

CONCEPTUALIZING HUMAN RIGHTS

REMARKS ON THE ‘GENUS’ AND DISTINGUISHING FEATURES OF HUMAN RIGHTS

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Abstract: The paper examines the conceptual issues of human rights using the framework of the *genus proximum – differentia specifica* definitional technique. My aim is not to come up with a definition for human rights, but rather to identify their *genus* that can, as a starting point, serve the purposes of constructing a more elaborate theory. As an unsurprising, but not at all obvious suggestion, it is argued that the closest conceptual category to human rights is the category of rights, understood in a wide but still Hohfeldian sense of the word. Subsequently, the paper examines five potential ‘distinguishing features’ that can, either separately or in combination with each other, set apart human rights from other rights.

Keywords: Theory of rights, Hohfeld, jural relations, claim-rights, moral rights, concept of human rights, universality, political conceptions of human rights, naturalist conceptions of human rights.

Summary: 1. INTRODUCTION. 2. ARE HUMAN RIGHTS A SUBSET OF RIGHTS?. 3. WHAT ARE THE DISTINGUISHING FEATURES OF HUMAN RIGHTS?. a. Human rights are moral rights. b. Human rights are held by every human being simply in virtue of being human. c. Human rights are rights that human beings possess, at all times and in all places. d. Human rights have a distinct political function. e. Human rights are individually justified. 4. CONCLUSION.

1. INTRODUCTION

My paper deals with the conceptual aspects of human rights and aims to outline a potential framework for their descriptive analysis. The method of investigation follows the classical method of defining a term with its *genus proximum* and *differentia specifica* (Aristotle trans. Smith 1997). Accordingly, the first part of the paper explores whether it is possible to understand human rights as a subset of rights, while the second part examines the ‘distinguishing features’ that have the potential to set apart human rights from other rights. However, my paper does not seek to define human rights, since giving a single definition seems impossible here. Apart from the difficulties of constructing definitions in general, for example the selection of the appropriate definitional technique (Hurley 2006, pp. 86-100), this can be attributed to the fact that our *definiendum*, i.e. the notion of human rights is an extremely elusive concept that refers to a multitude of very different phenomena. A definition, but presumably even a full-fledged theory, can only grasp a few aspects of such diversity and understanding other aspects of it requires the adoption of different definitional techniques and theoretical approaches. Moreover, as it will become apparent from the first part of the paper, our proposed *genus*, i.e. the category of rights

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is a similarly elusive concept, so before one can set out to identify the distinguishing features of human rights, the meaning of the *genus* needs to be established. Thus, making sense of the concept of human rights requires more profound theorising compared to what single definitions could provide. Nevertheless, the research questions of this paper are formulated according to the *genus proximum* and *differentia specifica* definitional technique mentioned above. The first research question, addressed in section 2, is whether it is possible to consider the category of rights as the *genus* of human rights. The second research question concerns the distinguishing features of human rights, i.e. the 'hallmarks' that set human rights apart from other rights. This question is addressed with an admittedly modest ambition. Section 3 does not intend to propose new distinguishing features or determine the 'definite' characteristics of human rights. Rather, it aims to briefly present the most prominent candidates for such features that can be identified in the literature and analyse their relations with each other.

The conceptual aspects of rights and human rights are both extensively discussed in legal and moral philosophy. Contributions that shaped the discourse on the concept of rights in the past thirty years include Thomson (1990), Jones (1994), Wellman (1995), Kramer, Simmonds and Steiner (1998), Cruft (2004), Wenar (2005), Rainbolt (2006), Kramer and Steiner (2007), Eleftheriadis (2008), Stewart (2012), Preda (2015), McBride (2017), Frydrych (2018). It would be no exaggeration to say that most of these sources are heavily influenced by Wesley Hohfeld's theory of jural relations (Hohfeld 1913) with respect to, e.g., their conceptual categories, terminology, or analytical methodology. Section 2 draws mostly on the works of Hohfeld (1913), Wellman (1995 and 2011), Cruft (2004 and 2012), Wenar (2005), Tasioulas (2012) and Frydrych (2018) – it is through the review of these contributions that I make a case for a 'capacious' but still Hohfeldian account of rights and argue to accommodate human rights *within* this conceptual framework. The concept of human rights is also a widely debated topic. State-of-the-art human rights theories are shaped by the debate between representatives of the political (Rawls 1999; Ignatieff 2001; Beitz 2009; Raz 2010) and moral conceptions (Griffin 2008; Tasioulas 2012) of human rights. The basic characterisation of human rights, including their distinguishing features, seem to depend on the specific conception one adopts in this respect. Consequently, the modest ambitions of section 3 can also be attributed to the desire to remain neutral in the debate between the moral and political approaches to human rights. Moreover, to go beyond mere description and to normatively evaluate different accounts of human rights, one needs a set – or rather a system – of 'desiderata' against which the adequacy of specific accounts can be measured. A simple list of criteria will hardly suffice; a full-fledged system also requires, for example, to develop a method to resolve the potential conflicts between different 'desiderata'. This goes well beyond the scope of this paper. However, I mention a few criteria in the following paragraph because I will refer to these in section 2 to argue that human rights, under these criteria, are better conceptualised as rights than aspirations.

Perhaps the most important requirement for an 'adequate' account of human rights is fidelity to contemporary human rights culture (Tasioulas 2012, p. 18; Kahn 2021, p. 163). International legal instruments such as the Universal Declaration of Human Rights provide the basis for this culture; the human rights designated by an 'appropriate' concept will at least roughly correspond to the rights listed in international human rights

instruments. However, fidelity is a complex criterion that might require more than mere correspondence between the list of human rights in ‘theory’ and ‘practice’. For instance, it can also imply that an ‘adequate’ concept attributes roughly the same characteristics to human rights as contemporary human rights culture does. Moreover, contemporary human rights culture itself is much less homogenous than one would expect. Tadros (2015, p. 443) even claims that the philosophical discussion on the nature and the concept of human rights must be abandoned because there is no single dominant discourse of human rights against which the ‘adequacy’ of a theory can be measured. A second criterion is that a proper theory should account for the distinctive importance of human rights. Not every normative consideration is important enough to be considered as a human right and even important normative considerations can be distinct from human rights (Tasioulas 2012, p. 18). A third requirement is that the given account must have morally plausible implications (Kahn 2021, p. 163). It seems clear that an account which (gravely) violates our moral intuitions will not be an adequate one. Of course, it is possible to have more than three criteria to evaluate different accounts of human rights. Tasioulas (2012, p. 19) and Buchanan (2010, p. 691), for example, also discuss the ‘desideratum’ of non-parochialism, while Kahn (2021, p. 163) refers to the requirements of internal consistency and utility. Van Duffel (2015, p. 65), based on Buchanan (2010, p. 692), distinguishes between the requirements of consonance, reasonable fit, constraint, content, guidance and non-parochialism.

2. ARE HUMAN RIGHTS A SUBSET OF RIGHTS?

To answer this question, one needs to give at least a rudimentary account of what rights are. When it comes to the concept of rights, most authors start from Wesley Hohfeld’s theory of jural relations. As Hohfeld (1913, p. 30) explains, the term ‘rights’ tends to be used in four different senses: rights as claims, liberties (privileges), powers and immunities. These legal positions stand in correlative relations with other legal positions called duties, no-rights, liabilities, and disabilities, respectively.² One divisive issue between theorists is whether all four legal positions ‘merit’ the name of rights or it is only claims that qualify as rights ‘in the strictest sense’ (Hohfeld 1913, p. 30). Hohfeld (1913, pp. 29, 32), for example, adopts the latter position; he argues that for the sake of clarity, rights shall always be understood as claims that entail correlative duties.³ Others, such as Carl Wellman (2011, pp. 17-19), Leif Wenar (2005, pp. 224-235) or Rowan Cruft (2004, pp. 355-359) accept that liberties, powers and immunities can also qualify as rights;⁴ they argue that most rights seem to have a ‘molecular’ character (Wenar 2005, p. 234), and they are best understood as complexes of Hohfeldian legal positions.⁵ Judith Jarvis Thomson (1990, p. 56) also argues that ‘many [...] familiar rights that we take ourselves to have’ qualify as ‘cluster-rights’.

²Correlativity means that in a legal relation between two parties, the presence of a legal position in one party entails the presence of the correlative legal position in the other party. For instance, someone’s claim-right always entails someone else’s duty (Ratnapala 2009, p. 301).

³A similar approach is taken by Kramer and Steiner (2007, pp. 296-297).

⁴Cruft (2004, p. 358) argues that – in addition to claims, liberties (privileges), powers and immunities – liabilities can also qualify as rights in certain cases.

⁵Eleftheriadis (2008, p. 7.) and Frydrych (2018, p. 8) provide different classifications of theories of rights based on which Hohfeldian position or combination of positions qualify as rights.

For example, the right to property seems to be constituted by at least four Hohfeldian positions: (1) the liberty of the owner to do or not do with his property what he wants; (2) the claim-right of the owner that correlates with the duty of others not to interfere with the enjoyment of the owner's property; (3) the immunity of the owner that his property is not burdened by new legal relations without his consent; (4) the power of the owner to sell his property and, as a consequence, change the system of corresponding claim-rights and liberties (Rosdorff 1974, pp. 82-83; Thomson 1990, p. 57).⁶

In addition to the requirement that rights are composed of Hohfeldian positions, theories of rights usually contain an additional requirement that refers to the 'purpose' or 'function' that these positions serve (Frydrych 2018, pp. 2-7). The two major candidates for the function of rights are specified by the interest and the will theories.⁷ Roughly, interest theories hold that the function of rights is to further the well-being or the interests of the right-holder, while will theories find the purpose of rights in protecting the free choice of the right-holder. Although these theories are considered to be mutually exclusive (Frydrych 2018, p. 3), endorsing one of these functions seems necessary because Hohfeldian positions that do not serve the interests or protect the free choice of the right-holders do not seem to qualify as rights in the 'ordinary' sense of the word.⁸ The fact that my neighbour has no power to exempt me from my duty to pay my income tax means that I am immune from his intervention to alter my legal position in this respect. However, we would not call this immunity a right because it does not protect me from any *adverse* change, and consequently it does not directly serve my interests or protect my freedom (Hart 1982, p. 191; Wenar 2005, p. 245; Cruft 2006, pp. 177-178).

The long-standing debate between the interest and will theories ended in a stalemate (Wenar 2005, p. 223 and p. 238). Luckily, for the purposes of the present paper, it does not seem necessary to take sides in this debate. For the conceptual analysis of human rights, it seems sufficient to accept that a Hohfeldian position qualifies as a right if it serves *either* the interests *or* protects the free choice of its holder (not excluding the possibility that certain rights might do both). This leads to a 'capacious' understanding of rights that is probably unacceptable to 'dedicated' interest and will theorists, because the two theories are considered to be mutually exclusive and there is a common presumption that rights need to serve a singular, ultimate purpose (Frydrych 2018, p. 2).

At this point, it is possible to pose two questions with respect to the concept of human rights. (1) The first question is whether all human rights can be understood as one of the previously mentioned Hohfeldian positions (i.e. claims, liberties, powers or immunities) or as complexes of these positions. (2) The second question is whether all

⁶ A similar account of the right to property is given by Thomson (1990, p. 57).

⁷ According to the 'several functions' theory of Wenar, rights do not have a 'single function' or 'ultimate purpose' as presupposed by interest and will theories. Wenar (2005, pp. 246-251) lists six functions that rights can have (exemption, discretion, authorisation, protection, provision, performance). For a critique of his theory, see Kramer and Steiner (2007, pp. 281-299).

⁸ Wenar (2005, p. 244) also points out that a theory which holds that any Hohfeldian incident or complex of incidents is a right seems over-inclusive.

human rights serve the interest and/or protect the will of the right-holder, so they qualify as rights from a ‘functional’ perspective as well (not excluding the possibility that they can have other functions as well). Depending on how one answers these questions, there are at least four ways to conceptualize human rights.

(I). If the answers to both questions are ‘yes’, then all human rights qualify as rights according to our previously described, ‘capacious’ account of rights.

(I’). A ‘stronger’ (i.e. less inclusive) version of this position is that all human rights are claim-rights and therefore they count as rights from our ‘capacious’ and from Hohfeld’s original perspective as well.⁹ In this case, answers to both aforementioned questions are ‘yes’ but this approach is ‘stricter’ with respect to question (1) as it conceptualizes all human rights as claim-rights. There could be two reasons for adopting (I’). (a.) First, it is possible that someone is more inclined to adopt the original Hohfeldian view that rights are always claim-rights and therefore conclude that human rights need to be claim-rights as well. For the purposes of this paper, a wider account of rights was adopted, but this does not necessarily mean that the ‘narrower’ Hohfeldian view about rights is incorrect. However, the problem with this approach is that it operates under the assumption that human rights constitute a subset of rights, the very idea that we aim to examine here. (b.) Second, it can be argued that it is a special feature of human rights that they are always claim-rights. This approach seems to be wrong because human rights often have complex structures and can be associated with other Hohfeldian incidents as well (Wellman 2011, pp. 22-23). It is possible to argue that human rights are ‘paradigmatically’ claim-rights (Tasioulas 2012, p. 27), but to claim that they are always claim-rights seems implausible. Wellman (2011, p. 23) gives the example of the ‘moral human right to liberty [which] is, as its name suggests, a liberty-right’. To be sure, Wellman does not deny the possibility that claims can (and very often do) form part of human rights complexes but if their ‘defining core’ is not a claim-right (such as a liberty in the previous example), then they cannot be thought of as claim-rights.

(II). If the answers to either or both questions are ‘no’, then some human rights will not qualify as rights according to our previously described, ‘capacious’ account of rights.

(II’). A ‘stronger’ (i.e. less inclusive) version of this position would be that no human right qualifies as right.¹⁰ This could be for two reasons. (a.) It can be argued that human rights are not Hohfeldian positions. In this case, human rights can be understood, for example, as expressions of moral values or human interests that do not constitute correlative duties, no-rights, liabilities or disabilities necessary for the existence of claims, liberties,

⁹The inverted comma indicates that position (I’) is a modified version of position (I). Theoretically, there are other less inclusive versions of position (I). It is possible, for example, to claim that human rights are always powers or that they are always immunities. These positions can be relatively easily refuted by showing that there is at least one human right that is a claim-right.

¹⁰The inverted comma indicates that position (II’) is a modified version of position (II).

powers and immunities, respectively. This position is hardly tenable because many human rights seem to be 'inseparable' from their Hohfeldian correlatives. This inseparability is demonstrated by the fact that people often refer to these correlatives to express the content of these human rights. For instance, the right not to be tortured is best regarded as a claim-right that imposes a correlative duty on others to refrain from torture (Wellman 2011, p. 23). This right is usually expressed by its correlative duty; Article 3 of the European Convention on Human Rights (ECHR), for example, states that '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment', i.e. everyone has a duty to refrain from torturing others. A theory that excludes rights with correlative duties, no-rights, liabilities or disabilities (e.g. the right not to be tortured) from the list of human rights is at odds with the requirement of fidelity to contemporary human rights culture (Tasioulas 2012, p. 18). (b.) It can also be argued that human rights are not rights because they do not serve the interests or protect the choice of its holder. This position seems very much implausible because even if there are human rights that serve exclusively, for example, collective interests,¹¹ it is hard to imagine that all human rights do that – it is pretty obvious that the right not to be tortured, for instance, serves primarily the interests of the right-holder.

While positions (I') and (II') seem untenable, position (II) cannot be so easily dismissed. Surprisingly many theorists endorse the position that some human rights do not qualify as rights (Cruft 2012, p. 136). Socioeconomic human rights are a classic example, as they are often conceptualized as 'goals' or 'aspirations', not only in theory, but in international legal practice as well. Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, requires that each State Party takes steps, to the maximum of its available resources, towards the 'progressive realization' of the rights recognized in the Covenant. While conferring rights on individuals, the ICESCR does not impose counterpart duties on states, as opposed to the International Covenant on Civil and Political Rights (ICCPR) which conceives civil and political rights as subjects of 'immediate obligation' (Wiles 2006, p. 38). Of course, the fact that there are international human rights instruments which portray certain human rights as goals does not settle the theoretical dispute about the Hohfeldian character of human rights. After all, it can be argued that socioeconomic human rights also impose counterpart duties on states, i.e. the relatively 'weak' and 'indeterminate' duties to progressively realize socioeconomic rights, contingent on the available resources of each state.¹² It is also possible to argue that international human rights instruments, such as the ICESCR, mistakenly portray socioeconomic human rights as goals – 'in reality', these rights impose duties on states the same way civil and political rights do (Cruft 2012, p. 138).¹³

¹¹ One such right could be the right to national self-determination, although Tasioulas (2012, p. 29, fn. 11) claims that it does not count as 'human rights proper', exactly because it lacks the individualistic grounding characteristic to human rights.

¹² Maybe this is the reason why Article 12 of the ICESCR guarantees the 'right to the enjoyment of the highest attainable standard of physical and mental health' instead of the 'right to health'. As Kahn (2021, p. 170) points out, such an approach is problematic because it creates a two-tier system of human rights. It implies that people living in wealthy countries have the human right to health, while people in poorer countries have a 'weaker' right, i.e. the right to governmental efforts to improve health.

¹³ However, the requirement of fidelity to contemporary human rights culture might be compromised in this case.

Similarly to the previously adopted reasoning with respect to position (II'), I examine separately the arguments that some human rights are not rights because (a.) they are not Hohfeldian positions or complexes of Hohfeldian positions, and/or because (b.) they do not serve the interests or protect the choice of the right-holder.

Ad (a). The temptation to deny that human rights are rights can result from the belief that rights understood as Hohfeldian incidents have an 'overly intimate' connection with duties.¹⁴ Duties correlative to certain human rights, especially socioeconomic rights, might place too heavy a burden on a lot of states. Although it is logically possible to have rights that entail unfulfillable duties, it seems 'farcical' to speak about human rights with correlative duties that 'vastly exceed what their bearers can do' (Cruft 2012, p. 139). After all, what is the point of having human rights that have no realistic chance to be fulfilled in the near or even in the distant future? Conceptualizing human rights as such is not only preposterous but can lead people to question the seriousness of the whole 'human rights project'. One way to go around this problem is to extend the list of addressees of human rights and claim that correlative duties fall not only on states but on other individuals and international organizations as well (Cruft 2012, p. 139; Kahn 2021, p. 166). In such manner, positive obligations imposed by socioeconomic rights are more realistically fulfilled and it will be less 'farcical' to speak about socioeconomic rights with correlative duties, even if one of the duty-bearers is an impoverished state. The other way to tackle this problem is simply to abandon the Hohfeldian character of certain human rights and claim that (1) such 'rights' entail no duties at all for governments that cannot afford the provision of goods associated with these rights, or (2) such 'rights' impose duties on impoverished states, but the content of the duties is different from the content of the corresponding 'rights' (Cruft 2012, p. 142). Position (2) was briefly mentioned previously with respect to socioeconomic rights and the ICESCR – the difference of content means, for example, that the human right to health entails only the relatively weak duty to progressively realize minimally acceptable standards of healthcare. To be sure, positions (1) and (2) both imply leaving Hohfeld's conceptual framework, because his theory presupposes a strict correlation between rights and duties and cannot account for any differences in their content – for Hohfeld, the duty *is* the content of a claim-right. This, in turn, implies the adoption of position (II), i.e. the position that certain human rights are not rights because rights were previously defined as Hohfeldian positions or complexes of these.

Position (1) reduces certain human rights to 'mere' human goods that governments (and perhaps other actors such as international organizations and individuals) have good reasons to pursue but have no duty to respect them 'categorically' or provide them 'completely'. Position (2) is more subtle because it does not reject the idea that rights entail duties; it only rejects the idea that rights always entail the same set of duties. Perhaps this is the reason why its representatives – contrary to the conclusion of the previous paragraph – do

¹⁴ This intimate relation is obvious in the case of claim-rights that necessarily entail correlative duties. However, liberties, powers and immunities are also related to duties in very specific ways. Liberties entail the absence of certain duties, while powers and immunities imply the inability to alter specific directed duties (Cruft 2012, pp. 145, 149-150).

not think of position (2) 'as involving a rejection of the thesis that human rights are genuine rights' (Cruft 2012, pp. 142-143). They consider human rights as rights in a non-Hohfeldian sense of the word, endorsing what Raz calls the dynamic character of rights, i.e. that the duties corresponding to a specific right are not fixed but can change with the change of circumstances, e.g. depending on the financial potential of governments (Cruft 2012, pp. 137, 145).

Leaving the Hohfeldian framework has both advantages and disadvantages for a theory of human rights. I think it can be plausibly argued that the disadvantages outweigh the potential advantages, and it is worth sticking to the idea that all human rights can be conceptualized as Hohfeldian positions or complexes of such positions. One major disadvantage of leaving Hohfeld's framework is that it makes the content of human rights 'worryingly indeterminate' (Cruft 2012, p. 146), meaning that there are either no correlative duties to a specific human right or that the correlative duties change with the change of circumstances. This is not exactly what most people expect from human rights. Although it is unclear whether the requirement of universality extends to the *content* of human rights and the very idea of universality is increasingly questioned in contemporary human rights discourse (Tasioulas 2012, pp. 31-36; Ignatieff 2001, pp. 56-58), it can be argued that the indeterminate content of human rights is at odds with their alleged universality.

Ad (b.) Theoretically speaking, it is also possible to endorse position (II) by arguing that some human rights are not rights because they do not serve the interest or protect the freedom of the individual right-holder. There are no obvious examples here: while it is possible that human rights serve collective interests, they always seem to do 'something' for the right-holder as well.¹⁵ Political conceptions of human rights shift emphasis from what human rights do for the individual to the political function they have in the international arena. However, representatives of the political approach do not necessarily deny that human rights are rights. Many of them accept that human rights are moral rights that serve the interests of the right-holders but at the same time have a distinct political function as well (Raz 2010, p. 323). Only representatives of the *sui generis* version of the political approach reject the idea that human rights are rights (Tasioulas 2012, pp. 44-45), although it is unclear if their opinion is based on the rejection of the Hohfeldian character or the individualistic function of human rights. I will discuss political conceptions of human rights in the following section in more details.

Before I go any further, I would like to briefly turn to the potential disadvantages of endorsing position (II) and summarize the concerns associated with conceptualizing human rights as fundamental human interests. I have already mentioned that a non-Hohfeldian approach to human rights carries the risk of making the content of human rights indeterminate. An additional concern about endorsing position (II) is that it might lead to the proliferation of human rights which, arguably, goes together with their devaluation. In theory, position (II) allows that any kind of important human interest becomes a human

¹⁵ Except for perhaps the right to national self-determination mentioned earlier.

right; this is problematic because it obscures the distinctiveness of human rights from the many other important social goals that we have good reasons to achieve (Tasioulas 2012, p. 25). Finally, conceptualizing human rights as fundamental interests fails to account for the moral character of human rights. More specifically, it fails to explain why it is morally wrong to violate human rights (Tasioulas 2012, pp. 23-24). Fundamental interests can be violated by any action or omission that does not further these interests, even if such an action or omission is not morally wrong. Not giving my spare kidney to someone else does not seem to be morally wrong, even if the other person is sick and needs a kidney transplant; however, the person's right to health understood as a fundamental interest will still be violated by such an omission. Thus, we might end up with a theory which implies that the violation of a human right is not necessarily morally wrong which seems to be at odds with the 'desideratum' of moral plausibility.

All in all, it seems to me that human rights are better perceived as rights in a broad Hohfeldian sense, i.e. it is better to adopt position (I) over position (II). This means that the requirement of fidelity is partially compromised because position (I) probably excludes certain socioeconomic rights from the list of human rights. However, adopting position (II) seems even more problematic because it is at odds with the requirements of moral plausibility and distinctive importance.

3. WHAT ARE THE DISTINGUISHING FEATURES OF HUMAN RIGHTS?

The previous section examined the question whether human rights qualify as rights according to a capacious, yet Hohfeldian understanding of rights. If it is accepted that all human rights qualify as rights in this sense, the conceptual analysis can proceed to the distinguishing feature(s) capable of setting human rights apart from 'ordinary' rights. This section considers five candidates for a 'hallmark' of human rights, but my list is by no means an exhaustive one. Moreover, it is also possible that more features combined constitute the *differentia specifica* of human rights.

a. Human rights are moral rights

Human rights are often perceived as moral rights (Wellman 2011, pp. 19-21; Tasioulas 2012, pp. 26-27; Cruft et al. 2015, pp. 4-5). It is a common expectation of human rights that they incorporate extra-legal ethical standards and can be used to critically evaluate conventional legal and societal norms (Cruft et al. 2015, p. 5). It is possible that human rights are also legal rights, but as moral rights they have a pre-legal character and exist independently of state regulations. A major advantage of applying Hohfeld's theory of jural relations to the question of human rights is that it applies equally to moral relations (Kramer 1998, p. 8; Wellman 2011, p. 19); moral rights have the same structure as legal rights and legal recognition is not necessary to conceptualize human rights as Hohfeldian positions. In fact, the whole analysis of the previous section was meant to apply to human rights primarily as moral rights.

It seems quite obvious that the moral character of human rights cannot be their only distinguishing feature. (1) Firstly, if one adopts a political approach to human rights, the idea

that human rights are 'pre-political' moral rights becomes strongly questionable.¹⁶ Even if some representatives of the political approach, such as Raz (2010, p. 335), accept that human rights are a sub-set of moral rights, they do not consider this as a specific hallmark of human rights. (2) Secondly, it can be plausibly argued that not all moral rights qualify as human rights. For example, the right of parents to discipline their children or the right of the promisee to demand the performance of the promised act are moral but not human rights (Wellman 2011, pp. 19-21). Thus, the category of moral rights is better perceived as a more precise *genus* of human rights rather than a distinguishing feature that sets apart human rights from other rights. Therefore, the question remains what distinguishes human rights from other moral rights. A potential answer is outlined in the next section.

b. Human rights are held by every human being simply in virtue of being human

A moral right is usually grounded in the special status of its holder established by certain morally relevant reasons (Wellman 2011, p. 21). The moral right of parents to discipline their children rests, for example, on the special status of right-holders as parents. By contrast, human rights are said to be unconditional in the sense that the 'possession of a human right cannot be conditional on some conduct or achievement of the right-holder, [...], or their membership of a particular community or group' (Tasioulas 2012, p. 37). It is some aspect of human nature, such as human needs (Miller 2012) or agency (Gewirth 1984; Griffin 2010) that gives rise to human rights. These aspects are considered to be fundamental to human existence and therefore universally valuable for everyone, either intrinsically or instrumentally, i.e. for the realization of other valuable aspects of humanity (Raz 2010, p. 323). The so-called 'naturalist', 'moral' or 'orthodox' theories of human rights justify human rights as protectors of these valuable aspects of human nature (Cruft et al. 2015, p. 5; Maliks and Karlsson Schaffer 2017, p. 3).

The unconditionality implied by naturalist approaches could serve as a distinguishing feature of human rights, especially if one agrees with Tasioulas (2012, p. 37) that the counterpart duties of unconditional human rights, contra Hohfeld, can be conditional on a special relationship, status, action or achievement of the right-holder. However, if this position is rejected, it seems hard to make sense of the unconditional character of human rights in contemporary human rights discourse, where the existence of many newly emerging human rights seems to be conditional on the fact that certain social conditions are in place – consider, for example, the right to free education or due process rights (Maliks and Karlsson Schaffer 2017, p. 4). Unconditionality seems to be at odds with the requirement of fidelity to contemporary human rights culture.

Naturalist conceptions of human rights face other problems besides the issue of unconditionality. Some doubt, for example, that a single substantive value is broad enough to provide a basis for the whole spectrum of human rights (Cruft 2012, p. 130). Of course, it is possible to take a pluralist approach and argue that there are many different fundamental values capable of grounding human rights (Tasioulas 2015). However,

¹⁶Tasioulas (2012, pp. 49, 54) identifies the theory of Charles Beitz as a *sui generis* political theory that does not understand human rights as a sub-set of universal moral rights.

neither the monist, nor the pluralist approach addresses the concern of Raz (2010, p. 323) that naturalist conceptions misconceive the relation between values and rights: the fact that certain things are valuable does not necessarily mean that people have a right to them. Of course, it is possible to reply that the values behind human rights are *so* important and fundamental to human existence that they deserve to be protected *qua* rights.

c. Human rights are rights that human beings possess, at all times and in all places

Ordinary moral rights can change as the moral norms of a society change, while human rights are said to be universally applicable at all times and in all places. Thus, universality can also be a hallmark of human rights distinguishing it from other rights. However, universality, just as unconditionality, seems to be a ‘by-product’ of naturalist approaches to human rights. Consequently, a theory that posits the universality of human rights will probably be a naturalist theory with all the potential weaknesses discussed in the previous paragraph. Moreover, universality, similarly to unconditionality, does not seem to be in line with the requirement of fidelity to contemporary human rights culture. It takes a lot of imagination to accept that a caveman in the Stone Age had the exact same human rights as a modern person has today, including, for example, the right to a fair trial or the right to political participation. This leads some authors to abandon the trans-historical interpretation of universality and limit universality to the period of modernity (Tasioulas 2012, p. 35). Others try to ‘save’ the idea of universality by distinguishing between the possession and the applicability of human rights and argue that although certain rights would not have been applicable in the Stone Age, people still possessed them the same way as they do now (Wellman 2011, p. 28). The success of such efforts is questionable, especially that the idea of universality is challenged on other fronts as well. For instance, the critique inspired by cultural relativism emphasizes that universalism imposes Western liberal values on non-Western societies in an unacceptable way (Tasioulas 2012, p. 18; Ignatieff 2001, p. 58).

d. Human rights have a distinct political function

In recent years, several authors (Rawls 1999; Ignatieff 2001; Beitz 2009; Raz 2010) have argued that human rights primarily have a political character, and that their conceptualization is incomplete without acknowledging their distinct political function. They assert that the hallmark of human rights is the political function they have in international relations. Raz (2010, p. 328), for example, understands human rights as ‘rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a [...] reason for taking action against the violator in the international arena.’ Although he does not deny that human rights are moral rights, he argues that the watershed between human rights and other moral rights is not that human rights are grounded in ‘fundamental moral concerns’ or ‘aspects of human nature fundamental to human existence’ (Zanghellini 2017, p. 30). Rather, the distinguishing feature is the fact that the violation of human rights can trigger international intervention.

A general objection against political approaches is that they presuppose the idea of some kind of political institution (i.e. states or state-like entities) when conceptualizing human rights (Tasioulas 2012, p. 47). This seems to be at odds with the expectation that

human rights exist independently of states and legal systems. A more profound question, informed by the requirement of fidelity, is whether the list of human rights of political approaches resembles, at least vaguely, the list of international human rights documents. Generally speaking, political conceptions seem to produce a fairly parsimonious list of human rights (Tasioulas 2012, p. 44). This might violate the requirement of fidelity, as Tasioulas (2012, pp. 50-51) points out in relation to the theory of Rawls. On the other hand, political approaches are less committed to the idea of universality and can more easily accommodate rights that do not seem to be timelessly valid.

e. Human rights are individually justified

Rowan Cruft (2012, pp. 129-136) argues, somewhat unconventionally, that the real difference between rights and human rights is that human rights are always individually justified. Individual justification is normally considered to be a hallmark of rights. It means that the existence of a right is justified by what it does for its holder, i.e. it either serves the interest or protects the autonomy of the individual. This is how rights were conceptualized in the beginning of section 2 of this paper; it was established that it is a necessary function of rights to serve the interest or protect the will of the right-holder. Although justificatory and conceptual issues get intertwined at this point,¹⁷ Cruft seems to argue that it is a specific conceptual feature of human rights that they are individually justified. Rights, on the other hand, are often justified with reference to other things, such as the common good. Trivial property rights, while possible that they serve the interest of the right-holder to a certain extent, 'are justified because the property system of which they are a part serves the common good' (Cruft 2012, p. 131). It is fairly obvious that Cruft's approach is over-inclusive. There are rights which are usually not classified as human rights, but their existence is justified solely with reference to the important things they do for the right-holder (Cruft 2012, p. 134). To remedy this over-inclusiveness, Cruft (2012, p. 136) accepts that individual justification is just one distinguishing feature of human rights; supplementary defining features are necessary to 'narrow down' the category of human rights to fit the requirement of fidelity to contemporary human rights culture.

4. CONCLUSION

My paper examined the conceptual issues of human rights in the framework of a specific definitional technique, i.e. the definition by *genus* and difference. I deliberately did not try to give a definition or construct a theory of human rights – the former seems impossible, while the latter is well beyond the scope of this work. The first part of the paper addressed the question whether all human rights qualify as rights. The position that some human rights are not rights, or at least not Hohfeldian rights, is not implausible, especially in the light of contemporary human rights culture that increasingly moves away from the presumption that human rights (particularly socioeconomic rights) entail fixed duties. The lack of counterpart duties, however, makes the content of such rights 'worryingly indeterminate' (Cruft 2012, 146). Moreover, allowing human interests to become human

¹⁷ For an illuminating discussion of this issue, see Preda (2015).

rights, while chimes with the tendency of proliferation, seems problematic because it fails to account for the distinctive importance of human rights over other important social goals. Thus, I concluded that human rights are better perceived as a subset of rights, and the notion of rights, if properly conceptualized, can serve as a *genus* for human rights.

The second part of the paper examined some of the potential distinguishing features that can set apart human rights from other rights. Instead of jumping to hasty conclusions about what constitutes the ‘real’ hallmark of human rights, I propose to briefly summarize the possible relations between the five distinguishing features discussed earlier. It seems to me that human rights do not have a single distinguishing feature but will be set apart from other rights by a combination of different features. However, the following account of potential combinations is merely a tentative one. Political conceptions of human rights endorse some version of hallmark d. which seems to be at odds with hallmarks b. and c., i.e. that human rights are held unconditionally (‘simply in virtue of being human’) and universally (‘at all times and in all places’). On the other hand, hallmark d. can be combined with hallmark a., i.e. that human rights are moral rights, depending on whether the specific political conception is a *sub-set* or a *sui generis* theory (Tasioulas 2012, pp. 44-45). Hallmarks b. and c. can be combined with each other and with hallmark a. as well. In fact, classical naturalist conceptions of human rights seem to endorse hallmarks a., b. and c. at the same time when asserting that human rights are moral rights that all human beings possess simply in virtue of being human, at all times and in all places.

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