one escaped the fetters of self-incurred minority, he thought, sustained reflection would lead everybody to an understanding of the rights that each human being enjoys. The faculty of moral understanding, autonomy as freedom under a moral law, entitles all humans to vindicate their position as equal members of that imagined community of mutually guaranteed dignity that Kant, in one of his striking visions, called the “*Reich der Zwecke*,” the realm of ends.<sup>24</sup>

One of Kant’s most original philosophical pupils, Friedrich Schiller, honorary citizen of the French Republic and fierce critic of *la terreur*, put the matter concisely: For him, human rights were among those political issues of his age that decided the “very fate of humanity.”<sup>25</sup> The “great legal dispute” of his time derives its outstanding importance from the fact that human beings are both the addressees and, by the power of their autonomous reasoning, the authors of these rights: “However important the substance and consequence of this great legal dispute might be to anyone calling himself a human being, the way in which it is conducted should be of especial interest to anyone who can think for himself.”<sup>26</sup>

<sup>21</sup> William Blackstone, *Commentaries of the Law of England, Vol. 1: Of the Rights of Persons*, ed. David Lemmings (Oxford: Oxford University Press, 2016), 125, 121, 120. These “rights of mankind” are the right to personal security (life, limbs, body, health and reputation), the right to personal liberty and the right to property, and – in modern terminology – a social right to help if in material need, Blackstone, *Law of England, Vol. 1*, 125 ff.

<sup>22</sup> Thomas Paine, “African Slavery in America,” in Thomas Paine, *Common Sense and Other Writings* (New York: Barnes & Noble Classics, 2005), 6 f.

<sup>23</sup> Blackstone, *Law of England, Vol. 1*, 123.

<sup>24</sup> Immanuel Kant, *Grundlegung der Metaphysik der Sitten, Akademie Ausgabe*, Vol. IV (Berlin: Georg Reimer, 1911), 433 f.

<sup>25</sup> Friedrich Schiller, *Die ästhetische Erziehung des Menschen* (Ditzingen: Reclam, 2000), 10; Friedrich Schiller, *On the Aesthetic Education of Man*, trans. Keith Tribe (London: Penguin Books, 2016), 6 (adapted from the German original).

<sup>26</sup> Schiller, *Ästhetische Erziehung*, 10; Schiller, *Aesthetic Education*, 6: “So nahe dieser große Rechtshandel, seines Inhalts und seiner Folgen wegen, jeden der sich Mensch nennt, angeht, so sehr muß er, seiner Verhandlungsart wegen, jeden Selbstdenker in besondere interessieren.”

The brutal rule of force gives way to the rule of reason, and arguments start to count, accessible to all: “A question that would otherwise be settled by the blind right of might now seems to have been brought before the tribunal of pure reason; and whoever remains capable of putting himself at the center of things, advancing from a mere individual to a representative of the human race, might equally consider himself a member of this tribunal, as he is, as human being and citizen of the world, party at the same time and more or less caught up in its outcome.”<sup>27</sup> Reasoning beings are naturally entitled to determine the laws to be created: “It is hence not just his own interests that will be decided by this legal process; judgment will also be made according to laws which his rational mind is competent and entitled to dictate.”<sup>28</sup> Schiller explicitly adopts a cosmopolitan perspective: The issue dealt with in France and elsewhere is a matter not only of local but of general human concern.

Mary Wollstonecraft strikes a similar note, though importantly to vindicate the rights of women: “If the abstract rights of man will bear discussion and explanation, those of woman, by a parity of reasoning, will not shrink from the same test.” Reason is the source of insights about rights, but it is not for men alone to decide on these matters: “Who made man the exclusive judge, if woman partake with him of the gift of reason?”<sup>29</sup> For her, too, the cause of human rights, as rights of both sexes, was a human cause: It is “an affection for the whole human race that makes my pen dart rapidly along to support what I believe to be the cause of virtue.”<sup>30</sup>

The fundamental stance on reason, conscience and rights exemplified by these diverse writers has a political consequence: It *radically empowers human beings* in a twofold manner. First, their personal understanding becomes the ultimate yardstick for determining what human beings’ rights and duties are, and universally so. The epistemic Bastille, which hitherto withheld the power of insight from all but a

<sup>27</sup> Schiller, *Ästhetische Erziehung*, 10; Schiller, *Aesthetic Education*, 6: “Eine Frage, welche sonst nur durch das blinde Recht des Stärkeren beantwortet wurde, ist nun, wie es scheint, vor dem Richterstuhle reiner Vernunft anhängig gemacht, und wer nur immer fähig ist, sich in das Centrum des Ganzen zu versetzen, und sein Individuum zur Gattung zu steigern, darf sich als ein Beysitzer jenes Vernunftgerichts betrachten, so wie er als Mensch und Weltbürger zugleich Parthey ist, und näher oder entfernter in den Erfolg sich verwickelt sieht.”

<sup>28</sup> Schiller, *Ästhetische Erziehung*, 10; Schiller, *Aesthetic Education*, 6: “Es ist also nicht bloß seine eigene Sache, die in diesem großen Rechtshandel zur Entscheidung kommt, es soll auch nach Gesetzen gesprochen werden, die er als vernünftiger Geist selbst zu diktiren fähig und berechtigt ist.” Schiller does not refer explicitly to human rights in this passage. But the context shows beyond doubt that human rights are a key issue of the “great legal dispute” of his time – in particular, the French Revolution and its declaration of human rights. Human rights are a central concern in his thought about aesthetic education and are generally crucial for his theoretical writings and plays. Cf. e.g. Schiller, *Ästhetische Erziehung* (Augustenburger Briefe), the first version of his thought on the aesthetic education of human beings, or – as one of his major plays – *Don Carlos*.

<sup>29</sup> Mary Wollstonecraft, *A Vindication of the Rights of Woman* (London: Penguin Books, 1983), 87.

<sup>30</sup> Wollstonecraft, *Vindication*, 85.

privileged merry few, now strikes its flag. Everybody has the capacity to reach true understanding – there are no lords and masters in a fiefdom of knowledge about humans' proper actions and justified claims. On the contrary, everybody is an equal citizen in the republic of cognition and is able to grasp that which it is urgently important to know.

The intrinsic logic of this egalitarian epistemology makes it hard to maintain patriarchal, racist or colonial denials of the ability of women or people with certain skin colors (or indeed any other group) to think for themselves and understand the importance of human rights, although it took centuries for the subversive power of this epistemological stance to fully unfold. The door to understanding the justification of rights is wide open to everyone.

Second, the exercise of commonly shared human understanding does not lead to the conclusion that submission to others, inequality, bondage and disrespect for everyone apart from a chosen class of privileged persons are justified, as many great minds held in the history of ideas. On the contrary, critical thought free from prejudice, intimidation, superstition and stifling traditions confirms that respect for all human beings – for their lives and bodily integrity, freedom and equality – is the right of all who look in the mirror of a shared humanity, history and social practice, trust their eyes and draw sober-minded conclusions from what they see.

This is one important reason why the reference to everybody's capacity for critical thought and moral reflection as part of the properties that justify the ascription of rights to humans does not lead to the exclusion of certain groups of people from the realm of rights, such as infants or comatose patients who have not yet fully developed or have lost certain cognitive abilities. On the contrary, the *inclusion* of every human being is the consequence of a proper understanding of the very idea of human rights, as we will see in more detail,<sup>31</sup> even though the journey towards

<sup>31</sup> The concern as to whether the reference to properties such as "reason and conscience" excludes certain human beings from protection by human rights stands at the forefront of many debates about essentialist accounts of humanity, and rightly so, given the practical importance of these questions for the status of infants, people with certain disabilities or comatose patients, to name just a few pertinent examples. Unsurprisingly, in light of the barbarous historical example of the Nazi "Euthanasia" program (a main testing ground for the Holocaust), it was also raised in the drafting process when the inclusion of the clause referring to "reason and conscience" was debated, cf. Schabas, *The Universal Declaration*, 854 (E/CN.4/AC.1/SR.13). The Soviet delegate Koretsky argued that the reference to human beings endowed with reason "might have resulted in misunderstanding and have been interpreted as justification of the fascist destruction of feeble-minded people on the grounds they were not reasonable human beings."

Another important topic raised by various actors, delegates and stakeholders was gender-neutral language to underline the inclusion of women in the protection afforded by human rights, cf. for instance the early intervention of the *Commission on the Status of Women* to change the language of Art. 1 of the draft declaration, the debate and, in particular, Chairwoman Eleanor Roosevelt's response, Schabas, *The Universal Declaration*, 1669 ff. (E/CN.4/SR.50).

drawing political conclusions from this insight was at least as long and bitter as that towards the acceptance of all as the legitimate subjects of moral understanding.<sup>32</sup>

This stance echoes an intrinsically humanizing approach to the existential question of the origin of the normative principles that ought to rule human life. It is exemplified in its classical form in Socrates' practice of engaging the people of Athens in an open-minded inquiry about the good and the just and their meaning for human life. This practice (which ended fatally for Socrates himself) has inspired serious thought throughout the ages and made its protagonist a "person of world history."<sup>33</sup> This approach holds that human beings are able to answer questions not only of rights, but of morality in general, of justice and benevolence *themselves*. It believes that humans are not the victims and passive recipients of others' commands, but themselves are the subjects of the process that leads to determining what they ought to do and justly can demand. They are guided along this path – which is open to all human beings, difficult as progress along it may be – by universally accessible reasons and insights that can be shared with others, not by rude force or mindless accommodation to the patterns of the past.

The belief in the abilities of human thinking embodied in this stance does not mean entertaining comforting illusions about the obstacles that have to be overcome. One of the sobering lessons from the history of human rights is that it is possible to argue wholeheartedly for the equal rights of human beings and at the same time have one's tea served by a slave and not be able to conceive of the fact that the woman one has the tea with, loves and shares a life with may have all those rights, too. Prejudice, superstition and powerful interests fight the idea, and the ensuing ideological battles are not easy to win. In addition, even if the basic idea is established, much effort is still required to master the intricacies of the concept as it stands today, many of which remain controversial in detail.

This sober, disillusioned, skeptical trust in reason and conscience had far-reaching consequences that made history. It is an epistemology with a political bite. In the eighteenth century, it even became the midwife of revolutionary change that reshaped the political world through one of its most important political consequences: the gradual establishment of a democratic constitutional state under the rule of law based on human rights and embedded in an international legal order increasingly committed to the protection of these fundamental human entitlements. And not only that: It seems hard to imagine any more recent emancipatory political project from *Black Lives Matter* to *Fridays for Future* and the ideas about social organization that they stand for without relying on the power of each individual to understand and judge

<sup>32</sup> Cf. for instance Blackstone's views on the legal status of women, Blackstone, *Law of England*, Vol. 1, 430.

<sup>33</sup> Georg Wilhelm Friedrich Hegel, "Vorlesungen über die Geschichte der Philosophie I," in *Werke*, Vol. 18, eds. Eva Moldenhauer and Karl Markus Michel (Frankfurt am Main: Suhrkamp, 1986), 441: "*welthistorische Person*."

morally. This egalitarian epistemic stance, politically empowering each human being, should not be abandoned without compelling reason.

### 1.7 THE SPHERES OF RIGHTS

The *Universal Declaration* outlines moral and political aims that justify and ask for political action and legal institutions. It is important to emphasize that the system of legal human rights protections that the *Universal Declaration* was designed to inspire is by no means limited to international law. On the contrary, the *Universal Declaration* imagines itself as an element of a realm of human rights that are protected effectively on the state level, usually through constitutional law, and complemented internationally through elements of regional and universal public international law. The project embodied in the *Universal Declaration* is a universalism with a judicious plurality not only of moral and political but also of legal tools.

The international human rights law stemming from the *Universal Declaration* is quite explicit about this particular feature of the project. In the preamble, the *Universal Declaration* underlines that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” and thus its universalistic cause.<sup>34</sup> These rights are supposed to serve as “a common standard of achievement” for nothing less than “all peoples and all nations.”<sup>35</sup> The human rights formulated constitute normative standards for individuals and “every organ of society,” which includes at least public authorities. These rights are part of individual and political morality. This morality is authoritative and binding. Human rights are to be promoted by educational efforts and – importantly – national *and* international measures to secure their universal and effective recognition and observance. Evidently, such measures include but are not necessarily limited to legal forms of protection. The morality of human rights is the foundation of the legal realm of human rights.

From the very beginning of the post-World War II human rights culture, its founding document thus envisages a complex architecture that interweaves national and international moral, political and legal modes of human rights protection. At the same time, it clarifies that one of the most influential forms of human rights relativism, namely what one may want to call “colonial relativism,” has no place in this project: The rights protected are mandatory standards everywhere, including the

<sup>34</sup> UDHR, Preamble.

<sup>35</sup> The interweaving of national and international law was a common thread of the drafting process. The preamble of Cassin’s draft included the formulation “that the enjoyment of such rights and freedoms by all persons must be protected by the commonwealth of nations and secured by international as well as national laws.” The Working Group of the Drafting Committee commented that this passage shall “be retained and modified” – as it was, Schabas, *The Universal Declaration*, 788 (E/CN.4/AC.1/W.1).

still-existing colonies. This set the tone for other legal instruments, including regional systems of human rights protection that have universalist aspirations, although by their very legal nature they are capable of realizing these aims only within the scope of their limited jurisdiction. Referring to the *Universal Declaration*, the preamble of the ECHR accordingly states that it “aims at securing the universal and effective recognition and observance of the rights therein declared.”<sup>36</sup> It adds that its intention is “to take the first steps for the collective enforcement of certain of the rights stated in the *Universal Declaration*.”<sup>37</sup> As mentioned earlier in this Introduction, the colonial powers went to great effort not to extend the *Convention’s* application to colonies through the colonial exemption clause – a stark reminder of the sway of colonial relativism and the political realities behind the universalist language of the ECHR. This is important even though the further development of the *Convention* system has increasingly vindicated the universalist aims formulated in the preamble and not the power politics of some of its founding members.

The *American Convention on Human Rights* includes language that is equally clear in this respect, “recognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality.”<sup>38</sup> The aim is “to consolidate within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man.” International protection of these rights is “reinforcing or complementing the protection provided by the domestic law of the American States.” Art. 2 of the *American Convention* consequently calls for the legal implementation of these rights, which are conceptualized as universal, in domestic legislation.

This architecture is bolstered by a pillar made of procedural law: All international systems of human rights protection require that domestic remedies have been exhausted as a procedural precondition of the various forms of judicial, quasi-judicial or nonjudicial scrutiny of human rights violations. This precondition has an implication for the architecture of human rights: It presupposes the existence and desirability of a domestic protection of human rights, strengthened but not replaced by international human rights.

The idea of the international human rights architecture thus seems reasonably clear. It is a federated system of human rights protection, so to speak: States and regional units work to protect these rights under the supplementary umbrella of a subsidiary universal protection system. This system has had significant influence on constitutions that were drafted after 1948. A good example of an attempt to meet this challenge – and an unsurprising one, given Germany’s past – is that country’s Basic

<sup>36</sup> ECHR, Preamble.

<sup>37</sup> ECHR, Preamble.

<sup>38</sup> Organization of American States (OAS), *American Convention on Human Rights*, “Pact of San Jose,” Costa Rica (ACHR), UNTS 1144 (123), November 22, 1969, Preamble.

Law, which considers human dignity to be inviolable and to be the foundation of the “inviolable and inalienable human rights as the *basis of every community*, of peace and of justice *in the world*.”<sup>39</sup>

The universal aspirations of current law even reach beyond the core area of human rights to ideas such as the rule of law, which are related to or arguably even founded upon but not identical with human rights. The *Universal Declaration*, for instance, refers to the importance of the protection of human rights by the “rule of law.”<sup>40</sup> Respect for the rule of law is a precondition for membership in the Council of Europe.<sup>41</sup> The ECHR regards the rule of law as the common heritage of its member states.<sup>42</sup> One of the fundamental European Union (EU) treaties even explicitly identifies the rule of law as a “universal value,”<sup>43</sup> together with freedom, democracy and equality. The inclusion of democracy as a universal value in such a list also comes as no surprise, given that the *Universal Declaration* already regards central elements of democracy as demands of human rights.<sup>44</sup>

This fundamental structure of modern human rights law, a universal normative idea secured by complementary and mutually reinforcing national, regional and international legal instruments, has deep roots in the human rights project that lies at the core both of modern constitutionalism and – arguably – of earlier important thought. One element of this project is the perception that human rights constitute ideas of universal validity. However, given the political reality, for the time being they can only be secured for certain territories and people until the rule of rights can be guaranteed in other communities as well. Thomas Paine, for instance, voiced a not entirely solitary view when he stated in one of the most influential writings in support of the American Revolution: “The cause of America is in a great measure the cause of all mankind.”<sup>45</sup> The reason for this is connected with the idea of human rights: “Many circumstances have, and will arise, which are not local, but universal, and through which the principles of all lovers of mankind are affected, and in the event of which their affections are interested.”<sup>46</sup> “[D]eclaring war against the natural rights of all mankind” ranks prominently among the things that affect the “principles of all lovers of mankind.”<sup>47</sup> Unsurprisingly, Paine later expresses the same attitude in defense of the French constitutional project and in particular of the *Déclaration des Droits de l’Homme et du Citoyen*: “The cause of the French people is that of all

<sup>39</sup> Art. 1 para. 2 Grundgesetz [Basic Law for the Federal Republic of Germany (GG)], May 23, 1949 (emphasis added).

<sup>40</sup> UDHR, Preamble.

<sup>41</sup> Council of Europe, *Statute of the Council of Europe*, ETS 1, May 5, 1949, Art. 3.

<sup>42</sup> ECHR, Preamble.

<sup>43</sup> European Union, *Treaty on European Union (Consolidated Version) (TEU)*, *Treaty of Lisbon*, Official Journal C 326/1, December 13, 2007, Preamble; cf. Art. 2 TEU.

<sup>44</sup> Art. 21 UDHR.

<sup>45</sup> Paine, *Common Sense*, Introduction.

<sup>46</sup> Paine, *Common Sense*, Introduction.

<sup>47</sup> Paine, *Common Sense*, Introduction.

Europe, or rather of the whole world.”<sup>48</sup> Jefferson held in a similar vein: “[W]e feel that we are acting under obligations not confined to the limits of our own society. It is impossible not to be sensible that we are acting for all mankind: that circumstances denied to others, but indulged to us, have imposed on us the duty of proving what is the degree of freedom and selfgovernment in which a society may venture to leave it’s individual members.”<sup>49</sup> In one of his most-quoted remarks, Kant stated that humanity has developed in such a way that the violation of human rights “in *one* place of the earth is felt in all,” and justifiably so, given the imperatives of practical reason.<sup>50</sup> For Kant, the institutional consequence was to protect these universal rights in republics, confederated in a world community under universal law – the realm of ends of cosmopolitan thought.<sup>51</sup> Schiller and Wollstonecraft were evidently no exception in their view that a universal human cause truly was at stake in the debates about human rights in particular human communities, though the problem of counting all humans as humans was still not solved, as Jefferson’s slaves illustrate, for instance.

Thinking that human rights can only be protected by international law with a universal application therefore would miss an important point of the history of human rights. On the contrary, the bottom-up, layered tradition of the protection of human rights embodied in classical thought on rights and authoritatively restated in the *Universal Declaration* is part of the core of the idea of human rights. Human rights certainly are rights of international concern, but that does not mean that they are not of equal domestic importance and should not be protected primarily where they can be protected most efficiently: at home. Consequently, today, the various domestic systems are – as envisaged by the *Universal Declaration* – complemented but in no way superseded or substituted by regional and universal international law in order to create common standards and to prevent the abuse of rights by state governments and other actors.<sup>52</sup>

## 1.8 THE INQUIRY INTO MIND AND RIGHTS

The preceding remarks have shown the basic assumption, underpinning human rights culture, its history of reflection and struggles for emancipation, is that insight

<sup>48</sup> Paine, “The Rights of Man,” 103.

<sup>49</sup> Thomas Jefferson, “Letter to Joseph Priestly,” June 19, 1802, *Founders Online*, National Archives, accessed August 16, 2021, <https://founders.archives.gov/documents/Jefferson/01-37-02-0515>. As has been much discussed, this stance was accompanied by Jefferson’s practice as slaveholder.

<sup>50</sup> Immanuel Kant, *Zum Ewigen Frieden, Akademie Ausgabe*, Vol. VIII (Berlin and Leipzig: Walter de Gruyter, 1923), 360; translation: Immanuel Kant, *Perpetual Peace*, trans. Mary J. Gregor, in *Practical Philosophy (The Cambridge Edition of the Works of Immanuel Kant)*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1996), 330 (emphasis in original).

<sup>51</sup> Kant, *Zum Ewigen Frieden*, 349 ff.

<sup>52</sup> Klaus Günther, “Geteilte Souveränität, Nation und Rechtsgemeinschaft,” *Kritische Justiz*, 3 (2016): 321 ff.

into the idea of human rights with the content just outlined is not the privilege of just a few, but the epistemic domain of all. However, as we have just seen, gaining such an understanding of human rights is a very challenging task.

Consequently, there are many problems that are worthy of the serious attention and the admirable work devoted to them in contemporary human rights theory, which is particularly rich, lively and full of creative thought. Given the anthropological and epistemological foundational ideas of the human rights project and their intimate relation to the equal autonomy of every human being as a moral and reflective agent, the following questions are of particular interest: What is really the role that reason and conscience play in our understanding of human rights? How can these terms be understood – to what elements of human cognition do they refer? Does the assumption that everybody can understand the idea of human rights make any sense? Does the egalitarian epistemic stance not take an overly optimistic view of human beings' capacity for insight? Is it tenable to suppose that the free exercise of human understanding by potentially anyone will lead to the idea of human rights when reflecting about human existence, informed by its history and the realities of social life? Will this be the result of inquiry if guided by nothing other than the gentle but irresistible hands of reasons that convince? Is there not deep disagreement about these matters? Is human thought not structurally skewed – for instance, by biases and heuristics? Are the answers to these questions relevant for the justificatory theory of human rights? In other words: *What is the actual relationship between human thought, its structure and exercise and the idea and justification of human rights?*

As will become clearer over the course of the following reflections, searching for answers to this question does not imply that the many other questions asked in current human rights theory (some of which were mentioned above) are less worth pursuing. On the contrary, they are evidently of great importance, and quite a number of them actually will be addressed in the course of this study. We are simply claiming that this particular question merits serious attention if we truly want to understand what human rights are about and how intricately they are related to the particularities of the human condition. The research objectives of this inquiry thus aim not to replace but to enrich current human rights theory in a circumscribed but meaningful and potentially profoundly important way.

How timely is this topic? The contemporary world is full of violent conflict on a massive scale and is plagued by severe social problems. Furthermore, human rights have been under political attack for years. In principle, this is nothing new, as mentioned earlier in this Introduction. In addition to these familiar adversaries of human rights, however, there are special new threats from within democratic and constitutional systems in which different political forces undermine important fundamental rights. Prime examples include: the measures taken in the so-called War on Terror; the erosion of fundamental norms such as the prohibition of torture; the profound threat to privacy and self-determination posed by the international

surveillance systems; the undermining of the international rule of law (e.g. through ongoing practices of extrajudicial killings through drone strikes);<sup>53</sup> and the symptoms of a new religious illiberalism epitomized by the Swiss ban on the minaret. Moreover, liberal democracies have come under pressure not only from strengthened authoritarian regimes, but also from domestic antidemocratic populist movements.

Given this state of affairs, a reflection on human rights certainly needs no excuse. But why mind and rights? Would an inquiry into the role of human rights in these concrete political conflicts not be a more opportune approach?

And are not other perspectives more promising if we want to engage in the theory of fundamental rights – say, rights and culture, rights and the narratives of modernity, the social construction of rights or the analysis of the social assemblage of rights? Is the question of the relationship between mind and rights not less pressing in both practical and theoretical terms?

There are good reasons to assert that this impression is misleading and that, on the contrary, tackling this problem is crucial if we are to gain an understanding of human rights and assure their political survival. Given the upsurge of interest in the relevance of neuroscience and empirical psychology for the understanding of ethics and law,<sup>54</sup> it is not far-fetched but quite evidently necessary to consider in some

<sup>53</sup> On these latter two examples and their wider impact, cf. e.g. David Cole, “Must Counterterrorism Cancel Democracy?” *The New York Review of Books*, no. 1 (January 8, 2015): 26 ff. On targeted killings, cf. UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings*, A/HRC/H/24, May 28, 2010, Add. 6.

<sup>54</sup> Cf. the broad range of very different approaches by, for instance, Steven Pinker, *The Blank Slate: The Modern Denial of Human Nature* (London: Penguin Books, 2002); Kwame Anthony Appiah, *Experiments in Ethics* (Cambridge: Harvard University Press, 2008); Michael S. Gazzaniga, *The Ethical Brain* (Chicago, IL: University of Chicago Press, 2005); Matthias Mahlmann, *Rationalismus in der praktischen Theorie*, 2nd ed. (Baden-Baden: Nomos Verlag, 2009); John Mikhail, “Universal Moral Grammar: Theory, Evidence and the Future,” *Trends in Cognitive Sciences* 11 no. 4 (2007): 143–52; John Mikhail, *Elements of Moral Cognition: Rawls’ Linguistic Analogy and the Cognitive Science of Moral and Legal Judgment* (Cambridge: Cambridge University Press, 2011); Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012); Stephen J. Morse and Adina L. Roskies, eds., *A Primer on Criminal Law and Neuroscience: A Contribution of the Law and Neuroscience Project, Supported by the MacArthur Foundation* (Oxford: Oxford University Press, 2013); Joshua Greene, *Moral Tribes: Emotion, Reason and the Gap between Us and Them* (New York: Penguin Press, 2013); Robin Bradley Kar, “The Psychological Foundations of Human Rights,” in *The Oxford Handbook of International Human Rights Law*, ed. Dinah Shelton (Oxford: Oxford University Press, 2013), 104–43; Eyal Zamir, *Law, Psychology and Morality: The Role of Loss Aversion* (Oxford: Oxford University Press, 2014); Michael S. Pardo and Dennis Patterson, *Minds, Brains, and Law: The Conceptual Foundations of Law and Neuroscience* (Oxford: Oxford University Press, 2013); Bartosz Brożek, Jaap Hage and Nicole Vincent, eds., *Law and Mind: A Survey of Law and the Cognitive Sciences* (Cambridge: Cambridge University Press, 2021); Owen D. Jones, Jeffrey D. Schall and Francis X. Shen, *Law and Neuroscience* (Alphen aan den Rijn: Wolters Kluwer, 2020); Shaun Nichols, *Rational Rules: Towards a Theory of Moral Learning* (Oxford: Oxford

detail the lessons that the modern theory of the human mind may have for our understanding of the foundations of human rights and – given the constitutive role of human rights for legal systems in general – for the foundations of legal justice.<sup>55</sup> Neuroscience and psychology have a major impact on the contemporary reflection of normative issues. Consequently, it is no longer possible to imagine a plausible theory of human rights without thoroughly considering whether the contemporary analysis of the workings of the human mind is or is not important for an understanding of these rights.

Two kinds of recent human rights revisionism that are paradigmatic examples of a certain perspective on human rights underline this point.

The first is what might be called a genealogical revisionism with deconstructive normative connotations.<sup>56</sup> This challenge formulates the thesis that human rights are of recent, historically contingent and politically doubtful origin. At first glance, it might appear as though this kind of critique is limited to matters of moral and legal history. On a deeper level, however, the legitimacy of human rights is at stake. According to this view, if human rights have a partisan, politically suspect origin, this undermines their legitimacy. The implicit assumption is that the criteria governing the validity of the claim that human rights are justifiable, and perhaps universally so, themselves have a contingent historical origin that renders their justification obsolete. From this point of view, the idea of universally legitimate human rights turns out to be a harmful historical illusion on a grand scale that limits human ethical and political imagination at best and is a tool for human repression at worst.

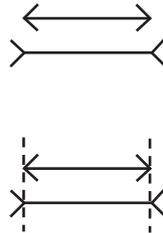
This kind of critique leaves us with two tasks. The first is to investigate what the historical record teaches us about the origin of human rights and whether its lesson is that the contingent nature of the idea of human rights precludes any further questions about their origin, nature or justification. Second, if this is not the case, we need to develop an alternative theory of the validity of human rights and explain how this account fits with the historical record.

University Press, 2021). For critical views, cf. for instance, Stephen Morse, “Law, Responsibility, and the Sciences of the Brain/Mind,” in *The Oxford Handbook of Law, Regulation and Technology*, eds. Roger Brownsword, Eloise Scottford and Karen Yeung (Oxford: Oxford University Press, 2017), 156, warning against exaggerated claims (“brain overclaim syndrome”); Selim Berker, “The Normative Insignificance of Neuroscience,” *Philosophy & Public Affairs* 37, no. 4 (2009), 293 ff.; James Davison Hunter and Paul Nedelsky, *Science and the Good: The Tragic Quest for the Foundations of Morality* (New Haven, CT: Yale University Press, 2018), both making the point that descriptive science has no normative implications, the latter fearing a new moral “nihilism.” As we will see, when assessing the merits of such criticisms, all depends on the particular theory discussed. Some do respect the is/ought distinction, while some do not, for instance. On the project of “computational ethics,” see Edmond Awad et al., “Computational Ethics,” *Trends in Cognitive Science* 25 no. 5 (2022): 388–405.

<sup>55</sup> Cf. on the many ways in which the search for the “foundations of law” can be understood, Hubert Rottluthner, *Foundations of Law* (Dordrecht: Springer, 2005).

<sup>56</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010).

It is clear that the legitimacy of human rights cannot be justified without the assumption that a proposition of the kind “human right X is (universally) valid” is in fact an act of cognition – an act of insight and not of error. This brings us to the second challenge to the idea of human rights: a neuroscientific, psychological revisionism that employs a very influential model of the human mind – the dual process model of the mind<sup>57</sup> – against the idea of human rights. It argues that this idea is just the product of a particular mechanism of the mind that should not, however, govern our decision-making. The consequence of such theories is far-reaching: Human rights appear as something like a cognitive illusion in the technical sense; that is, a mental phenomenon that is necessarily experienced by human beings given a certain input because of the structure of the human mind, but that in fact delivers erroneous information about the true state of the world.<sup>58</sup> Beliefs about the validity of human rights are as necessarily experienced and as delusory as the impression arising in our minds when we see the Müller-Lyer illusion.



The uppermost of the two parallel lines, each with “arrowheads” and “tails” pointing in different directions, appears to be shorter than the other, although in fact all are of equal length. This is a well-known visual illusion, and even if we are familiar with the effect we still perceive the arrows in this manner. The idea of human rights is the same kind of cognitive illusion, argues the neuroscientific revisionist approach: Human rights are an offshoot of mental mechanisms that deliver certain ideas, whether we want them to or not, and whose erroneous nature can be rectified only by other forms of rational thinking. The impression that human rights are justified stays with us, however, just like the impression of the different lengths of the arrows. Accordingly, we cannot free ourselves entirely from such ideas as human rights, but we can learn to ignore them when it is important to do so.

This position consequently concludes that a proper state-of-the-art scientific understanding of the structure and cognitive conditions of the exercise of human rationality or reason does not yield arguments supporting the legitimacy of the idea of human

<sup>57</sup> Cf. Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).

<sup>58</sup> Greene, *Moral Tribes*. For a related but not identical argument, see Cass R. Sunstein, “Moral Heuristics,” *Behavioural and Brain Sciences* 28, no. 4 (2005): 531 ff.; and the comments by John Mikhail, “Moral Heuristics or Moral Competence? Reflections on Sunstein,” *Behavioural and Brain Sciences* 28, no. 4 (2005): 557 ff.

rights, let alone their universality. On the contrary, such theories assert that there are hard scientific grounds for radically and irreverently critiquing such ideas, which have been venerated as admirable human achievements for no reason and properly should be consigned to the dustbin of human thought. If we take seriously and think through the consequences of such a perspective, which regards fundamental principles of morality and the idea of human rights as something like a cognitive illusion, the specter of Descartes' evil demon reappears:<sup>59</sup> The deceiving god Descartes thought to be unimaginable now resides within us as part of our cognitive machinery. Our mind is not ultimately an inner light that leads to insight despite all errors, as Descartes hoped, among many others.<sup>60</sup> Far from it: Right at the heart of human understanding, our vision is clouded by sources of obscurantism, including the idea of the morality of human rights. These claims are embedded in a theoretical background assumption about morality in psychology and neuroscience that contends that there is hard empirical evidence that concern for humanity, evidently crucial for human rights, is not part of the moral makeup of the human mind because the human mind is not structured for such moral ideas.<sup>61</sup> To assess the merits of such claims, we have to engage seriously with the question of the relationship between the theory of mind and human rights and explore what can be learned from such theoretical attacks.

The fundamental question underlying these problems is as follows: Is human knowledge of ethics and normative legal theory possible? How do we identify it if it is? These questions are deeply embedded in a rich and fertile tradition of thought. As we have seen, it is a central Socratic assumption – influential far beyond the so-called history of “Western” practical philosophy – that moral principles and especially justice are objects of true human insight and can be recognized as such.<sup>62</sup> The criteria of genuine insight, as opposed to unwarranted opinion or error, play a crucial role in this reflection.<sup>63</sup> Identifying that which constitutes justice and thus forms such a criterion is therefore a central concern from pre-Socratic<sup>64</sup> thought through to contemporary theories of justice.<sup>65</sup>

Insight is not just there, however. Humans have to achieve it through a mental process of reflection, of thinking, and thus through actively exercising the instrument through which we gain insight: the human mind. A central question of

<sup>59</sup> René Descartes, “Principia Philosophiae,” in *Œuvres de Descartes*, Vol. VIII, eds. Charles Adam and Paul Tannery (Paris: Léopold Cerf, 1905), I, XXIX, XXX, 16 f.

<sup>60</sup> Descartes, “Principia Philosophiae,” I, XI, XXX, 8 f., 16.

<sup>61</sup> Cf. e.g. Haidt, *Righteous Mind*, 234.

<sup>62</sup> Cf. e.g. Plato, *Gorgias*, 508e–509a. The disavowal of knowledge in this passage after the assertion of knowledge is best understood as “Socratic irony,” cf. Gregory Vlastos, *Socrates: Ironist and Moral Philosopher* (Cambridge: Cambridge University Press, 1991), 21 ff., 236 ff.

<sup>63</sup> Cf. Plato, *Euthyphron*, 5d, 6d–6e.

<sup>64</sup> E.g. Simonides' principles, Plato, *Republic*, 331e.

<sup>65</sup> Cf. e.g. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2009); Stefan Gosepath, *Gleiche Gerechtigkeit: Grundlagen eines liberalen Egalitarismus* (Frankfurt am Main: Suhrkamp, 2004).

modern epistemology therefore is whether the structure of the mind is important for what counts as criteria for insight. In other words: Is thought more than just a pure medium of cognition? Does it – by virtue of its properties and structure – determine what appears to humans as truth and not as error? Are the properties and the structure of the mind decisive for the content of thought? If this is so, these mental properties and structures need to be investigated in order to understand the nature and foundation of human cognition, including moral judgment and moral cognition. Reflecting not only on the substance of insight but also on the mind that provides insight is, however, a classical project of modern philosophy. It is – despite different opinions about the structure of the mind – the common attempt of Descartes,<sup>66</sup> Locke<sup>67</sup> and Leibniz<sup>68</sup> to describe the properties of human thought that enable human beings to understand, requiring “art and pains,” because “the understanding, like the eye, whilst it makes us see, and perceive all other things, takes no notice of itself.”<sup>69</sup> It is the Humean resolve to inquire into the “secret springs and principles, by which the human mind is actuated in its operations,”<sup>70</sup> the Kantian project of a critique of reason, the demand of the “ripened power of judgement of our age, which will no longer be put off with illusionary knowledge, and which demands that reason should take on anew the most difficult of its tasks, namely, that of self-knowledge.”<sup>71</sup> To be sure, this project has been subject to

<sup>66</sup> Cf. e.g. Descartes’ analysis of the human mind, Descartes, “Principia Philosophiae,” I, VIII, 7 ff.

<sup>67</sup> Cf. John Locke, *An Essay Concerning Human Understanding* (Harmondsworth: Penguin Books, 1997), book I, ch. I, § 1.

<sup>68</sup> Gottfried Wilhelm Leibniz, “Nouveaux Essais,” in Gottfried Wilhelm Leibniz, *Sämtliche Schriften und Briefe: Philosophische Schriften*, Series VI, Vol. 6, Akademieausgabe (Berlin: Akademie-Verlag, 1990), 48 f., Preface: “Il s’agit de savoir, si l’ame en elle même est vuide entièrement comme des tablettes, où l’on n’a encore rien écrit (tabula rasa) suivant Aristote et l’auteur de l’essay, et si tout ce qui y est tracé vient uniquement des sens et de l’expérience; ou si l’ame contient originairement les principes de plusieurs notions et doctrines que les objets externes reveillent seulement dans les occasions, comme je le crois avec Platon et même avec l’école, et avec tous ceux qui prennent dans cette signification le passage de St Paul (Rom. 2, 15.) où il marque que la loi de Dieu est écrite dans les cœurs” (emphasis in original).

<sup>69</sup> Locke, *Human Understanding*, book I, ch. I, § 1: “The understanding, like the eye, whilst it makes us see, and perceive all other things, takes no notice of itself: and it requires art and pains to set it at a distance, and make it its own object. But whatever be the difficulties, that lie in the way of this inquiry; whatever it be, that keeps us so much in the dark to ourselves; sure I am, that all the light we can let in upon our minds; all the acquaintance we can make with our own understanding, will not only be very pleasant, but bring us great advantage, in directing our thoughts in the search of other things.”

<sup>70</sup> David Hume, “An Enquiry Concerning Human Understanding,” in *David Hume: Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, ed. P. H. Nidditch, (Oxford: Oxford University Press, 1975), 14.

<sup>71</sup> Immanuel Kant, *Kritik der reinen Vernunft* (1st ed. 1781), *Akademie Ausgabe*, Vol. IV, (Berlin: Georg Reimer, 1911), 9: a demand “der gereiften Urteilskraft des Zeitalters, welches sich nicht länger durch Scheinwissen hinhalten läßt, und eine Aufforderung an die Vernunft, das beschwerlichste aller ihrer Geschäfte, nämlich das der Selbsterkenntnis aufs neue zu übernehmen,” (emphasis in original). Translation: Immanuel Kant, *Critique of Pure Reason (The Cambridge Edition of the Works of Immanuel Kant)*, trans. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1999), 100 f.

manifold critiques, from Heidegger's doubts about Cartesian metaphysics<sup>72</sup> to Wittgensteinian externalism.<sup>73</sup> But it could still be worthwhile to consider closely "the ways, whereby our understanding comes to attain those notions of things we have"<sup>74</sup> to avoid a philosophical inquiry beginning "at the wrong end."<sup>75</sup>

This approach has its parallel in the modern philosophy of language and its thesis that a theory of language is a necessary element of any theory of human knowledge. One of the philosophy of language's persistent questions is whether the properties of ordinary languages influence the nature of human thought, making it relative to a certain language<sup>76</sup> – bewitching it, perhaps<sup>77</sup> – or, on the contrary, whether they provide reasons that confirm the possibility of universally shared human thought.<sup>78</sup> From this point of view, not only the material criteria for insight but also the medium by which insight may be gained is of central importance, and some even

<sup>72</sup> Cf. Martin Heidegger, *Sein und Zeit* (Tübingen: Max Niemeyer Verlag, 1984), 89 ff. on the deficient "Zugang" ("access") to the world of Cartesian metaphysics, especially missing its "Zuhandenheit" ("readiness-to-hand").

<sup>73</sup> Cf. Ludwig Wittgenstein, *Zettel* (Berkeley and Los Angeles: University of California Press, 2007), 606, 608; Hilary Putnam, *Pragmatism: An Open Question* (Oxford and Malden, MA: Blackwell Publishing, 1995), 79: "The mind is not in the head." Concretely on the question of neuroscience and more generally in favor of an externalist account of the mind, cf. Matthew R. Bennett and Peter Michael Stephan Hacker, *The Philosophical Foundations of Neuroscience* (Oxford and Malden, MA: Blackwell Publishing, 2003); Pardo and Patterson, *Minds, Brains, and Law*, 12 ff.: rule-following (with conceptual necessity) is not in the head.

<sup>74</sup> Locke, *Human Understanding*, book I, ch. I, § 2.

<sup>75</sup> Locke, *Human Understanding*, book I, ch. I, § 7: "For I thought that the first step towards satisfying several inquiries, the mind of man was very apt to run into, was, to take a survey of our own understandings, examine our powers, and see to what things they were adapted. Till that was done, I suspected we began at the wrong end, and in vain sought for satisfaction in a quiet and sure possession of truths, that most concerned us, while we let loose our thoughts into the vast ocean of being, as if all that boundless extent, were the natural and undoubted possession of our understandings, wherein there was nothing exempt from its decision, or that escaped its comprehension."

<sup>76</sup> Cf. the classical thesis of Wilhelm von Humboldt, "Über die Verschiedenheiten des menschlichen Sprachbaues," in *Wilhelm von Humboldt, Werke, Vol. III: Schriften zur Sprachphilosophie*, eds. Andreas Filtner and Klaus Giel (Darmstadt: Wissenschaftliche Buchgesellschaft: 2002), 224, that language is an "eigenthümliche Weltansicht," language is a kind of worldview. For him, a central task in the study of language is to determine the part that language plays in the creation of beliefs, von Humboldt, "Verschiedenheiten des menschlichen Sprachbaues," 153. For the Sapir/Whorf hypothesis of the determination of thought by language, cf. Benjamin Lee Whorf, *Language, Thought and Reality: Selected Writings of Benjamin Lee Whorf* (Cambridge: Technology Press of Massachusetts Institute of Technology, 1956), 212; on the implausibility of this thesis, see e.g. Steven Pinker, *The Language Instinct: How the Mind Creates Language* (New York: William Morrow and Company, 1994), 59 ff.

<sup>77</sup> Ludwig Wittgenstein, "Philosophische Untersuchungen," in Ludwig Wittgenstein, *Werkausgabe Vol. 1: Tractatus logico-philosophicus, Tagebücher 1914–1916, Philosophische Untersuchungen* (Frankfurt am Main: Suhrkamp, 1984), § 109.

<sup>78</sup> Cf. e.g. Noam Chomsky, *Language and Thought* (Wakefield and London: Moyer Bell, 1993), 23 f. It is worth noting that von Humboldt underlined the reality of universal understanding, von Humboldt, "Verschiedenheiten des menschlichen Sprachbaues," 158 f.

regard it as crucial for comprehending the reach and limit of human understanding. Here, too, not only the content of that which is regarded (perhaps falsely) as knowledge but also the means of acquiring it are important elements of research.

The critiques claiming to show that human rights are a historical or cognitive illusion are thus helpful because they lead us to questions that any theory of human rights has to deal with. They remind us that we need to think carefully about the historical and cognitive origins of the idea of human rights in order to understand better how, why and with what justification this idea has conquered the world – at least for now.

### 1.9 WHY IT IS WORTH THE EFFORT

The inquiry into the roots of human rights is no sideshow of current scientific undertakings. Human science is distinguished by many intellectual achievements of impressive sway. It has led to substantial insights into the structure of matter and into the laws that govern the development of the universe. It has deciphered part of the path of the metamorphosis of life from its inorganic origins to today's abundance of forms and peered into the mysteries of how life reproduces itself.

Understanding such matters of scientific inquiry is of considerable human interest. There are sometimes straightforward, practical reasons for this – say, the aim of launching a satellite for telecommunications or of improving medicine. Sometimes, and not infrequently, this importance or even greatness of science stems from other sources than practical interests, however. Approaching some kind of understanding of the structure of the universe, for instance, has no clear instrumental purpose. Nevertheless, cosmology is one of the truly admirable enterprises of the curious human mind. Its importance derives from the occasionally irresistible desire to understand some of the riddles that surround us and the intrinsic value of insight.

Such great intellectual achievements are not reserved to the natural sciences. Other topics are equally important. Comprehending the nature of beauty is no less significant than deciphering the subatomic structure of matter, for instance. It is as honorable to contribute to the understanding of human language as to the understanding of the fate of red giants. Deepening insight in the workings of human societies is as crucial a task as making out what drives the reproduction of life.

The same holds for the study of human rights. Human rights are of evident and even existential practical significance for human beings. Human rights have become part of the moral language human beings speak, and this is true worldwide. They are not just gibberish. Human rights add something very important to the human moral universe. Their message is: Dignity, life, freedom and equality are not crumbs that occasionally fall from the table of the legitimate rulers to be picked at by the undeserving if it so pleases their masters. We are not just granting a favor when

we respect the goods of others' human lives. We owe others something.<sup>79</sup> They rightly can demand something from us because they are entitled to it. Rights put people on their own two feet. They secure their agency and status as a subject of human social action.

These moral claims have practical effects. Moral arguments based on rights are influential and sometimes even have the power decisively to determine the course of affairs.

As legal instruments, they are among the most important peaceful means through which human beings can defend their lives, integrity, dignity and liberty and the justice of certain social arrangements. More controversially, they are the means through which human beings can claim certain material goods that are the pre-conditions for leading a decent human life.

For very long periods of time, states were instruments of power used to secure the privileges of kings, aristocracies and other oligarchical groups, sometimes on a global scale, as the history of colonialism and imperialism illustrates in modern times. They were used for the aggrandizement of dynasties, nations or particular religious creeds. States' power derived from financial and economic control, from ideologies maintaining a belief in the legitimacy of their order and – not least – from the ability to use physical force through their security apparatus and military means to quash dissent.

It is therefore all the more striking that, through a long political process, human societies were able to forge the idea of the necessity and legitimacy of binding these tremendous powers by law, wresting them from the hand of the few and making them tools that served the interests of all in a way that respected the demands of justice. This idea has not become a fully uncontested baseline of our time, as the plethora of flourishing dictators reminds us, but some political orders are seriously committed to it. This is expressed at least in principle in constitutional orders bound by human rights in which political power is generated by democratic means. These orders are not the pinnacle of the political culture possible for human societies. Nevertheless, they are still remarkable achievements if we do not lose our sense of historical proportion and remain aware of the grim nature of humanity's past and of some of the disquieting prospects that may lie ahead.

No person with even brief practical experience of working in legal systems will have the slightest inclination to overestimate the relevance of the law, and in particular of human rights law. But it would be naive to overlook the fact that the basic rights of human beings do have tangible and substantial effects. Powerful institutions enforce human rights, not the least courts. These institutions use state power not to subdue individual freedom but to ensure that human autonomy's

<sup>79</sup> Cf. Griffin, *On Human Rights*, 92: “[G]etting something accepted as a human right transforms one’s case. One is transformed from beggar (‘you ought to help me’) to chooser (‘it is my right’). If one can claim by right, one is not dependent upon grace or kindness or charity to others.”

dominion is safeguarded against unjustified intrusions and limitations, in particular by the state itself. Today, the protection of human rights has gained an international dimension: The international legal order is oriented towards the realization of human rights in several ways, sometimes achieving substantial results, as in the case of the ECHR or the inter-American system of rights protection – although it should be repeated that the reality is a far cry from anything close to an “international rule” of these rights.

Human rights are thus not just a lofty idea but elements of a very important social practice. Many people think about the meaning of these rights and apply and enforce them. Human rights – both in their moral as well as in their legal dimensions – have thus become building blocks of the social fabric of the world. They are part of the very stuff that current civilization is made of. They form a core aspiration of our epoch that defines its nature and has a clear effect on the lives of many people – at least until human beings abandon it, perhaps to worship anew the false idols of human folly and, even in the intimate realm of their moral hopes, succumb to the fateful lure of power, injustice and domination.

Accordingly, human rights are limited but crucially important concrete expressions of the intimate human longing for justice and a morally decent life. The quest for justice and moral goodness is one of the traits that distinguish the human species. Throughout history, human beings have searched and struggled for a way of life that takes justice and what we owe to each other as seriously as these ideas deserve. These endeavors have occupied, bewildered and at times enchanted human thought. They seem to be one of the undertakings that are key to understanding the core of human existence.

There are many wonders in the natural world, as planets, black holes, red giants, curved space–time, gravitational waves, subatomic particles and the like illustrate. But some of the wonders of this world lie within human beings’ inner selves, in their subjectivity, and these are as magnificent in their architecture, as rich in mind-baffling riddles, as fascinating in their surprising properties, as vast in the space they open up for human inquiry as anything in the outside world. One of these remarkable phenomena of the inner human world is the apparent existence of a moral compass, a sense of justice, a principle of humanity, a “conscience,” to use the term chosen by the drafters of the *Universal Declaration*. Morality is a constitutive element of human beings’ inner world and part of the stuff that defines this rather peculiar species.

Given the very particular role that human rights play in history and contemporary human life and their apparent link to the riddles of morality that are so central to the human life form, they belong among the most important products of human thinking. The desire to understand human rights as such, as elements of pure theoretical inquiry beyond the practical ethical, legal and political interests at stake – the wish to decipher the origin and nature of this element of human thought and practice and to unearth the preconditions of its development in human thinking,

history and social development – is consequently a pursuit worthy of very serious effort. Exploring the moral idea of human rights and its manifestations and effects, its history and roots in human beings' inner selves, is no less significant than the attempts of the inquiring human mind to solve the riddles of time and space (or what is left of these traditional forms of human thinking about the world) or to explore the structure of matter deep below the surface. Human rights in ethics and law mirror constitutive features of human moral understanding, and there is no need to defend attempts to determine the exact meaning of what we see in this fragile looking glass.

This remains the case even if we are skeptical about the rise of human rights over the last 200 years or so, as some are; it remains the case even if we deplore the language of rights and see it as depoliticizing intrinsically political struggles, or even as a parochial tool of Western hegemony, which should have no place in a postcolonial world freed from all illegitimate, socially constructed, contingent fetters; and it remains the case even if we see human rights as a chimera sprung from the delusionary workings of our brains – all matters to which we will return. Even in these cases, we should be interested in understanding better the origins and current reality of human rights, firstly because of scientific curiosity and secondly because understanding rights is a precondition for fighting successfully against their rule – if, after reflection, we still find reasons to do so.

#### 1.10 THE LINE OF ARGUMENT

How, then, to approach these far-reaching and important questions? This inquiry will try to get to grips with at least some of the problems involved by proceeding in the following steps: First, given the intense debate about human rights, it has been necessary to show in some detail that embarking on this particular theoretical journey is worth the effort. To this end, the preceding remarks considered the question of why the relationship between the human mind and rights is of significant theoretical interest. Thus, the first question – *Why does an inquiry into mind and rights matter for ethics and law?*<sup>80</sup> – hopefully has been answered sufficiently.

Second, the concept or idea of a human right as a subclass of moral and legal subjective rights (or, to use a different terminology: claim rights) will be outlined and its content clarified. The meaning of the term “human rights” is not obvious. The definitions of this term sometimes vary considerably and are far from uncontroversial, not least in theoretical debates. The questions implied are not just

<sup>80</sup> The term “ethics” is used in a variety of ways. One is to take ethics as a theory that reflects upon morality. Another widespread understanding of the term is to use “ethics” for anything that concerns the good, flourishing life in a roughly eudemonistic sense, e.g. Jürgen Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992), 139 ff.; Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011), 13 ff. In the present text, “ethics” is used in the former, not the latter sense.

terminological, however. On the contrary, important issues are at stake. On a very basic level, for example, we can ask whether phenomena such as “rights” are even possible – in the sober light of reflection, is the idea not after all just deplorably obvious “nonsense upon stilts”? If it is not, the question of the structure of rights arises. Another important question concerns the relation between moral and legal human rights. This analysis of the concept or idea of rights is thus indispensable if we are to answer the question: *What precisely are we talking about?*

Human rights as we know them are the products of history. They were not simply present in people’s minds in the same way as the perception of a setting sun. Accordingly, there is a rich tradition of studies on the history of human rights, and the field is currently marked by intense debate. It is not possible to discuss human rights credibly from any perspective without situating our argument in what we know about the historical development of this idea that has finally been turned into legal institutions. Therefore, the (fascinating) question *Where do human rights come from?* needs to be addressed as our third step. It will occupy our attention long enough to develop some reasons for a thesis that paves the way for the subsequent line of argument: Human rights have deep roots in the cross-cultural history of ideas and social practices, but not in the sense of a *Universal Declaration* in cuneiform. Rather, there are many clearly related ideas that help us to understand how humans came to form this peculiar concept and illustrate that it is naive to assume that any particular time or culture, including our own, has some kind of epistemic privilege of insight. The history of human rights must include phenomena that *are not human rights* but paved the way to develop this idea. More specifically, history illustrates that important seeds of human rights are moral judgments about individual human beings’ justified claims to qualified goods in concrete situations – claims that are addressed to other individuals, who are obliged to act accordingly. When critical reflection leads these judgments to be objectified as to content, generalized across situations and universalized across persons, turned into explicit ethical precepts and finally solidified in legal concepts and institutions, the idea of human rights is born. This process is summarized in a sentence but took centuries to unfold. Furthermore, the present study maintains that reflection on the historical genealogy of human rights necessarily leads beyond human rights history into the deep waters of the theory of human rights, their justification, epistemology and ontology and thus to those kinds of problems that these remarks intend to explore further. Neither history nor historicism offers an escape route from such a theory of human rights.

Fourth, the question *Why are rights justified?* will be considered. The rationale behind this discussion is as follows: There can be no meaningful epistemology of human rights without specifying a normative theory of how they can be justified. This is because the latter formulates the claims whose epistemological merits are assessed by the former. If it emerges that human rights are best justified by qualified interests of agents, the epistemological status of a justification by interest has to be

assessed. By contrast, if human rights are successfully grounded on instrumentalist considerations of preference maximization, the epistemological status of instrumentalist arguments is at issue. If loss aversion is the key to understanding the phenomenon of human rights, the epistemic merits of loss aversion have to be scrutinized. If human rights are most convincingly based on arguments from anthropology, political theory and normative principles of solidarity, justice and the intrinsic worth of human beings, as will be argued here, the task is to develop an epistemology of these argumentative pillars of the theory of justification. Only if we identify what the justification of human rights actually entails can we clarify what importance the theory of mind may or may not have for this justification. Admittedly, this step forms a major challenge for our argument because the justification of rights is particularly controversial, and with good reason, given the substantial difficulties to be surmounted. But if we want to proceed, we must meet this challenge as best we can.

These remarks on the analysis of the idea of human rights and what history and the theory of justification teach us about the relation between human understanding and human rights prepare the ground for the fifth and last issue to be addressed: *What, after all, is the importance of the theory of mind for the project of human rights? Can the modern theory of moral understanding vindicate the connection between reason, conscience and rights?* Here, the attack from today's neuroscientific neo-emotivism will be discussed, which is interesting in itself and has the advantage that its critique has considerable heuristic merits. Other important theories of moral psychology will be considered on this basis in order to determine what we can learn from them for a constructive account of the theory of mind and the foundations of human rights.

The next perspective to be explored will be how a theory of human rights could draw from an alternative theory of mind, and more concretely from a mentalist account of ethics and law, to provide such a constructive account. As indicated above, such perspectives on the theory of the moral mind form a necessary element of sufficiently rich explanatory theories of human rights. Without them, a crucial piece of the puzzle that needs to be put together for a theory of satisfactory explanatory power would be missing.

After this argument and on its basis, a central problem that arises in different theoretical settings will be addressed: the role of empirical findings for a normative theory and thus the problem of the trap of a naturalistic fallacy in the study of ethics and law. The present study will argue that while an understanding of the human mind is no substitute for normative theory, normative theory can be bolstered and enriched by a plausible theory of the human mind, not least to defend the idea of human rights against attacks that are motivated by what their proponents regard as the empirical findings of moral psychology. Not only can there be no full understanding of human rights without their theory being embedded in a plausible theory of the makeup of the mind, there can be no full-scale defense of their reign without such a theory either. This study will explain why a defense of human rights

strengthened by human moral psychology is entirely in line with a plausible theory of the evolution of human cognition – something that needs to be addressed because evolutionary arguments have become influential in the debate about rights.

The debate about rights is not limited to the rights of humans. The question of animal rights also has attracted much well-deserved attention. We will limit our inquiry, however, to the rights of humans, to avoid overstretching its already rather wide scope, but with the proviso that nothing in this study speaks against a critical theory of rights for nonhuman animals. On the contrary, what is going to be said here may enrich such a theory as well.

### 1.11 PROBLEMS OF INQUIRY

This research agenda involves particular difficulties. The first is that the questions posed lead to very different fields of inquiry, most importantly the philosophy and legal theory of human rights, the positive law of human rights, the theory of mind, moral psychology and the neuroscience of normative judgment and its evolution. The approach adopted here takes a particular perspective, namely that of practical philosophy and legal theory. As such, it differs from other approaches, has its own particularities and – most importantly – has its own specific limitations.

However, there is no way around such to a certain degree necessarily limited approaches from specific scientific perspectives when addressing a grand topic such as the one at stake here, which forms an object of investigation in other domains of inquiry as well. For example, a moral psychologist necessarily will include theoretical assumptions about the nature of rights in reflections on moral psychology, a moral philosopher assumptions of moral psychology (e.g. that human beings derive all moral concepts *de novo* through education). No one discipline has a monopoly on raising and attempting to answer certain questions. There is no monopoly of insight either: A legal theorist is well advised to listen closely to what a moral philosopher or a cognitive neuroscientist has to say about the topic of human rights. On the other hand, an approach from the point of view of legal theory should be of interest for these other disciplinary perspectives as well. At best, these different perspectives can complement each other and ultimately may help to answer some of the truly big questions at stake.

This mutual interest and benefit are all the more obvious if we remain aware that such disciplinary boundaries are to a certain degree artificial. To be sure, there are differences in the research methods, intellectual cultures and background assumptions in different disciplines. There is common ground, too, however. A psychological fact is no less a fact if it contradicts what lawyers are accustomed to think. An interesting thesis of the theory of law is not irrelevant for philosophy just because it was outlined in an office at a law faculty and not at a desk in a philosophy department in the next building. As far as the topic of human rights is concerned, traditionally many approaches have played a role. This is particularly true for the

relation between practical philosophy and moral psychology. It is no coincidence that many important works in the history of ideas wed the two together.

In addition to these problems, another difficulty is that the theoretical questions involved are particularly contested. There is not just one theory of human rights. There are many histories of human rights, too, and, to make things even more complicated, there is profound disagreement about the right method of approaching these questions in the first place. The theory of mind, cognitive science, moral psychology and evolutionary theory are equally divided fields. The basic assumptions of some approaches are taken to be outlandish by others. There is no clear middle ground in these debates. Any question concerning the nature, content and justification of human rights, the history of rights and its lessons, the theory of mind, the insights of neuroscience or the basics of moral psychology or evolution will require us take a stance that appears questionable to some and perhaps even entirely flawed to others. But there is no alternative to proceeding along the outlined course. There can be no history of rights without a concept of rights. There can be no theory of rights, their content and their justification without a concept and some historical understanding of the genealogy of human rights. There can be no theory of the moral and legal mind without understanding what morality and human rights actually mean and how they developed historically. There can be no account of the evolution of moral cognition if there is no theory of what actually makes up moral understanding.

One first aim of these remarks is thus to dispel any hopes that a theory of human rights can be achieved on simpler terms. As we will see, this is not a useless function, as all too often a particular view on any of these issues is too easily accepted as the only defensible approach, sometimes with far-reaching consequences for the plausibility of the argument put forward.

We should be mindful, therefore, of the fact that the particular standpoint from which we approach the question implies limitations, blind spots and disciplinary biases. Furthermore, we should be mindful of the intricate theoretical questions to be answered on the way and their contested nature. Any road taken will lead to path-dependent arguments that may be flawed because of some misconception implied in the background assumptions about the nature of rights, their historical or evolutionary origin, their content and justification and the mechanism of the mind relevant to develop this idea. All of the remarks that follow will be made and should be read with an awareness of this contingency.

The underlying attitude of this inquiry into human rights is thus perhaps best described as a form of *constructively audacious humility*: Substantial theses will be formulated in the hope that they may help us to understand some of the problems at issue, both through occasional insights and through fallacies that may help us to find a better way to proceed by clearly identifying argumentative failures and reflective dead ends. At the same time, there will be no effort made to hide the provisional, fallible and tentative character of any argument formulated here behind pompous

language, scientific posturing or robust self-assertion about the things that have supposedly been “shown.”

A last difficulty should be mentioned at this point. This difficulty arises in the context of any argument that deals with matters of human morality and profound questions of justice, not least when dealing with human rights. It has two dimensions: First, it is demanding to talk credibly about matters as serious as human rights. Such endeavors can easily sound like moralistic, mawkish hypocrisy, like moral kitsch telling sweet little lies about human goodness and reasonability that are vividly refuted by one glance at the morning papers or one’s news feed. They can appear as spinning the metaphysical yarn of the past in a futile effort to salvage a sweet, moving dream when the time for a sobering awaking is already long overdue. Second, important moral issues also can provoke critiques that miss crucial insights because their critics are wedded to the belief that truly unprejudiced human thought cannot leave anything intact that appears grand or noble like human rights, that one truth condition of a theory is that it unveils the profane construction concealed behind a cozening facade. Furthermore, there is a strange intellectual pleasure in defiling that which many seem to cherish highly.

Daring to express irreverent disregard of the false authority of customary thought doubtlessly is a crucial sign of freedom and independence of thought, and this freedom is essential for any serious theoretical endeavor. However, we have to retain an open mind about the possible results of an inquiry into these matters that jettisons false idols. In particular, we need to consider the possibility that an idea like human rights has gained the importance attached to it on very good grounds. We thus have to avoid two pitfalls: moralistic posing on the one hand and gratuitous doubt, which is the born enemy of truly critical thought, on the other.

#### I.12 THEORY OF HUMAN RIGHTS AND THE ETHICS OF A WAY OF LIFE

The inquiry into these questions is not only of theoretical interest, although this interest alone can already motivate passionate work in this field. These questions are of very concrete political significance, too. This is because there are very serious reasons for concern about the human rights project. We should not take the existence of the level of civilization epitomized by human rights for granted. The history of the last century is sobering. Massive crimes were committed because fantastic ideologies such as National Socialism held their barbarous sway. Camus with good reason called it “*le siècle de la peur*,”<sup>81</sup> a century of fear that formulated the categorical imperative “*ni victimes, ni bourreaux*,” to become neither victims,

<sup>81</sup> Albert Camus, “19 Novembre 1946: La siècle de la peur,” in *Cahiers Albert Camus Vol. 8: Camus à Combat – éditoriaux et articles d’Albert Camus (1944–1947)*, ed. Jacqueline Lévi-Valensi (Paris: Gallimard, 2002), 608.

nor hangmen.<sup>82</sup> Given this cataclysm and the added experience of the suffering that has followed since around the world, the recent past has certainly taught us that we should not place too much confidence in the decent behavior of human beings. To be sure, such skepticism does not necessarily imply a verdict about reason or an endorsement of theories about its intrinsic dark side<sup>83</sup> or the amoral driving forces of the human will.<sup>84</sup> But it does nourish a very ancient reluctance to underestimate the fragility of civilization. After all, the Athenians did not lack culture but nevertheless sowed destruction in the Peloponnesian Wars, both for others and ultimately for themselves.<sup>85</sup>

Dispelling doubts about the justification of human rights is thus not only a theoretically important but also a politically crucial end. It is necessary to strengthen the (not at all self-evident) motivation to do something to defend human rights' fragile rule where it exists. It is a precondition for helping to increase their sway, which challenges power, injustice and bondage in this world – albeit often without success, given the formidable adversaries of the idea that human beings enjoy certain intrinsic rights. There can be no long-term politically effective defense of human rights without understanding their nature, structure and deeper roots and thus the kind of inquiry to which these remarks intend to contribute.

In the story *Typhoon*, the darkness of the storm that the ship *Nan-Shan* is steaming through is a symbol for the condition human beings find themselves in – the impenetrable riddles of their existence, the immensity of appalling stillness that surrounds them, the threat of being the solitary self-conscious inhabitants of a world without sense and purpose.

The sailors fighting their way through the typhoon, led by the unimaginative but strikingly resilient and morally principled Captain MacWhirr, assert the meaning of human life with their struggle against this menace. Importantly, respect for other persons – in this case, the Chinese coolies, who are herded under deck by the shipowners but who MacWhirr demands be treated with as much decency and fairness as possible even in what appears to be the foundering ship's last minutes – is central to the existential self-preservation of the human beings battling the storm.

<sup>82</sup> Camus, "Siècle de la peur," 608.

<sup>83</sup> Following e.g. the argument of Max Horkheimer and Theodor W. Adorno, "Die Dialektik der Aufklärung," in *Theodor W. Adorno: Gesammelte Schriften*, Vol. 3, ed. Rolf Tiedemann (Darmstadt: Wissenschaftliche Buchgesellschaft, 1998).

<sup>84</sup> Cf. with the consequence of denying the "Wille zum Leben," will to life, Arthur Schopenhauer, *Die Welt als Wille und Vorstellung*, Vol. 1 in *Sämtliche Werke*, Vol. 1, ed. Wolfgang von Löhneysen (Frankfurt am Main: Suhrkamp, 1986), § 68; Arthur Schopenhauer, *Die Welt als Wille und Vorstellung*, Vol. 2 in *Sämtliche Werke*, Vol. 2, ed. Wolfgang von Löhneysen (Frankfurt am Main: Suhrkamp, 1986), ch. 48.

<sup>85</sup> The perceptive commentator Thucydides takes it as both the premise and the justification of his work that humans will repeat such miseries as the war he describes and may therefore profit from a true account of the past, cf. Thucydides, *History of the Peloponnesian War*, Vol. I: Books 1–2, trans. Charles Forster Smith, Loeb Classical Library 108 (Cambridge, MA: Harvard University Press, 1928), book 1, XXII.

The force of this tale draws our attention to a final point: Human beings have traversed periods of profound darkness, and not only in the recent past. There are probably more dark times ahead, with challenges to the protection of human rights coming both from traditional and new sources that may prove highly significant, as the possible consequences of global warming show with worrisome clarity. Protecting human rights is not only important in order to prevent harm to human beings, however. It is not only a means of fending off the danger of *that* dark night. Rather, this protection forms part of a certain interpretation of the existential condition humans find themselves in as human rights express an attitude towards human life. Simply put, they assert the worth of being human. If humans were dispensable, irrelevant and meritless creatures, there would be no reason to make any effort to respect human persons and protect their capability to lead their lives. It is the very point of human rights that every life is taken to be of equal worth, whether the respective person makes a fortune, excels in physics, leaves behind great sculptures or disappears in the “*immense oubli*,” the great forgetting that Camus rightly sees as the fate of people like his hardworking, uneducated and poor parents and family, and which – one might add – will be the final resting place of most of us, regardless of the walk of life from which we come. The language of human rights expresses the persistent consciousness of the meaningfulness of all human life despite the numerous catastrophes of human history, the yaw of intellectual doubt, the many forms of human suffering and the silent vastness of the world in which humanity is seeking its difficult way. Human rights thus reassert the value of naked, simple, unadorned human existence and the spark of greatness that is its core.

Whether a reflection on mind and rights is able to add anything meaningful to these large questions will be scrutinized in the analytical steps outlined above. The path we will follow is beset with particular difficulties. Any step will thus be taken modestly, as indicated above, with the profound conviction that more questions will be raised than answered. The first step is to better clarify what the concept of human rights actually entails.