Human Rights

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1 Introduction

Human rights may be defined as

- rights that every person has;
- by virtue of merely existing; and
- that aim to secure for such a person certain benefits or freedoms that are of fundamental importance to any human being.

Human rights have changed the way we look at law. For a long time, law has been seen primarily as a set of rules laid down by an authority that people are (legally) obligated to comply with. The advent of human rights has added on top of that a set of requirements impinging on the lawmaking authority itself. For the law to be valid, it is not enough for it to be laid down; it must also sufficiently respect and promote the fundamental interests of human beings. This has substantially moralized law, for better or worse, and this change resonates across the whole legal system.

This chapter takes for granted that constitutional fundamental rights and human rights are roughly equivalent because they have the same function, that is, they aim to do the same thing: to protect the basic interests or freedoms of all human beings. However, some would rather emphasize that different ideologies, national identities, and historical developments underlie different systems of human rights protection, which lead to radical differences between these systems. Most international treaties for the protection of human rights and most national constitutions protect the freedom of speech of individuals against State intervention, and from that perspective, they are equivalent. But the interpretation that is given to freedom of speech, the value that is afforded to it, and the exceptions that are made to this right can be seen to depend on ideological divides that underlie the similarities.

For example, as may be seen from the case *Brandenburg v. Ohio*, the United States has an individualistic culture that is tolerant of hate speech. By contrast, as may be seen by the case *Saada Adan v. Denmark* (UN Committee for the Elimination of All Forms of Racial Discrimination), the UN considers that hate speech is dangerous and discriminatory and that it should be criminalized.

The present chapter is divided as follows. First, ► Sect. 2 presents an account of the historical development of human rights. Because human rights are not exclusively a legal concept, ► Sect. 3 explains how human rights are seen from different disciplinary perspectives. ► Sections 4 and 5 describe who benefits from human rights and who is obligated to provide the benefit, respectively. ► Section 6 describes the actual rights that are provided by law, and ► Sect. 7 explains how these rights may be limited or constrained. ► Section 8, finally, explains how human rights are protected.

2 The Historical Development of the Idea of Human Rights

In this section we explore the philosophical ideas and historical developments that led to the present day systems of human rights protection. Given the fact that the idea of human rights has existed, in one way or another, for millennia, it is inevitable that this account can only be schematic.

2.1 Natural Law Background

Historically, human rights can trace their origin to the natural law tradition developed, among others, by the Stoics of Ancient Greece and Rome and philosophers such as Thomas Aquinas (1225–1274). According to the natural law tradition, above positive law there is a higher law that protects all mankind and to which positive law should conform.

This way of thinking was based on the idea that in nature there is an inbuilt order of things with requirements that men should identify and follow. For example, it is fitting for man to procreate, and the law should therefore recognize and protect children. This order of things was thought to be independent of the truths of revealed religion. Under this framework it was thought that, for example, Christians, Muslims, and pagans could all participate through reason in teasing out the requirements of natural law, even if they held different faiths and attributed different origins to nature. Natural law was thought to be a common ground for different cultures and religions. For example, natural law was a basis for claiming that although South American natives were not part of the Christian civilization and did not have access to revelation, they were still owed respect.

Classical natural law lost a lot of persuasive power due to the advent of the scientific world view which sees nature as mechanical and deprived of inherent purpose or meaning, so that it is human beings who have to decide for themselves what needs to be done.

The collapse of the old view led to a modern variant of natural law thinking that retained the idea of a universal higher law from the old tradition but which gave «nature» as such a very minor role to play, emphasizing instead the capacities of free individuals to seek cooperative schemes of mutual advantage. This line of thinking was championed by intellectuals such as Hugo Grotius (1583–1645), John Locke (1632–1704), and Immanuel Kant (1724–1804). These scholars reinterpreted natural law principally in terms of subjective rights that are the prerequisites for the construction of a fair social order. Here the linkage between natural law and human rights becomes clearer because the focus lies on individual rights which enable the exercise of individual freedom.

The natural law tradition found a receptive soil in the American political experiment. In 1789, the United States was the first country to adopt a legally enforceable constitution, with a list of basic rights. The writers of the American Constitution were knowledgeable about the two variants of natural law thinking and appealed to it when drafting the Constitution.

Natural law thinking lost steam in the nineteenth and the first half of the twentieth century. As mentioned, classical natural law was undermined by the advent of the scientific world view, but its fall was further solidified by the rise of Marxism, Darwinism, and Freudianism, which showed that the mechanical view of nature could be used to provide far reaching explanations of topics which were normally thought to be beyond the reach of science. The modern variant of natural law was undermined by the Romantic Movement, which celebrated local cultures, shared sentiments, and particular identities, instead of individual rationality. All these countercurrents to human rights thinking remain influential today.

2.2 Revival After the Second World War

The Second World War allegedly «shook the conscience of mankind» and sparked a renewed interest in the idea that there are universally applicable moral limits to what States are allowed to do with their subjects. Such renewed interest in human rights found expression at the global, regional, and domestic levels.

Global Developments

At the global level, the protection of human rights became a key concern of the United Nations. While the UN Charter, the founding document of the United Nations, makes little reference to human rights, the UN took for itself to promote human rights at the global level, and today the promotion of human rights constitutes one of the three main aims of the United Nations (the others being achieving peace and security, and promoting development).

The United Nation's engagement with human right started with the 1948 *United Nations Declaration of Human Rights*. This non-binding instrument was to be followed by binding treaties, the most general being the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), both of which entered into force in 1976.

Regional Developments

Some regions of the world have sought to have a supranational system of human rights protection that is stronger or better adapted to regional peculiarities than that of the United Nations. Three regional systems of human rights protection are notable:

1. The European System of Human Rights Protection, operating out of the Council of Europe (not the European Union) and encompassing most States of geographical Europe, including Russia, Turkey, Georgia, Azerbaijan, and Armenia but excluding Belarus
2. The Inter-American System of Human Rights, operating out of the Organization of American States encompassing almost all States of the continent but with full participation of mostly Latin American States
3. The African System of Human Rights Protection, originally operating out of the Organization for African Unity and now based in the African Union, encompassing nearly all African countries

Less mature initiatives exist in Asia and the Arab region, but their relative lack of development means that citizens of these countries need to rely more on the global UN system or on domestic law.

It is curious that States have found it pertinent to make a variety of global and regional treaties protecting human rights. At first glance, it may be thought that human rights are predominantly a domestic affair. Compare: if a country pollutes the ocean, or imposes excessive tariffs on imports, other countries are affected, but if a country mistreats its own citizens, it is not immediately clear that this will impact other States. This anomaly has been explained in a variety of ways.

First, it has been argued that the international community as a whole is morally concerned with the protection of all human beings. Second, it has been argued that massive human rights violations spill over into wars, and consequently, all States have an interest in ensuring compliance with human rights. From a purely factual perspective, neither of these two claims is wholly convincing.

Domestic Developments

At the domestic level, the Basic Law of the Federal Republic of Germany of 1949 (eventually the constitution of the reunified German State) was, like the United Nations Declaration of Human Rights, a reaction to the atrocities of the Second World War. The Basic Law served as a model for new constitutions being made all over the world.

The first article of the German Constitution reads: «Human dignity shall be inviolable. To respect and protect it shall be the duty of all State authority», and this article is followed directly by a list of fundamental rights. Constitutions typically start by making references to the sovereignty of the people, the shared territory, language, or history. The German constitution is unique for departing from human dignity and rights. Nowadays, most States of the Western world have constitutions that include enforceable bills of rights with roughly the same content as the ICCPR. Even traditional bastions of resistance to the idea of legally entrenched and judicially enforceable human rights, such as the United Kingdom and Canada, have been influenced by this trend. In the case of the United Kingdom, this has been done through the domestic incorporation of regional human rights standards (the Human Rights Act of 1998 incorporated the European Convention of Human Rights into domestic law), while in Canada this occurred through the development of a homegrown bill of rights (in particular, the Canadian Charter of Rights and Freedoms of 1982).

3 The Dimensions of Human Rights

Human rights are not the monopoly of lawyers. Although the present chapter focuses on human rights as a legal phenomenon, the legal dimension of human rights does not exhaust the concept. In principle, one can use human rights in (at least) four different ways, only one of which is, strictly speaking, legal. Human rights are (1) positive law, (2) moral claims, (3) standards for measurement, and (4) a political language. It is important to be aware of these different dimensions of human rights, because such an awareness can help avoid ungainful confusion.

Human rights are a legal reality. From this perspective, they exist because they are created by law, and to know what rights we have, we have to look at the relevant sources of law that are currently in force. Normally the place to look will be the constitution and ratified international treaties.

That being said, human rights also exist as moral claims. The natural law tradition claims that there are rights that apply to all human beings, which precede the positive law and which the positive law must recognize and honor. Such moral claims are relevant for lawyers. They inspire the creation or rejection of legal rights and can be useful for interpreting the legal rights that are found in treaties and constitutions.

Human rights have also become a standard for measuring the development of States. In the field of development there has been some disillusionment with the use of economic criteria as a means for assessing development, and some have claimed that societies should be assessed not by their economic output but by the degree to which they secure the enjoyment of human rights.

The idea of using human rights as standards for development has received imperfect expression in the Human Development Index published by the United Nations Development Program. This index ranks countries in relation to their performance in life expectancy, education, and per capita income. These criteria are supposed to be closer to human rights than to traditional economic analysis. In the twentieth century, economist Amartya Sen (1933-) and philosopher Martha Nussbaum (1947-) achieved academic prominence for conceptualizing human rights as the main component of development.

Finally, human rights are also a tool for social protest. It is said that we now live in a culture of rights. Western society regards matters of human rights as having a much greater importance than all other issues. Due to this, human rights have become a powerful language to frame social grievances. There is the expectation that framing a claim as a matter of rights will make it more effective. This use of rights is independent from the legal and moral dimensions of human rights. Human rights may be effective as a means to frame complaints even if the complaints being made have no clear legal or moral backing.

4 Critiques

For most people in the West, the phrase «human rights» has a positive connotation: human rights are seen to be fundamentally a good thing. Yet not everyone agrees with this. Some believe that there is something wrong with human rights.

Three powerful objections are that human rights are (1) suboptimal, (2) undemocratic, and (3) parochial.

The problem of suboptimality is easy to grasp. Human rights rule out certain forms of behavior because they infringe the rights of individuals. But it is quite easy to think of situations where infringing the rights of an individual will lead to better results overall. While this problem is endemic to rules in general, it is more severe in the field of human rights because human rights are very hard to change.

Fearing an attack like that of September 11, the German Parliament approved a law (the Luftsicherheitsgesetz) that would allow it to shoot down civilian airplanes if they were hijacked by terrorists intent on using the plane as a weapon against civilians in the ground. The German Constitutional Court (see decision *BVerfG, 1 BvR 357/05 vom 15.2.2006*) invalidated this law on grounds that it infringed the rights of civilians in the plane, treating them as mere objects. Many feel that respecting the rights of citizens in such a situation would be suboptimal. It would lead to a loss of life in both the airplane and the building. There was nothing the parliament could do to reject this seemingly suboptimal decision.

Maybe suboptimality is not a big problem. Human rights aim to secure a just society, not an optimal one. But the next two critiques threaten to put in question the justice of human rights.

Human rights are undemocratic in more than one way. First, they authorize courts to ignore or invalidate democratically made legislation because it infringes individual rights. This is not necessarily a bad thing. That something is democratically decided does not obviously make it just or fair. But sometimes it is question-begging to assume that something is owed as a matter of rights and therefore meant for judicial, rather than parliamentary, determination. In these situations, an appeal to human rights removes contested issues from the political arena and hands them over to lawyers.

Returning to the example of the decision of the Constitutional Court against shooting down hijacked planes, it is question-begging to assume that respecting the dignity of passengers of the plane is a matter of rights, while protecting the life of civilians on the ground is not. Both claims can be defended as a matter of rights. In such cases it is worthwhile to ask who is better situated to resolve the polemic in an even-handed manner: judges, a representative body like parliament, or the people on referendum?

Finally there are worries that human rights are not universal, but parochial to the West. The idea here is that it is unfair to impose on non-Western countries normative expectations that have nothing to do with their history and traditions.

Psychologist Jonathan Haidt (1963-) has identified a type of morality he calls WEIRD. The letters stand for «Western Educated Industrial Rich and Democratic». An emphasis on individualistic rights is a core part of WEIRD morality, and maybe such an emphasis makes sense in a WEIRD social environment, but why should it be exported to different social environments where different values hold?

The force of this critique should not be overstated. Even if it turns out that human rights are the product of Western thinking, it may be the case that they are still desirable for non-Western cultures because they provide benefits that are attractive from any cultural standpoint, for example, protecting individuals from State abuse. But if this is the case, arguments will need to be produced to show that human rights are better at doing this than other alternatives that may exist in non-Western societies.

5 The Right Holders

If we are talking about human rights, it seems obvious that the right holder must be a human being, but such simplicity hides pervasive disagreements. Some claim that human rights accrue only to «persons», understood restrictively as human beings in actual exercise of rational capabilities. Others claim that human rights accrue to all human beings, understood in the wide sense as members of the human family, independently of the exercise of rational capacities.

Similarly, one can question whether legal persons (such as corporations) should count as persons deserving human rights protection. On one hand, corporations are mere fictions. On the other hand, it seems that certain rights naturally express themselves through corporations and excluding corporations from protection can lead to gaps in the system. For instance, it is customarily assumed that freedom of press can be exercised by a newspaper company or that freedom of association includes the right to create legal persons.

This particular issue has been resolved differently in different jurisdictions. The European Court of Human Rights grants protection to corporations, the Inter-American Court of Human Rights does not.

Another relevant problem concerns the rights of collectives. Human rights have been traditionally conceived as rights of individuals. Many have thought that such individualism should be tempered by adding a collective dimension to the rights that protect not only the individual person but also the subsistence of a group and its customs.

In relation to various indigenous tribes in South and Central America, the Inter-American Court of Human Rights has recognized at times that there are human rights that these tribes enjoy collectively, especially the right to collective ownership of their ancestral lands. The African Convention on Human and Peoples' Rights takes the same approach, and explicitly recognizes collective rights to development, peace and a healthy environment.

The danger of collective rights is that they may enter into conflict with individual rights, for instance, when the right of a collective to practice its traditional forms of justice implies the endorsement of procedures and punishments considered backward or inhumane.

In some Latin American countries indigenous tribes have gained the right to use and administer their own justice system. Such systems sometimes involve flogging, the death penalty and rudimentary standards of evidence. If human rights are individual rights only, then it is clear that these practices are prohibited. If there exist both individual rights and collective rights, the result is unclear.

6 Duties

6.1 Who Are the Duty Bearers?

The general orthodoxy is that human rights only create duties for the State. Human rights originated as guarantees against State abuse. This orthodox view has been challenged on many fronts. Some argue that due to globalization the State has lost practical control on what happens in its territory. Often non-State entities such as corporations and terrorist groups hold more power than the State, and it is unrealistic to expect underdeveloped countries to keep them in line. This, it is claimed, would justify addressing human right duties directly to these non-State entities. Others worry that due to its focus on States human rights law is insufficiently sensitive to what happens within the private domain of the family.

It is open to question whether these concerns really justify attributing human rights duties to non-State actors. Human rights are very vague standards, especially in contrast to the norms of civil law and criminal law, and, consequently, their application against private parties will be unpredictable and potentially oppressive. It seems more appropriate to use human rights to demand the state to ensure that appropriate civil or criminal legislation is in place.

This strategy has proved effective in the courts. For example, in the case X and Y v. The Netherlands, the European Court of Human Rights found that the failure of the State to have appropriate criminal legislation against child abuse was a human rights violation.

6.2 Types of Duties

It is traditional to distinguish two different sets of rights by looking at the sorts of demands they make on the State. «Negative» or «liberty» rights demand State inaction; «positive» or «welfare» rights demand State action. For example, the right to freedom of speech is negative because it only demands that the State censors no one, while the right to health is positive because it requires the State to provide health care for the sick.

The tension between these two sets of rights was a dominant theme in the drafting of the main UN global treaties for the protection of human rights. The Universal Declaration of Human Rights (UDHR) included both types and at first the idea was to make a single binding human rights treaty with the same content as the UDHR. Nevertheless, first world countries strongly resisted the inclusion of economic, social and cultural rights in a binding treaty, while socialist countries championed their primacy. As a result of this controversy, it was decided to split the rights into two treaties, resulting in the ICCPR and the ICESCR we have today.

The strict division between liberty or negative rights and welfare or positive rights has lost ground. At present it is usually assumed that a single human right may give rise to many duties; some of these duties may be negative and others positive. For example, the United Nations claims that any right may give rise to duties (1) to respect, (2) to protect, and (3) to fulfill.

Duties to *respect* are negative and are complied with by the State by refraining from doing something: from impairing the enjoyment of a right.

Duties to *protect* require the State to take action to prevent third parties from impairing the enjoyment of a right of another individual.

Duties to *fulfill* are positive and require the State to take action (such as aiding, providing, or informing) in order to ensure that somebody enjoys a right that he/she is presently not enjoying.

So, for example, the traditional «negative» or «liberty right» freedom of speech can be though to give rise to:

- A duty to respect, in the sense that the State should not censor speech that criticizes the government
- A duty to protect, in the sense that the State must protect protesters from harassment and intimidation that could discourage speech
- A duty to fulfill, that the State must take steps to encourage pluralism in media

Likewise, the traditionally «positive» or «welfare right» to education gives rise to:

- A duty to respect, that the State should not ban certain children from receiving an education
- A duty to protect, that it should ensure that negative stereotypes do not impede children from getting a good education
- A duty to fulfill, to make public education available for everyone

Positive rights are, nonetheless, not universally accepted. There is a fear that the protection of positive rights may undermine negative rights. For example, if human rights enjoin States to promote pluralism in media and responsible journalism, States may use this as a pretext to censor broadcasters in the name of rights. This objection is very similar to the concern (discussed above) that introducing collective rights may undermine individual rights.

6.3 Getting from Rights to Duties: The Role of Case Law

Generally the treaty law or the constitutional text will provide us with a list of rights, but it will say nothing of the duties that flow from such rights or their scope. Getting from the rights to the duties is never a mechanical procedure. For example, if the right to life prohibits arbitrary killings, it may not be clear what arbitrary means. Moreover, it is debatable whether such a right enjoins the State to take police action to prevent killings from third parties, to prosecute and punish murders, to reduce infant mortality rates, or to do other desirable things.

For the most part, the critical task of specifying what duties arise from rights falls onto judges. For this reason, it may be said that human rights is an area of law that is driven by judicial decisions. This means that even where there is no doctrine of *stare decisis* (civil law jurisdictions, international law) human rights still relies on case law.

7 The Catalog of the Rights

Having discussed who enjoys human rights and who has to protect them, we now need to discuss the rights themselves. Naturally, the international, regional, and constitutional lists of rights are not identical. They have nevertheless broad similarities, and this section will focus first on these similarities by identifying six clusters of human rights that have widespread acceptance. Afterward the section will discuss some controversies relating to what belongs and does not belong in the list of human rights.

7.1 Rights to Integrity of the Person

The right to life and the right to be free from torture deserve to have their own cluster due to their intimate connection to the being whose humanity is being protected.

The right to life prohibits States from engaging in murder and other arbitrary deprivations of life. Because the focus is on *arbitrary* deprivations of life, this right is hedged by a variety of exceptions. For example, the police may use lethal force when it is necessary to do so in order to secure public order, and in some regions, the death penalty is permitted.

By contrast, the right to be free from torture is supposed to be devoid of exceptions. That is to say, the prohibition of torture is thought to be an absolute prohibition. Sadly, the prohibition of torture exhibits in practice a variety of textual «loopholes» that relativize what should be an absolute prohibition.

The United Nations Convention Against Torture, Article 1 defines torture as follows:

> For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based

on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. This seems to create a variety of significant gaps. For example, what about pain and suffering inflicted for no purpose whatsoever, or the pain and suffering inflicted by non-State agents?

Violations of integrity rights tend to be considered particularly severe. Most international crimes or categories of crimes, such as genocide, torture, crimes against humanity, or war crimes, involve violations of integrity rights.

7.2 Freedom Rights

Under freedom rights, we cluster those rights that create a sphere of autonomy for individuals, in which the State may not intervene. Freedom rights include, most prominently, freedom of conscience, freedom of religion, freedom of speech, freedom of movement, freedom of association, the right to property, and the right to privacy.

Although they are not as intimately connected with the human being as integrity rights are, they are nevertheless of tremendous importance. These rights are instrumental for the maintenance of a free society, a space where individuals may interact with each other in conditions of freedom and equality, exchange ideas, and form their identities without the intervention of the State. A free civil society is necessary for democracy, and the absence of a free civil society is a mark of totalitarianism.

Despite their importance, these rights are characterized by being subservient to the public good. Almost all freedom rights expressly allow for limitations when the public good is at stake. Such limitations vary from banning television programs that are deemed to be harmful to minors to allowing surveillance of private conversations to stop criminal activities.

Not all freedom rights are subject to exceptions. Freedom of religion and freedom of conscience are generally thought to have an external and an internal aspect. The internal aspect refers to what one believes in one's mind, and the external aspect refers to making those beliefs public. The internal aspect of these rights is generally considered to deserve absolute protection. The law may never legitimately interfere with a person's conscience.

7.3 Political Rights

Strictly speaking, political rights are the right to vote in free elections and to be elected into office. From a broader perspective, it can be seen that most freedom rights have a political dimension. Freedom of conscience protects one's political beliefs, freedom of speech allows one to disseminate them, freedom of assembly allows one to make a political protest, and freedom of association allows one to organize a political party. Usually the importance given to these rights by courts is heightened when they are exercised in a political context.

Even then, it is useful to distinguish political rights, strictly defined, from freedom rights in their political dimension. It is generally accepted that the political rights of being able to vote and to be elected to office can be made available only to nationals but does not hold true for the political exercise freedom rights.

Due to this restriction one could see political rights as an exception to the rule that human rights belong to every human being. To have political rights, one needs a special legal status, that of having a particular nationality or being resident in a particular country. Even then, this should be seen in the light of the presupposition that every person is a citizen of a country and that statelessness is an anomaly. In reality, according to the United Nation's High Commissioner for Refugees (2009), there are some 12 million stateless persons in the world.

7.4 Welfare Rights

Welfare rights refer to a wide set of provisions that, fundamentally, aim at addressing the problem of poverty. The most notable welfare rights include the right to an adequate standard of living, food, water, access to health services, education, housing, social security, and work.

For most of these rights, it is understood that the State must provide benefits for those who are unable to take care of themselves. This means that welfare rights clearly constitute «positive rights» and for this reason they are traditionally objects of polemic. Since the 1990s, there has been a clear trend for increased recognition of positive rights, but it would be premature to say that they have received widespread acceptance.

India and South Africa are leaders in the judicial protection of welfare rights. In the case *People's Union for Civil Liberties v. Union of India & Others* the Indian Supreme Court enjoined the State to provide meals to children attending public schools. In

the case *Minister of Health and Others v Treatment Action Campaign and Others*, the South African Constitutional Court ordered the State to make available an antiretroviral drug that prevented mother to child transmission of HIV.

7.5 Equality and Nondiscrimination Provisions

The idea of human rights and the idea of equality are closely connected. Not only do most lists of human right include a right to equality under the law, but also all human rights are supposed to apply equally to all human beings. Human rights instruments tend to be written in an egalitarian language: «everyone shall enjoy freedom of speech», and «no one shall be held in slavery».

But the idea of equality can be cashed out in a variety of ways. Among conceptions of equality vying for legal recognition, two stand out: formal equality and material equality. Formal equality is content with having laws that are neutral and that do not single out any specific class of persons for special treatment. Material equality, by contrast, aims to ensure that persons end up enjoying the same benefits and, to achieve this, is willing to treat certain classes of persons differently, giving them special benefit or burdens. Material equality provisions are meant to overcome the limitations of formal equality which are well captured by the famous quote from Anatole France: «The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread».

Connected to the idea of equality, we find the prohibition of discrimination. Discrimination is prohibited under human rights law, but what discrimination means is contentious. The traditional approach to discrimination sees discrimination as the intentional belittlement or exclusion of a group that impacts the enjoyment of their rights. The modern approach to discrimination finds discrimination in any difference in the enjoyment of rights, irrespective of whether the difference was brought about intentionally or happened accidentally, as long as that different cannot be rationally justified.

The traditional and modern conceptions of equality and the traditional and modern conceptions of discrimination tend to go together. The traditional notions of equality and discrimination tend to focus on how individuals are treated. The modern notions of equality and discrimination tend to focus on what people end up enjoying. Problematically, making

people equal in one sense will make them unequal in another sense. Which dimension of equality should be legally recognized and enforced remains polemical.

For an example, consider the case of religious minorities that are required to work in days that are of religious observance for them. In such cases, it is clear that there is no intent on part of the business owner to belittle or to exclude the employee. The business owner treats his employees equally, but this nonetheless results in heavy burdens for the minority. Canadian courts would consider this to be discrimination. They would simply see that there is a difference in result that is not justifiable because the business could find ways to accommodate the worker and make him more equal (see, e.g., *Supreme Court of Canada, Ont. Human Rights Comm. v. Simpsons-Sears*).

7.6 Fair Trial and Administration of Justice

Finally, we must consider rights that are relevant when one is subject to a judicial or administrative dispute. The rights that fall under this cluster are very diverse. They include the right to a fair trial, the right to an effective remedy, and specific requirements, such as restrictions on the time one may remain under detention without trial. For ease of exposition, we will focus on three functions that these rights, taken as a whole, carry out.

First, they control what the State can and cannot do to a person without passing first through judicial control. For instance, a State cannot criminally punish a person without a trial.

Second, these rights also control the functioning of judges requiring them to follow a procedure that achieves certain levels of fairness and effectiveness. The list of requirements that these rights make is large and varied. For example, judges must come to a verdict within «reasonable time», they must be impartial, they must ensure the equality of arms between the litigants, there must be a fair and public hearing, and in criminal proceedings they must respect the presumption of innocence.

Third, these rights guarantee the very existence of a fair judicial procedure that one can have recourse to when one's human rights are violated. In this way, these rights are both discrete human rights and guarantee for the protection of all human rights.

These rights are often applied, with some variation, to disputes between citizens and the public administration. For example, it may be the case that the revocation of a license as a penalty imposed by the public administration may not be carried out without giving the citizen a fair and public hearing.

7.7 Polemics about the Rights Catalog

The clusters that have been discussed represent widely accepted human rights. But these clusters do not tell the whole story. Today there is an exuberant variety of things for which recognition as human rights is demanded.

Just to give three examples, coffee, tourism, and the internet have all been claimed to be human rights by official bodies. These proposals have not been legally recognized. But somewhat outlandish demands have received legal recognition. For instance Article 7 of the ICESCR proclaims the right of everyone to paid holidays, and Article 12 of the same treaty proclaims the right of everyone to the highest attainable standard of physical and mental health. Clearly, a world without torture is a different sort of concern than a world without unpaid holidays.

Many object to this so-called proliferation of rights which conflates the essential and the nonessential that dilutes the power of human rights as well as its transcultural acceptability. Objectors would claim that for something to be included into the catalog, it must pass a test of rational acceptability. A relevant test may be one of seriousness. Only sufficiently serious interests deserve protection as human rights. Paid holidays with leave may be a nice thing to have, but not essential. Another relevant test may be that of practicability. Taken literally, having everyone reach the highest standard of health would require absurd levels of state intervention. This way of thinking gives the «moral» dimension of human rights a large role to play in constraining the development of the legal dimension of human rights.

But not everyone sees human rights this way. Those who see human rights first and foremost as a tool of political protest would reject efforts to put restrictions to the rights catalog, as this would create a barrier to the political process whereby excluded groups claim to have rights.

8 Rights as Trumps?

Human rights make a claim to hierarchy. They are not at the same level as the civil code, the labor code, the criminal code, or common law (in common law countries). Human rights aim to limit the power of government, to define certain things that the government may never do or that the government must always do, notwithstanding what may be politically convenient at the time. For this role, human rights need to be above ordinary legislation.

Ronald Dworkin (1931–2013) famously described human rights as «trump cards»: when a human right is involved, that right must be honored in spite of any other consideration, including legal rules that do not express human rights, but rather promote economic efficiency or political expediency.

Nevertheless, the promise of rights trumping «ordinary» rules is never truly realized for two reasons. First, when human rights are implemented as legal rights, hierarchy is not always fully recognized. Some constitutions do single out human rights as the highest point of the legal edifice, but others do not make them more important than other parts of the constitution.

The issue is even more complicated in international law. It is unclear whether treaties have a higher rank than domestic constitutions. An international lawyer and a constitutional lawyer are apt to answer the question differently. Furthermore, within international law, different sorts of treaties, whether they formulate human rights or not, share the same hierarchical position, as do other sources of international law, such as custom and general principles. This means that a human rights treaty does not necessarily have to be superior to, say, a free trade treaty, and this makes it difficult for human rights to assert their role as «trump cards» at the international level.

Moreover, most implementations of human rights leave room for valid legal counters. That a right is in play, or appears to be in play, is never a sure win. Invoking a right is never the coup de grace argument that ends the legal dispute. On the contrary, counterarguments must be carefully considered and subtly balanced against rights. Three mechanisms play a role in this connection: (1) conflicts of rights, (2) limitations to rights, and (3) exceptions.

8.1 Conflict of Rights

Invoking a right cannot mean automatic triumph if the other party can also invoke a human right in his favor. This is quite

common, as human rights tend to conflict with each other. For example, the freedom of speech of a journalist who aims to publish pictures of a celebrity may be taken conflict with the right to privacy of the celebrity who wishes to remain free from public scrutiny.

Of course, the existence of a conflict depends on the interpretation that is given to the rights. For instance, for the right to freedom of speech to conflict with nondiscrimination, it must first be established that «mere words» can as such discriminate. In this connection the distinction between positive and negative duties becomes particularly important. If rights are interpreted as purely negative demands, many apparent conflicts disappear.

For example, the von Hannover case at the European Court of Human Rights was framed as a conflict between the right to privacy of a celebrity and the right to freedom of speech of a journalist. But if what the right to privacy requires is merely that the State should not breach your privacy –and not to protect your privacy from third parties– then the fact that the journalist's publication will interfere with the privacy of a celebrity is not grounds to speak of a conflict. The State is only under one obligation: not to censor the journalist.

In any case, once a conflict is established, it will fall onto judges to resolve it. Two ways of dealing with conflicts stand out: hierarchy and balancing.

Hierarchy supposes that it can be ascertained that some rights are more important than others so that in case of conflicts the more important right defeats the less important one. This solution is unpopular because the relative importance of rights seems to depend on the facts of the case and cannot be determined beforehand.

Many people think that the right to life is always superior to the right to privacy, but this opinion might not hold in a particular context. Many think that the decision to end one's life is a private matter, and that the State should not interfere with it, even to protect life.

The alternative for solving conflicts is case-by-case *balancing*. Instead of creating an abstract hierarchy independent of the facts of the case in which two rights are in conflict, each individual situation is looked at in isolation, and the judge decides which right is more important *in that scenario*. This solution is more popular than hierarchy but is criticized for the lack of predictability it brings. After all, how can we rely on our rights if we cannot know if they will be balanced out of existence?

An example of this is the so-called freezing effect discussed in the context of the right to freedom of speech: if one is not sure whether a certain speech is protected or not, and the issue is so uncertain that it may lead to protracted litigation, one may simply decide not to express one's ideas, losing the benefits of the right in practice.

8.2 Limitations

Sometimes rights go too far. If complying with rights may cause a great deal of harm to society, there is a point at which one might consider dishonoring the right to protect the common good. The doctrine of limitations of rights can be seen as an escape clause for these situations. Under this doctrine, when certain (presumably rigorous) conditions are met, it can be legitimate not to honor a right.

For example, in the case Leyla Sahin v. Turkey, the European Court of Human Rights found that it was legitimate for the State of Turkey to ban the use of headscarves in education in order to enforce the idea that the State is secular.

At the international level, there is significant consensus on the conditions under which a right can legitimately be limited:

- The nature of the right must allow limitations.
- The limitation must be provided by law.
- The limitation must be restricted to a legitimate goal.
- The limitation must be proportional to the goal.
- The limitation must be of such nature that it is necessary in a democratic society.

With regard to the first condition, it is generally accepted that some rights are truly absolute and cannot be limited. The longer lists of these absolute rights usually include freedom from torture, freedom from slavery, freedom of conscience, and the right to be recognized as a person.

The «provided by law» condition demands that the restriction be general and prospective rather than ad hoc.

The «legitimate aim» condition requires that the restriction be brought about by an actual interest in the common good and not by partial political interests.

The requirement of proportionality is a sort of balancing test; restrictions should not go beyond what is needed to protect the legitimate goal.

The construct of «necessary in a democratic society» aims to capture the broader context of values in which the decision

must be taken. Some restrictions of rights that may seem to be proportional might turn out to be unnecessary if we live in a society committed to values of tolerance and equality.

In the case *S.A.S. v. France*, the European Court of Human Rights dealt with French laws that forbade the covering of the face in public. These laws negatively impact certain expressions of piety within Islam. The court found that prohibitions were justified in light of the legitimate aim of promoting French culture. Granting that the prohibition was provided by law, that the promotion of French culture is a legitimate aim, and that the restriction on freedom of religion was proportional to this aim, it is still open to question whether the whole enterprise would be unnecessary in a society committed to tolerance and equality.

Beyond this, many academics argue that while limitations for non-absolute rights are allowed, there is a minimum, an essence of every right that may not be limited under any circumstance. This essence is usually called the «core content» of the right.

8.3 Exceptions

Where limitations on rights can be seen as a way to push back the range of application of a right, sometimes the law explicitly says that the protection granted by the right does not cover something.

Known exceptions in United Nations human rights treaties include the death penalty, as an exception to the right to life, hate speech, as an exception to freedom of expression, and lawful sanctions which may nevertheless cause severe suffering are an exception to the prohibition of torture. Naturally, what counts as «hate speech» or «lawful sanction» is subject to interpretation.

9 Protection of Human Rights

This section discusses two broad ways in which rights may be protected: judicial and nonjudicial.

9.1 Protection by Courts

Because human rights are rights, courts are the natural guarantors of human rights. The judicial procedure for the protection of human rights will normally involve three stages.

The first is a stage of admissibility, where the court has to decide whether the claim satisfies several formal requirements for being considered by the court. If such requirements are not met, the claim is immediately dismissed, without the court giving an opinion on the substance of the case.

These formal requirements vary from court to court. The European Court of Human Rights requires that claims should be made by an interested party, that the claims reveal a prima facie violation of human rights, that claims are made within a certain time period after the alleged violation, and that claims are made with regard to rights enshrined in the European Convention on Human Rights. It also requires that claims show that the applicant has suffered a significant disadvantage and that domestic remedies are exhausted. Whether these requirements are fulfilled or not is analyzed by a panel of one or three judges.

If a claim is found admissible, that does not guarantee that it will be found valid. That second judgment depends on the merits stage of the proceedings. Here, the court will assess the law and the available evidence to determine whether a human right has been violated. This will involve many of the issues already discussed. The court will have to determine which duties flow form the right, and it will have to analyze whether the right being claimed is outweighed by another right or whether it should be subject to limitations.

In the European Court of Human Rights decisions on the merits are usually analyzed by panels of 7 judges, or in cases of high importance, by the Grand Chamber, which is composed by 17 judges. Here the focus is no longer on whether the claim meets formal requirements, but on whether the complainant is right or not.

In analyzing the merits of a rights-based claim, the European Court of Human Rights will often invoke the margin-of-appreciation doctrine. According to this doctrine the court should not venture judgments in controversial moral issues when there is no Europe-wide consensus on the matter. Rather the court should allow different States to come to different conclusions.

If the court determines that a human right has been violated, it passes to the remedies stage of the proceedings. Here, the court will determine which reparations should be granted by the State to the victim of human rights violations. Remedies might include declaratory relief (the idea that the court judgment is a form of moral recognition), monetary compensation, measures of restitution (requirements that the State do certain things), and guarantees of non-repetition.

Traditionally, the European Court of Human Rights has tended to order only remedies of compensation—that is, monetary remedies—and to

consider the judgment itself as a form of moral redress. This has been changing: the European Court of Human Rights is becoming much more flexible with regard to the remedies it can award. In particular, the Court has become friendlier to giving order for restitution, for example, requiring the State to free those who are unjustly imprisoned.

Steven Greer (1955-) has made a useful distinction between two models of judicial protection of human rights. The constitutional approach courts focus on giving broad guidelines for justice in society. The individual justice approach courts focus on reparations for individual victims. Naturally every court will have aspects of both, but sometimes one can see that courts favor one approach or the other.

Historically, the European Court of Human Rights has tended to favor an individual justice model, because it allows all individuals to make claims to the Court, and if they win, it provides monetary compensation that eases their troubles, but does not really affect other citizens. By contrast the Inter-American Court of Human Rights has tended to follow a constitutional model. Before a case can go to court, the American Commission has to approve this case. The Commission would only refer to the court cases whose resolution would have wide social significance. Likewise, the remedies ordered by the court have had a tendency to go beyond repairing the individual harm, and to address wider social problems. For example, instead of just compensating a victim of police violence, the court will also require the state to train police officers in human rights.

Of course human rights issues may also arise as an incident within ordinary judicial procedures. Ordinary courts may be called to interpret the civil law or criminal law in a way which furthers human rights or to cease to apply a statutory law because of requirements arising from rights that are protected by the constitution or by international treaties.

9.2 Other Forms of Protection

Beyond courts there are a wide range of institutions that are charged with promoting human rights. Examples of this include «expert bodies» like the United Nations Human Rights Committee, political bodies charged with promoting human rights such as the Human Rights Council, nongovernmental organizations such as Human Rights Watch, ombudsmen, and so-called human rights defenders: private individuals who decide to make promoting human rights a big part of their life.

This list involves considerable variety in terms of who is appointed to promote human rights, under what sort of credentials, and what is the behavior expected of him.

Some organs such as the United Nations Human Rights Council are staffed by politicians, and nobody would expect them to be insensitive to their national interest. By contrast, other bodies such as the Human Rights Committee are staffed by experts who are supposedly chosen because of their high moral standing and who are expected to be wholly impartial. Some NGOs are more successful than others, and the most successful ones are granted consultative status in the United Nations.

However, from a legal perspective, what is notable is that none of these bodies has the power to create law: they cannot apply law to individual cases in a binding fashion, and they cannot interpret law in a way that is binding for everyone. Nevertheless they still contribute to the protection of human rights by scrutinizing the behavior of States, identifying the human rights violations that take place and making them public. They can also propose interpretations of human rights instruments that may be useful for addressing social problems.

Is it a problem that these bodies don not have the power to issue binding decision? In the civil law or criminal law that the law is binding means that somewhere down the line, if you disobey, force is threatened or used. But in international law there is no global police force that may swoop down and force states to uphold human rights. Something similar is true for constitutional law. Police action against a recalcitrant Head of State may be impossible, or it may trigger a civil war. Under these conditions, whether a decision is binding or not is not very meaningful, and instead about worrying about the binding character of a decision or its lack thereof, it may be more productive to discuss whether the decision is legitimate and rationally persuasive. The jurist Thomas Franck (1931-2009) proposed this change of emphasis in his influential book *The Power of Legitimacy Among Nations*.

10 Conclusion

Nowadays, it is impossible to approach the law—domestic or international—without reference to human rights, and almost no one is against human rights. Nevertheless, this superficial agreement hides deep tensions. There is profound disagreement on what the human rights are, on which duties they give rise to, and on the proper methods for implementation. Support for human rights must not preclude us from questioning the foundation of rights, their role in the law, and their effectiveness in society. Quite on the contrary, reflection and critical thinking are a vital part of a healthy culture of rights.

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