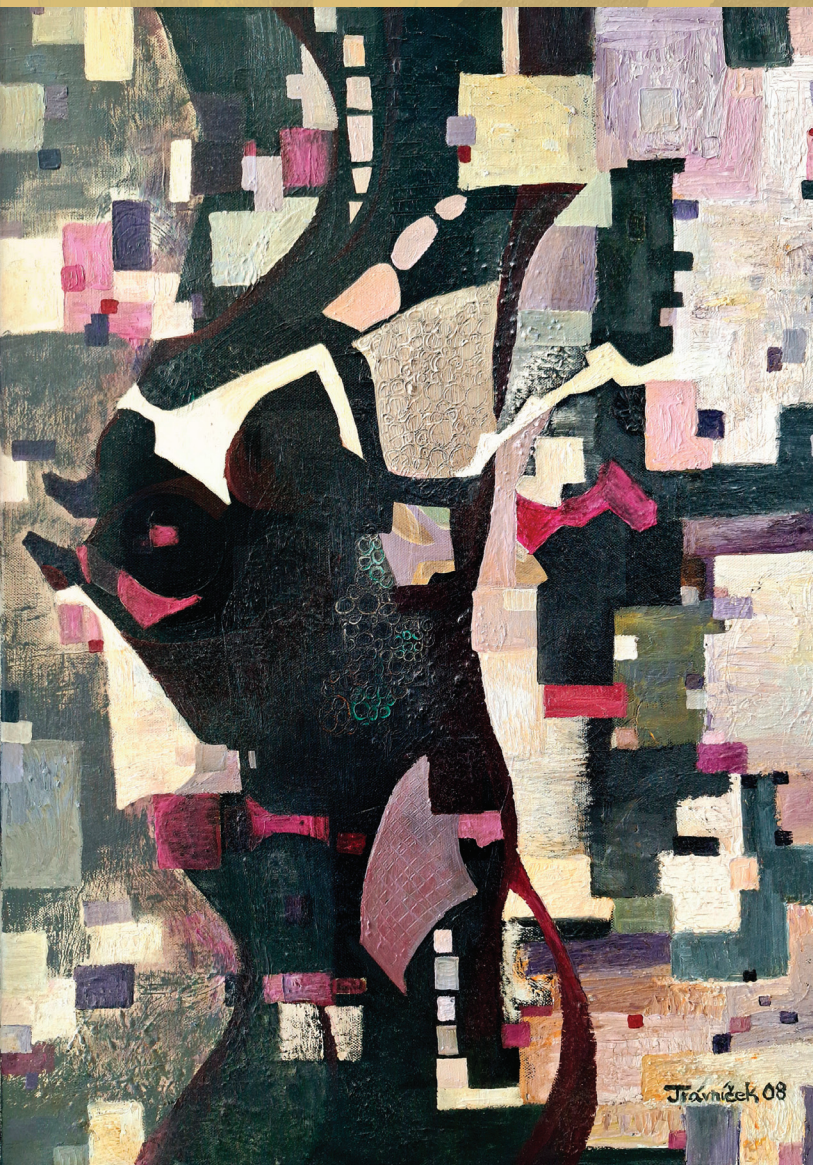


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Martin Hapla

# Philosophy of human rights

Concept  
and justification  
theories



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# **The philosophy of human rights**

Concept and justification  
theories

**Martin Hapla**

Department of Legal Theory  
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## Foreword

Philosophers are not interested in questions with simple answers but those which are difficult to solve, which is why lengthy and sophisticated debates surround so many of them. This also applies to those questions which are the focus of this book. *Why should we have human rights?* Over time, a large number of possible answers have surfaced. A significant part of the academic community has even been quite open to accepting some of them, though they have always remained the subject of lasting doubts and the targets of criticism by sceptical authors. The main objective of this monograph is to coherently present these discussions and highlight an area which tends to be marginalized. Surprisingly, it may be a school of thought commonly viewed as conflicting with human rights that offers valuable help in answering this challenging question.<sup>1</sup> This is utilitarianism, or one of its variations to be precise.

It is important to note that the book you are holding is not the full original work. It is a translation of my monograph *Utilitarismus a filozofie lidských práv* (Utilitarianism and the Philosophy of Human Rights),<sup>2</sup> which came out in Czech in 2022. As the title suggests, utilitarian ethics were the focus here. Its ambition was to rehabilitate this school of thought within the Czech Republic. Until its publication, utilitarianism had never been comprehensively presented here, and any preconceptions which the legal community had tended to be strange caricatures.<sup>3</sup> The situation abroad is different in this regard, which is also reflected in the structure and title of the translated text. Two chapters have been omitted, which introduced the aforementioned theory and

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1 Cf. e.g. LYONS, David. Human Rights and the General Welfare. *Philosophy & Public Affairs*. 1977, vol. 6, n. 2, p. 115. LYONS, David. Utility and Rights. *Nomos*. 1982, vol. 24, p. 109. See also HUSAK, Douglas N. Why There Are No Human Rights. *Social Theory and Practice*. 1984, vol. 10, n. 2, p. 125.

2 HAPLA, Martin. *Utilitarismus a filozofie lidských práv*. Prague: Leges, 2022.

3 Until the publication of my book, Tomáš Sobek was the only Czech author who had given this approach adequate attention. See e.g. SOBEK, Tomáš. *Právní rozum a morální cit: hodnotové základy právního myšlení*. Praha: Ústav státu a práva AV ČR, 2016, esp. p. 181. To a lesser degree certain aspects of utilitarianism were studied in Slovakia by Martin Turčan. See, e.g. his text TURČAN, Martin. K otázke pohnútky a úmyslu v utilitaristickej etike. In: KLUKNAVSKÁ, Andrea and Tomáš GÁBRIŠ (eds.). *Ad iustitiam per ius: pocta prof. PhDr. Jarmile Chovancovej, CSc.* Bratislava: Wolters Kluwer, 2018, pp. 70–85. In their writings, other authors tend to mention this theory seldom and very critically if they do so. Cf. e.g. WEINBERGER, Ota. Teorie spravdnosti, demokracie a právní politika. *Právník*. 1995, vol. 134, n. 6, pp. 519–520. HOLLÄNDER, Pavel. *Filipika proti redukcionizmu: (texty z filozofie práva)*. Bratislava: Kalligram, 2009, pp. 21–22. HOLLÄNDER, Pavel. *Filozofie práva*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2012, p. 335.

showed the traditional objections towards it and how these could be resolved. Various changes were then carried out in other sections to ensure coherency following this intervention. The result, therefore, is a publication in which utilitarianism is still afforded much attention, though more as one of several justificatory approaches which the book presents. This might have made it slightly less controversial, but not – I hope – any less interesting.<sup>4</sup>

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4 For the sake of thoroughness, I should mention that several of the original Czech chapters in this monograph draw on earlier texts of mine published between 2018 and 2020, primarily in academic journals. In this way, I incorporated certain passages from my articles such as *Utilitarismus a lidská práva* (HAPLA, Martin. *Utilitarismus a lidská práva. Časopis pro právní vědu a praxi*. 2020, year 28, n. 3, pp. 321–336.), *Lidská práva a základní potřeby* (HAPLA, Martin. *Lidská práva a základní potřeby. Právník*. 2018, vol. 157, n. 1, pp. 31–49.), *Etika lidských práv* (HAPLA, Martin. *Etika lidských práv*. In: SOBEK, Tomáš (ed.). *Právní etika*. Prague: Leges, 2019, pp. 141–157.), *Justifikace lidských práv a is-ought problém* (HAPLA, Martin. *Justifikace lidských práv a is-ought problém. Časopis pro právní vědu a praxi*. 2020, vol. 28, n. 1, pp. 37–54.). The last chapter in part comes from my text *Když se příběhy berou vážně – Richard Rorty, dialog mezi kulturami a lidská práva* (HAPLA, Martin. *Když se příběhy berou vážně – Richard Rorty, dialog mezi kulturami a lidská práva. Iurium Scriptum*. 2018, vol. 2, n. 1, pp. 15–26.). It is possible to consider it as an expanded and fundamentally revised version.

# Introduction

Within academic discussions today, the term ‘human rights’ has become more and more frequently used. For example, in the English literature its use has increased two hundred-fold, and at present it is used one hundred times more often than constitutional or natural rights.<sup>5</sup> Moreover, these rights are not merely being discussed by academics, but also by lawyers, politicians, journalists, as well as many other people. It has thus become a standard part of the academic as well as the everyday lexicon. This success contrasts interestingly with the doubts expressed by a number of authors about the theoretical grounding of human rights. It has often been claimed that their source is far from clear,<sup>6</sup> that they lack an appropriate theoretical foundation<sup>7</sup> and that in the words of the famous Scottish philosopher Alasdair MacIntyre – “every attempt to give good reasons for believing that there are such rights has failed.”<sup>8</sup> Despite all of their strong points, there is still a very pronounced scepticism associated with them, which indicates that we are unable to give a convincing answer to the question why we actually have them.<sup>9</sup> In the words of Vittorio Bufacchi: “The only consensus about human rights is that there is no consensus on the nature and justification of human rights.”<sup>10</sup>

However, is such scepticism really justified? To a large degree, this depends on what we understand by human rights and what claims we associate with their theoretical foundation. If someone were to imagine them as a certain kind of thing, existing in a strange transcendent realm, and chosen individuals (for example, members of a constituent assembly or constitutional judges) recognized them through a mysterious sixth sense, then such a notion would of course be indefensible.<sup>11</sup> If someone were to understand human rights in this way, then their relationship to them would be most

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5 POSNER, Eric A. *The Twilight of Human Rights Law*. New York: Oxford University Press, 2014, p.6.

6 NEUMANN, Michael. Needs Not Rights. *Canadian Journal of Philosophy*. 1992, vol. 22, no. 3, p.353.

FREEMAN, Michael. The Problem of Secularism in Human Rights Theory. *Human Rights Quarterly*. 2004, vol. 26, n. 2, p. 392.

7 FREEMAN, Michael. The Philosophical Foundations of Human Rights. *Human Rights Quarterly*. 1994, vol. 16, n. 3, p. 500.

8 MACINTYRE, Alasdair. *After Virtue. A Study in Moral Theory*. Indiana: University of Notre Dame Press, 2007, p. 69.

9 This issue was already addressed in my first book. See HAPLA, Martin. *Lidská práva bez metafyziky: legitimita v (post)moderní době*. Brno: Masaryk University, 2016, pp. 9–11.

10 BUFACCHI, Vittorio. Theoretical Foundations for Human Rights. *Political Studies*. 2017, vol. 66, iss. 3, p. 601.

11 See also some of the conclusions drawn in my first book: HAPLA, 2016, op. cit., pp. 136–137.

suitably described as belief,<sup>12</sup> with the added remark that in this case, there would really be no difference from belief in unicorns or witches, as was vividly suggested by the aforementioned MacIntyre.<sup>13</sup> In my book *Lidská práva bez metafyziky* (Human Rights without Metaphysics), which was published in Czech in 2016, I attempted to demonstrate how such an idea of human rights was fundamentally flawed. I still subscribe to this conclusion today. However, this in no way means that we cannot conceive of these rights in another way, or that questions concerning their theoretical foundation cannot make perfect sense under certain circumstances and even have an acceptable answer. One of the things I set out to do in my new work was to show what such a meaningful and workable concept might be – in other words, how we should understand human rights in order for them to be a plausible and transparent concept from a theoretical perspective, rather than some mysterious entity shrouded in mist, which no reasonable person could take seriously.

I claim that one of the keys to a defensible concept of human rights is to attribute them with an intersubjective rather than objective character.<sup>14</sup> What exactly do I mean by this? If we state that these rights exist, this doesn't mean that they have some kind of mental or physical attributes.<sup>15</sup> Their existence is nothing more than their validity, and this comes from the relevance of the moral reasons which support these rights.<sup>16</sup> Put simply, human rights are not a matter of faith, they are a matter of reasoning. We take them seriously because the arguments for them are stronger than for any of the alternatives. If it is unsettling to imagine an SS officer sending Jews to the gas chambers of Auschwitz because without eternal objective truths everything is just relative and therefore permissible, then the concept outlined offers an elegant solution to this problem. What arguments can be put forward to justify such behaviour? And contrastingly, how can we support the alternatives? If we require our positions to be justified, then these matters have already ceased to be arbitrary. If there are compelling reasons for human rights, then we can't simply dismiss them by saying we hold a different opinion. The process of reasoning also has its limits, but it is still the best instrument we have at our disposal. On the other hand, the mere reference

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12 The issue of what it means to believe in human rights has been raised by, for example, Michael Ignatieff. See, IGNATIEFF, Michael. *Human Rights as Politics and Idolatry*. Princeton: Princeton University Press, 2003, p. 53.

13 MACINTYRE, 2004, op. cit., p. 89.

14 See also some of the considerations in my article HAPLA, Martin. Justifikace lidských práv a is-ought problém. *Časopis pro právní vědu a praxi*. 2020, vol. 28, n. 1, pp. 40–41.

15 GEWIRTH, Alan. The Epistemology of Human Rights. *Social Philosophy & Policy*. 1984, vol. 1, n. 2, p. 3.

16 Compare this with Michael Freeman's claim that human rights exist to the extent that the reasons supporting them are strong. FREEMAN, Michael. *Human Rights. An Interdisciplinary Approach*. Cambridge: Polity Press, 2011, p. 88. See also a similar approach by Robert Alexy. ALEXY, Robert. Law, Morality, and the Existence of Human Rights. *Ratio Juris*. 2012, vol. 25, n. 1, p. 10. Cf. also a similar line of thought in BILETZKI, Anat. *Philosophy of Human Rights. A Systematic Introduction*. New York and London: Routledge, 2020, p. 37.

to human rights as objective truths can always raise legitimate questions about how we know that such rights exist objectively, that we are not mistaken in this respect, and that we are not merely imposing our subjective attitudes and prejudices on others under the guise of supposed eternal truths. How many people in the course of history have flaunted such immortal truths only for it to be revealed that these were merely their personal opinions? In this light, the crucial issue to me seems to be which moral reasons can be presented in favour of human rights.

Naturally, there is a whole series of approaches that can offer us moral reasons to support human rights. Normative ethics provides us with a range of theories and, like people, they too can be divided into those with good and bad reputations. And as with many a person, even a theory can have an entirely unjustified reputation. In the context of human rights we could point here to utilitarianism, which has received considerable attention as a theory of normative ethics. No overview on ethics worth its salt would be without a chapter on it,<sup>17</sup> and there is an almost overwhelming number of monographs which focus exclusively on it.<sup>18</sup> But isn't utilitarianism just a label that brings together a multitude of different approaches? Surely within legal philosophy, such a thing would not be altogether unusual?<sup>19</sup> It is true that it is possible to observe many differences even amongst its supporters. This should come as no surprise, as it has been influenced by many thinkers since the late 1700s. Nevertheless, we can consider it to be a compact school of thought in comparison with competing theories. All of its proponents are consequentialists. All of them emphasize the maximalization of utility. All of them agree we should be impartial in the calculation of utility (i.e. we should give equal weight to everyone's utility). It is therefore straightforward to describe utilitarianism in a way which is universally agreed upon and within whose boundaries all of its proponents operate.

In this book, I have attempted to work with a version of utilitarianism which I believe is the most resilient to traditional objections directed against this school of thought, while also respecting its historical roots (in particular the work of Jeremy Bentham and John Stuart Mill). This variation of utilitarianism does not set out to give people specific answers for how they should behave in everyday life. Here the principle of utility merely plays the role of the ultimate justification for our behaviour

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17 See, e.g. DRIVER, Julia. *Ethics: The Fundamentals*. Malden: Blackwell Publishing, 2007, pp. 40–79. RACHELS, James and Stuart RACHELS. *The Elements of Moral Philosophy*. New York: McGraw–Hill, 2012, pp. 98–124. SHAFER–LANDAU, Russ. *The Fundamentals of Ethics*. New York, Oxford: Oxford University Press, 2012, pp. 117–153. TIMMONS, Mark. *Moral Theory. An Introduction*. Plymouth: Rowman & Littlefield Publishers, Inc., 2013, pp. 111–175.

18 For the best summary of utilitarianism, I would recommend MULGAN, Tim. *Understanding Utilitarianism*. Stocksfield: Acumen, 2007.

19 Cf. e.g. the six different meanings which, according to Hart, were commonly attributed to positivism from the perspective of the late 1950s. HART, H. L. A. Positivism and the Separation of Law and Morals. *Harvard Law Review*. 1958, vol. 71, n. 4, pp. 601–602.

in a complex world. Naturally, we are guided by certain moral norms in everyday situations in life<sup>20</sup> without having to calculate the consequences they will have. In this regard you could say we are all deontologists. However, I am inclined to believe that in the long-term and from a universal perspective, such norms must maximize utility. In this book I will show that such a view of utilitarianism also stands up as a justification of human rights, and that it is at least as plausible as its competing alternatives in this area.

It is true that utilitarianism and human rights are sometimes seen as being incompatible,<sup>21</sup> which might be partly due to the fact that its founder, Jeremy Bentham, was very critical of the Declaration of the Rights of Man and of the Citizen.<sup>22</sup> He had a number of doubts concerning the rights it contained, starting with their vague formulation and ending with the issue of their enforcement in practice.<sup>23</sup> Without wanting to make light of the seriousness of his reservations, I believe good answers have already been given to several of them, which are entirely keeping with the utilitarian ethic. Indeed, even Bentham's follower, John Stuart Mill, thought that the two concepts were compatible,<sup>24</sup> and many leading utilitarians of the 20th century thought the same.

In my work I will argue that this school of thought can easily accept the idea that we should take seriously those rights which are capable of having an effect in empirical reality. It offers us an instrumental justification of human rights, i.e. a justification of them as instruments which contribute to the maximization of utility in the long term and from a universal perspective. This conception has a number of important advantages – for example, it is resistant to the objection of cultural relativism, while it also makes it relatively easy to specify the content of these rights.

However, when assessing whether a justification is plausible, there is no sense in demanding that absolute requirements be met. What is important is how it stands up to competing approaches, i.e. whether it is possible to bring stronger or weaker objections against it. 25 There are, of course, a large number of theories which endeavour to justify human rights and so it is impossible to consider them all here. In order to show how utilitarianism fares in comparison with them, I will present and analyse only four of them which might be considered the most relevant. These

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20 That statement is not to deny that many other kinds of norms (including legal ones) govern our actions.

21 Cf. e.g. LYONS, 1977, op. cit., p. 115. LYONS, 1982, op. cit., p. 109. HUSAK, 1984, op. cit., p. 125.

22 Cf. e.g. Bentham's description of natural rights as nonsense upon stilts. BENTHAM, Jeremy. *Anarchical Fallacies*. In: WALDRON, Jeremy (ed.). *'Nonsense Upon Stilts': Bentham, Burke and Marx on the Rights of Man*. London and New York: Methuen, 1987, p. 53.

23 Cf. e.g. *ibid.*, p. 56.

24 Cf. e.g. MILL, John Stuart. *Utilitarianism*. Auckland: The Floating Press, 2009, p. 75 ff.

25 Cf. HAPLA, Martin. Justifikace lidských práv a is-ought problém. *Časopis pro právní vědu a praxi*. 2020, vol. 28, n. 1, pp. 53–54.

are the theories of basic needs and capabilities, the schools of thought based on the ideas of normative agency, contemporary discourse theory, and finally the approach of Richard Rorty. I have chosen the first three because, like my own proposal, they are anchored in normative ethics, while they are also among the most sophisticated and discussed theories with many followers amongst leading contemporary theoreticians. I have chosen Rorty's approach as an alternative to the traditionally oriented schools of thought and as a suitable illustration for why it is impossible to ignore normative ethics when debating the meaning of human rights. The deeper analysis of the four approaches is intended to highlight their limitations, which ultimately cast doubt on their ability to provide a better justification for human rights than the one offered by utilitarianism.



# Chapter 1

## What are human rights?

A significant part of this book will focus on why we have human rights. No matter how simple this question may appear at first sight, it contains the potential for various misunderstandings and confusion. If we want to avoid this, it is necessary to firstly explain what these rights are, what is meant by their existence, and what exactly we are trying to find out when we ask that ‘why’ in relation to them. This clarification is the goal of this chapter, which will present the basic theoretical framework for considering these rights. Attention will first focus on the difference between institutional and justified moral rights, then the concept of human rights, how to deal with the objections that they have a dual nature or are a political concept, and finally I will introduce the issue of their justification and list their basic theories. I will basically present and defend the thesis that human rights represent a special kind of justified moral rights, whose existence equals their validity. The latter is determined by the relevance of the moral reasons which support them (in other words – their justification).

### 1.1 The concept and definition of human rights

In a certain sense, human rights have been a victim of their own success. The more often a word is used, the more likely it is that its meaning will evolve or be understood in divergent ways. Unfortunately, this also applies to human rights, which are often understood in different, often irreconcilable senses. Perhaps the most striking case is the fact that, on the one hand, they are identified with the rights contained in constitutions and various international documents, while on the other, they are seen as specific entities with natural-rights features, which are entirely independent of what the legal system provides. The interpenetration of these and other meanings can be the source of confusion and numerous misunderstandings. These have to be properly distinguished so that this book does not become one of their victims as well. A starting point could be to differentiate and assess the different types of institutionalized practice. We can always ask two very distinct questions: 1) What are we practising? 2) Is this practice really correct?

### 1.1.1 Human rights as institutional rights

We can understand human rights as institutional rights,<sup>26</sup> i.e. their existence (or validity) is bound to some form of social recognition or enforcement.<sup>27</sup> It may or may not be legal in character. This category thus allows for a further subdivision of human rights into legal and conventional rights.<sup>28</sup>

Legal rights are those which are recognized and used within a legal system,<sup>29</sup> and their validity stems from their being established within that system.<sup>30</sup> We can identify them as social facts, as the practice of officials who exercise public power. Among such defined rights is a specific group of rights which each citizen (and sometimes other people) has vis-à-vis the state, and we usually find it codified in constitutions or in some international legal documents. The rights that are thus summarized in national legislation with the highest legal force are usually also referred to as fundamental rights.<sup>31</sup> They play a number of important roles within the legal system,<sup>32</sup> for example, they are closely linked to the work of the constitutional judiciary and constitute a brake “against the democratic principle of majority rule”.<sup>33</sup>

It should be noted that these rights usually have a particularistic character rather than the universal one we normally associate with human rights. If, for example, we believe every person has the right to freedom of expression, and we would thus criticize the state for not guaranteeing such a right, we are using it in a very different sense from the one just described. From the standpoint of legal rights, we can only claim that such a right is or is not part of the legal system of a given state. Saying that people have it, even though no one understands it as part of them, and no courts or

26 For the definition of right, see e.g. FEINBERG, Joel. *The Nature and Value of Rights*. *The Journal of Value Inquiry*. 1970, vol. 4, n. 4, p. 255.

27 See also some of the considerations in GEWIRTH, Alan. *Human Rights. Essays on Justification and Applications*. Chicago and London: The University of Chicago Press, 1982, p. 42.

28 See also some of the considerations in LYONS, David. *Utility as a Possible Ground of Rights*. *Noûs*. 1980, vol. 14, n. 1, p. 17.

29 NICKEL, James W. *Making Sense of Human Rights*. 2nd ed. Malden, MA: Blackwell Publishing, 2007, p. 28. BOERSEMA, David. *Philosophy of Human Rights*. CO: Westview Press, 2011, p. 5.

30 GILBERT, Margaret. *Rights and Demands. A Foundational Inquiry*. Oxford: Oxford University Press, 2018, p. 29. Cf. also the slightly different definition of legal rights put forward by Anat Biletzki in her publication: „*Legal rights are the abstract derivatives of contractual documents, constitutional statements, or even oral agreements to which people commit.*“ BILETZKI, Anat. *Philosophy of Human Rights. A Systematic Introduction*. New York and London: Routledge, 2020, p. 36.

31 Cf. BARTOŇ, Michal et al. *Základní práva*. Prague: Leges, 2016, p. 28. HAPLA, 2016, op. cit., pp. 38–41. ONDŘEJEK, Pavel. *Princip proporcionality a jeho role při interpretaci základních práv a svobod*. Prague: Leges, 2012, p. 15.

32 In the Czech academic literature, Pavel Ondřejek provides a concise summary and commentary on various theories that conceptualize law as a system. See his monograph ONDŘEJEK, Pavel. *Koncepce práva jako systému*. Prague: Wolters Kluwer, 2020.

33 WINTR, Jan. *Principy českého ústavního práva*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2013, p. 131.

authorities apply it either, makes no sense in this context. Of course, the above does not rule out a substantive overlap of legal rights with other types of rights. However, these are separate and analytically distinct categories.

In addition to legal rights, we can also distinguish different kinds of moral rights, some (but not all) of which may also have the character of institutional rights. For example, moral rights can be described as those which are based on positive or conventional morality – in other words, a set of moral norms shared and accepted by a social group.<sup>34</sup> We could also identify these – let us call them conventional – rights as a specific kind of social fact and highlight their particularistic character. Again, this is not about human rights conceived as applying universally and unconditionally, irrespective of a community's recognition.<sup>35</sup> Indeed, as with legal rights, they are tied to some actual practice, just not one which we attribute a legal nature to.

For both these kinds of institutional rights it makes sense to ask whether we should have such rights, or what rights – legal and conventional – we should recognize and practise. From such a consideration, two more categories emerge in addition to the two already defined – ideal legal rights and ideal conventional rights. It is not appropriate to merge these two new categories of rights because not every right can function effectively as part of the legal system. For example, a child's right to equal treatment within the family can hardly be legal.<sup>36</sup> As was indicated above, different types of rights may have similar content, but this is not true in all cases. Some rights may have both a legal and a conventional character, but many do not have to display this duality.

### 1.1.2 Human rights as justified moral rights

We can also look for the source of moral rights outside the framework of positive morality. This is where so-called critical morality comes in. In contrast to the former, the latter is usually defined as a set of moral principles that serve to criticize it, as well as to evaluate other social institutions, even the law itself.<sup>37</sup> However, if we were to emphasize only this critical function, we could attribute it to any set of moral norms

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34 The distinction between positive and critical morality was already used by utilitarians in the 19th century. In later times it was further popularized by H. L. A. Hart. On his definition of these terms, see HART, H. L. A. *Law, Liberty, and Morality*. Oxford, New York: Oxford University Press, 1982, p. 20. Instead of the term positive morality, some authors use conventional morality in a similar sense. Viz např. FEINBERG, Joel. In *Defence of Moral Rights*. *Oxford Journal of Legal Studies*. 1992, vol. 12, n. 2, p. 152.

35 CAMPBELL, Tom. Human Rights: Moral or Legal? In: KINLEY, David, Wojciech SADURSKI and Kevin WALTON (eds.). *Human Rights: Old Problems, New Possibilities*. Cheltenham: Edward Elgar, 2013, p. 10.

36 BRANDT, Richard B. *Morality, Utilitarianism, and Rights*. Cambridge: Cambridge University Press, 1992, p. 179. See other similar examples in FEINBERG, 1992, op. cit., p. 161.; TASIOLAS, John. *Towards a Philosophy of Human Rights*. *Current Legal Problems*. 2012, vol. 65, n. 1, p. 2.

37 HART, 1982, op. cit., p. 20.

that is not currently dominant in society. Such a consideration inevitably leads to the question of whether any such critique would be relevant and what determines its possible relevance in the first place. If it is to be given any weight at all, it must be backed by arguments. The rights that are based on it are thus no longer a matter of empirical identification but of moral justification.<sup>38</sup> If we say they exist, this means they are justified by conclusive moral reasons.<sup>39</sup> In this sense, we can speak of a justified morality and justified moral rights.<sup>40</sup> For example, in the USA in the 19th century, women did not have the legal right to vote under the legal system.<sup>41</sup> But it makes sense to say that they were the bearers of a similar justified moral right, which was derived from the moral principle of equality and their characteristics as human beings.<sup>42</sup> Recognition of such a right is conditional on recognition of the principles set out above. In this context, it is worth noting that this right is exercised solely as a legal right. Still, from the position of justified moral right, one can argue that there is a claim for its legal enshrinement—that the state owes this right to women.<sup>43</sup> Moral rights in this sense are not only nothing exceptional, they are in fact a fairly common part of our vocabulary.<sup>44</sup> If we talk about human rights as rights that are valid even if they are not recognised by a (for example authoritarian) state and are not part of its social practice, then human rights are this kind of rights.<sup>45</sup> Indeed, such rights can allow us to criticize the law, but they can also assess the legitimacy of particular political systems.<sup>46</sup> As has already been indicated, their relevance depends on the strength of the moral reasons underpinning them.<sup>47</sup> We could therefore apply

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38 Cf. CAMPBELL, 2013, op. cit., p. 12. GILBERT, 2018, op. cit., p. 36.

39 GEWIRTH, 1984, p. 3. See also BILETZKI, 2020, op. cit., p. 37.

40 Alan Gewirth, for example, considers human rights to be primarily moral rights. See GEWIRTH, 1982, op. cit., p. ix, 1.

41 FEINBERG, 1992, op. cit., p. 149.

42 Ibid., p. 150.

43 Ibid., pp. 152–153.

44 CAMPBELL, 2013, op. cit., p. 12.

45 John Finnis has a similar understanding of human rights. Cf. FINNIS, John. *Natural Law and Natural Rights*. Oxford: Oxford University Press, 2011, p. 198.

46 On the legitimizing function of human rights, see also KYSELA, Jan. *Ústava mezi právem a politikou: úvod do ústavní teorie*. Prague: Leges, 2014, p. 259. KYSELA, Jan. V suterénu teorie lidských práv. Poznámky k jejich povaze, předpokladům a důsledkům. In: GERLOCH, Aleš, Pavel ŠTURMA et al. *Ochrana základních práv a svobod v proměnách práva na počátku 21. století: v českém, evropském a mezinárodním kontextu*. Prague: Auditorium, 2011, p. 87. DUFEK, Pavel. *Úrovně spravedlnosti: liberalismus, kosmopolitismus a lidská práva*. Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2010, p. 181.

47 Unlike natural rights, human rights defined in this way are not necessarily rooted in human nature but can be justified by various moral reasons. See HAPLA, Martin. *Teorie lidských práv*. In: SOBEK, Tomáš; HAPLA, Martin a KOLEKTIV. *Filosofie práva*. Brno: Nugis Finem Publishing, 2020, p. 342. See also GRIFFIN, James. *On Human Rights*. Oxford: Oxford University Press, 2008, p. 9. PAGDEN, Anthony. Human Rights, Natural Rights, and Europe's Imperial Legacy. *Political Theory*. 2003, vol. 31, no. 2, p. 176. For a different distinction between human and natural rights, see also BOERSEMA, 2011, op. cit., p. 5. There are also authors who do not distinguish between these terms. For example, John Finnis considers human rights to be the current idiom for natural rights. See FINNIS, 2011, op. cit., p. 198.

Michael Freeman's statement that they are "as valid as the reasons for supporting them are strong."<sup>48</sup> If someone did not recognize the principle of equality, then they would scarcely give any consideration to the moral right of women to vote.

Indeed, the force of different moral reasons can sometimes raise doubts. If we are to derive these rights from various moral principles, we may legitimately ask where these principles come from and why we should take them seriously. How do we know which ones are correct, and is it even meaningful to talk about any correct moral principles?<sup>49</sup> But the problems do not end there. Some authors see the key function of rights as the resolution of social and political disputes. However, are only institutionalised rights able to fulfil this function, while justified moral rights fail in this respect?<sup>50</sup> Are they not, after all, mere rhetoric, an inappropriate transference of a term from the legal sphere that leads to confusing the issue of the rights people have and the rights they should have?<sup>51</sup>

The above objections can easily lead us to consider whether it would be more accurate to speak only of legal rights and the moral values which these rights are supposed to protect.<sup>52</sup> Such a position, which identifies human rights with legal or, at most, conventional rights, can be described as *legal reductionism*. It does not preclude a moral critique of institutional rights; it merely suggests that, after considering the objections mentioned above, they should not be articulated in terms of human rights as justified moral rights.<sup>53</sup> Such reservations are of course relevant and will be addressed in later sections of this book.

For now we will remain with conceptual definitions. In their context, it is useful to add that justified moral rights themselves may or may not overlap with the category of ideal conventional rights as defined above. One can also hypothetically imagine a conception of rights which only serves to criticize social institutions, but will no longer aspire to become its positive morality. It is likely, however, that in most theories the two categories will merge, since most authors connect their concept of rights with an ambition to make a mark on the law<sup>54</sup> or the positive morality of society. Their institutionalization can take different forms and does not necessarily have to be only in the way of legal rights.<sup>55</sup>

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48 FREEMAN, 2011, op. cit., p. 88.

49 FEINBERG, 1992, op. cit., p. 166.

50 Cf. CAMPBELL, 2013, op. cit., p. 21–22.

51 See also similar concept in NICKEL, 2007, op. cit., p. 32.

52 CAMPBELL, 2013, op. cit., p. 3–4.

53 Ibid., p. 7.

54 Cf. e.g. some considerations in HART, H. L. A. Are There Any Natural Rights? *The Philosophical Review*. 1955, vol. 64, no. 2, p. 177.

55 POGGE, Thomas. Human Rights and Human Responsibilities. In: DE GREIFF, Pablo and Ciaran CRONIN (eds.), *Global Justice and Transnational Politics. Essays on the Moral and Political Challenges of Globalization*. Cambridge: The MIT Press, 2002, p. 180.

### 1.1.3 Characteristic features of human rights as justified moral rights

Human rights as justified moral rights are usually associated with a number of other defining characteristics.<sup>56</sup> For example, many authors define them as rights that every human has by virtue of being a human being.<sup>57</sup> Universality has also been attributed to them.<sup>58</sup> They have therefore been possessed by all people throughout all time and in all places.<sup>59</sup> They are referred to as rights that are abstract,<sup>60</sup> equal,<sup>61</sup> belong to all individuals,<sup>62</sup> and exist independently of the state and the structural features of institutions.<sup>63</sup> Their inalienability is also important.<sup>64</sup> Many of these characteristics are often linked to the first thesis above. For example, they are universal rights because

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56 Compare, for example, the ten truisms about human rights and human dignity listed by Szymon Mazurkiewicz in his work: “1. Every human has equal human rights. 2. Human rights are a kind of moral rights. 3. Human rights are to protect human existence. 4. Human rights are universal. 5. Human rights do not depend on will or beliefs of people. 6. We have human rights due to having human dignity. 7. Every human being has equal human dignity. 8. Human dignity is a worth of human. 9. Human rights exist independently of legal enactment. 10. Human rights require legal enactment and protection.” MAZURKIEWICZ, Szymon. *Explanation of Human Rights in Light of Contemporary Analytic Metaphysics*. Kraków: Manuscript, 2021, pp. 16–17.

57 BILETZKI, 2020, op. cit., p. 3. BOERSEMA, 2011, op. cit., p. 5. DONNELLY, Jack. *Universal Human Rights in Theory and Practice*. Ithaca and London: Cornell University Press, 2013, p. 10. FEINBERG, 1992, op. cit., p. 154. GEWIRTH, 1984, op. cit., p. 1. HOWARD–HASSMANN, Rhoda E. *In Defense of Universal Human Rights*. Cambridge: Polity Press, 2018, p. 6. HUSAK, Douglas N. Why There Are No Human Rights. *Social Theory and Practice*. 1984, vol. 10, no. 2, p. 125. KOHEN, Ari. *In Defense of Human Rights: a Non-religious Grounding in a Pluralistic World*. London: Routledge, 2007, p. 6. LYONS, David. Utility and Rights. *Nomos*. 1982, vol. 24, p. 108. TASIOLAS, John. On the Foundation of Human Rights. In: CRUFT, Rowan; p. Matthew LIAO, and Massimo RENZO (eds.). *Philosophical Foundations of Human Rights*. Oxford: Oxford University Press, 2015, p. 50. See also TOMUSCHAT, Christian. *Human Rights: Between Idealism and Realism*. Oxford: Oxford University Press, 2008, p. 69.

58 CAMPBELL, 2013, op. cit., p. 2.

59 BEITZ, 2009, op. cit., p. 53. Biletzki further links the universality of human rights to the requirement that these rights should be applied in the same manner under all circumstances. See BILETZKI, 2020, op. cit., p. 39.

60 FEINBERG, 1992, op. cit., p. 154. NICKEL, 2007, op. cit., p. 42. The abstract nature of human rights is usually contrasted with more specific rights (e.g. the human right to equal treatment versus the specific right of students to fair treatment in exams). See HAPLA, 2020, op. cit., p. 347.

61 The concept of equality is typically interpreted as the idea that each person holds the same set of rights. DONNELLY, 2013, op. cit., p. 10. FREEMAN, 2011, op. cit., p. 68. HOWARD-HASSMANN, 2018, op. cit., p. 6. POGGE, 2002, op. cit., p. 159.

62 FREEMAN, 2011, op. cit., p. 68. See also BOYLAN, Michael. *Natural Human Rights. A Theory*. New York: Cambridge University Press, 2014, p. 205.

63 BEITZ, Charles R. *The Idea of Human Rights*. Oxford: Oxford University Press, 2009, pp. 52–53. Beitz criticizes the idea of pre-institutionalized human (in his terminology, natural) rights by pointing out that some of these rights (such as the right to political asylum or free basic education) are conditioned by the existence of institutions. They cannot precede them because they could not exist without them. On this, see *Ibid.*, p. 55–57.

64 DONNELLY, 2013, op. cit., p. 10. HOWARD-HASSMANN, 2018, op. cit., p. 6.

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